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A SELECTION

OF

LEADING CASES IN EQUITY.

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With Notes.

VOL. II.

BY

OWEN DAVIES TUDOR,
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ADDENDA TO VOL. II.

[*The Addenda comprehend the Cases reported up to the* 1*st of October*, 1877.]

Page 96, column 2, eleven lines from the bottom, after "debts by specialty," add "including rents due from them: *In re Hastings, Sheriff* v. *Hastings*, W. N. 1877, p. 199."

,, 244, column 2, line fourteen from the bottom, after "*King* v. *George*, 4 Ch. D. 435," add "affirmed 5 Ch. D. 627."

,, 263, nine lines from the bottom, after "intended to pass," add "See *Everett* v. *Everett*, W. N. 1877, p. 167, thereafter-incurred debts did not pass by the will of a father to his son under a bequest, 'of sums in which my son is now indebted to me,' as a contrary intention sufficiently appeared in the will."

,, 319, column 2, line sixteen from the bottom, after "19 L. R. Eq. 408," add "*Porter* v. *Baddeley*, 5 Ch. D. 542."

,, 320, column 1, three lines from the top, after "2 L. R. Ch. App. 751, 758," add, "*Porter* v. *Baddeley*, W. N. 1877, p. 71."

,, 356, column 2, six lines from the bottom, after "7 Ho. Lo. Ca. 728," add "*Edgeworth* v. *Johnston*, 11 I. R. Eq. 326."

,, 374, column 1, eight lines from the top, after "11 I. R. Eq. 110," add "11 I. R. Eq. 340."

,, 457, column 1, fifteen lines from the top, after "19 & 20 Vict. c. 120," add "(repealed and in effect re-enacted by The Settled Estates Act, 1877, 40 & 41 Vict. c. 18.)"

,, 459, column 1, after "*Teall* v. *Watts*, 11 L. R. Eq. 213," add ("And it has been held that an order dispensing with service upon parties out of the jurisdiction could only be made by the Judge: *Barton* v. *Barton*, W. N. 1877, p. 23.").

As to affidavit required upon an application *ex parte* for the service of a writ in an action for partition upon defendants out of the jurisdiction, see *Randall* v. *Campbell*, W. N. 1877, p. 201.

,, 497, column 2, eleven lines from the top, after "*Morris* v. *Debenham*, 2 Ch. D. 540," add "*Tolson* v. *Sheard*, 5 Ch. D. 19."

,, 500, column 2, seven lines from the bottom, after "of the others," add "See also *Odessa Tramways Co.* v. *Mendel*, W. N. 1877, p. 155."

,, 525, column 2, twelve lines from the top, after "*Patrick* v. *Milner*," add "2 C. P. D. 342."

,, 539, column 1, eight lines from the bottom, after "18 L. R. Eq. 683," add "*Hardy* v. *Eckersley*, W. N. 1877, p. 199."

Page 700, column 2, twelfth line from the top, after "p. 94," add "5 Ch. D. 837."

,, 708, column 2, fifteen lines from the bottom, after "per Sir *G. Jessel*, M. R.," add "Although of course the words of an instrument may continue an allowance for maintenance or education beyond minority: *Quayle* v. *Spedding*, W. N. 1877, p. 177."

,, 709, column 1, sixth line from the top, after "p. 94," add "5 Ch. D. 837."

,, 777, column 1, last line after "7 L. R. Ch. App. 695," add "*Ranken* v. *Alfaro*, 5 Ch. D. 786."

,, 803, column 2, third line from the top, after "*In re Lewer*, 4 Ch. D. 101, 104," add "affirmed upon another ground, W. N. 1877, p. 53."

,, 806, column 1, after second line from the top, add "See now and consider The Factors' Acts Amendment Act, 40 & 41 Vict. c. 39."

,, 807, column 1, eleven lines from the bottom, after "2 I. R. Eq. 53," add "*Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 421."

,, 813, column 1, twelve lines from the top, after "4 L. R. Eq. 260, 263," add "So, likewise, it has been held that the assignment, by a creditor of a company who has presented a petition to wind it up, of his debt and also of his right to proceed with the petition is invalid: *In re Paris Skating Rink Company*, 5 Ch. D. 959."

,, 827, column 2, eleven lines from the bottom, after "1 I. R. Eq. 531," add "*In re Webb's Trusts*, W. N. 1877, p. 192."

,, 830, column 2, second line from the bottom, after "*Prole* v. *Soady*, 3 L. R. Ch. App. 220," add "see and consider *Norman* v. *Villars*, 2 Exch. D. 359."

,, 862, column 2, seventeen lines from the bottom, after "*Wall* v. *Rogers*, 9 L. R. Eq. 58," add "As to mode of procedure to obtain the sanction of the Court to a compromise by infants, see *Gray* v. *Paull*, W. N. 1877, p. 186."

,, 889, column 2, nine lines from the bottom, after "11 W. R. (L. J.) 606," add "*Marsden* v. *Kent*, 5 Ch. D. 598."

,, 905, column 1, eighteen lines from the top, after the words ("sect. 2,") add "Any capital stock moreover created under the East India Loan Act, 1877 (40 & 41 Vict. c. 51), shall be deemed to be East India stock within 22 & 23 Vict. c. 35, s. 32, and 26 & 27 Vict. c. 73."

,, 910, column 2, line six from the bottom, after "*Burnie* v. *Getting*, 2 Coll. 324," add "But a power given by will to trustees to invest 'upon any of the stocks or funds of the Government of the United States of America, of the Government of France, or any other foreign Government,' has been held to authorise an investment in New York and Ohio stocks, and Georgia Bonds: *Cadett* v. *Earle*, 5 Ch. D. 710."

,, 933, column 1, eighteen lines from the top, after "24 Beav. 244," add "It has been recently decided that where both trustees are fully cognisant of a breach of trust, a primary liability will not, in the absence of the cestui que trust, be attributed to one for whose benefit it was intended that the breach of trust should partially enure, simply because he derived a larger indirect benefit from the trust money advanced, than the other trustee anticipated: *Butler* v. *Butler*, 5 Ch. D. 554, 557."

,, 961, column 2, last line, after "5 Ch. D. 1," add "*In re British Imperial Co.*, W. N. 1877, p. 129."

,, 967, column 1, fourteen lines from the bottom, after *In re Bond, Cole* v. *Hawes*, 4 Ch. D. 238, add "*M'Alinden* v. *M'Alinden*, 11 I. R. Eq. 219."

,, 987, column 1, fifteen lines from the top, after "*Freeland* v. *Pearson*, 3 L. R.

Eq. 658," add "The latter case was not followed in *In re Humble, Humble* v. *Bowman*, W. N. 1877, p. 201."

Page 1004, column 2, two lines from the bottom, after "5 L. R. C. P. 201," add "And a surety whose liability is defined by one Act of Parliament will be discharged by a change in his position under a subsequent Act: *Finch* v. *Jukes*, W. N. 1877, p. 211."

,, 1026, column 2, nine lines from the top, after "5 B. & Sm. 240," add "A mere receipt given to one of the debtors will not amount to a release so far as to release another joint debtor, if it appears from the surrounding circumstances that it was not intended to be so given: *Ex parte Good, In re Armitage*, 5 Ch. D. 46; and see *North* v. *Wakefield*, 13 Q. B. 536, 541; *Watters* v. *Smith*, 2 B. & Ad. 889."

,, 1078, ten lines from the top, after the words "3rd edition" add "But if a good mortgagee, by proving for his whole debt, gives up his security, the benefit thereof will result to general creditors, and not to subsequent incumbrancers: *Cracknall* v. *Janson*, W. N. 1877, p. 185."

,, 1079, column 1, eleven lines from the bottom, after "*Palmer* v. *Danby*, Prec. Ch. 137," add "see and consider *Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 639; reversed W. N. 1877, p. 197."

,, 1125, column 2, eight lines from the top, after "*Jones* v. *Heavens*, 4 Ch. D. 636," add "*East* v. *Whitney*, W. N. 1877, p. 80."

,, 1136, column 2, line ten from the top, after "*Johnson* v. *Lyttle's Iron Agency*," add "5 Ch. D. 687."

,, 1137, column 2, fourteen lines from the top, after "1 C. P. D. 120," add "affirmed Dom. Proc. 2 App. Ca. 439."

LEADING CASES IN EQUITY.

BASSET *v.* NOSWORTHY.

Term Hil. 25 *Car.* 2, *Anno* 1673.

[REPORTED REP. TEMP. FINCH, 102.]

PURCHASE FOR VALUABLE CONSIDERATION WITHOUT NOTICE.—*A bill was filed by an heir-at-law against a person claiming as purchaser from the devisee under the will of his ancestor to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, bonâ fide, without notice of any revocation, and the plea was allowed, and upon proof of it, the bill was dismissed.*

Though lands by the falling in of several lives prove to be of much greater value than they were at the time of the purchase, if the consideration be such as will make the defendant a purchaser within the stat. 27 *Eliz., he will be considered as a purchaser for valuable consideration; for the question is, not whether the consideration be adequate but whether it be valuable.*

THE plaintiff, Sir William Basset, entitled himself, as son and heir of Elizabeth Seymour, who was the only daughter and heir of Sir Joseph Killegrew, who was brother and heir of Sir Henry Killegrew, whose estate the lands in the bill mentioned formerly were; the defendant's title being under (as the plaintiff alleged) a pretended purchase of these lands at Drury House, and under the will of Sir Henry Killegrew, the purchase being from Jane Davis (afterwards the wife of Mr. Berkley) and from

Henry Hill, the pretended natural son of the said Sir Henry Killegrew, of which will the plaintiff alleged there was a revocation by some subsequent deed or will; and for a discovery thereof, and what Mr. Nosworthy really paid for the purchase, and what deeds and writings he had, and to set aside the incumbrances which he had bought to protect his purchase, and that Mrs. Seymour might try her title at law, upon the supposed revocation against the title of the defendant, as a purchaser under the said will, the now plaintiffs exhibited this bill (*a*).

To which the defendant pleaded a dismission of a bill in the Court of Exchequer (*b*), signed and enrolled, which bill was there brought for the same matter as in this bill, and fully examined and dismissed upon a full hearing, but without prejudice, and the dismission duly signed and enrolled.

The defendant further pleaded *that he was a purchaser for a valuable consideration, bonâ fide paid, without notice of any revocation.*

This cause being heard by the Lord Keeper *Bridgman*, he ordered precedents to be searched, where a plaintiff, after a dismission of his bill on a judicial and formal hearing, and a full examination of witnesses in one Court of equity, and that without prejudice, had ever been admitted in another Court of equity, to examine new witnesses to the same matter formerly in issue and examined (*c*).

Afterwards there being several orders made in this cause, and one by which the plea was overruled (*d*), the cause now came on to be heard.

Lord Keeper Finch (*e*), having read the articles for the defendant's purchase, and the conveyances, leases, fine, and recovery, which appeared to be made before any purchase, at Drury House, and having considered the whole matter, was of opinion that the Court had gone much out of the way, and that the cause had been perplexed with several extraordinary orders and not according to the usual course of proceedings; and therefore it

(*a*) A bill of revivor.

(*b*) See *Seymour* v. *Nosworthy*, Hard. 374, upon an issue directed by the Court of Exchequer, whether the will of Sir Henry Killegrew was revoked or not; Mich. 16 Car. 2.

(*c*) *Seymour* v. *Nosworthy*, before Lord Keeper *Bridgman* and Justice *Morton*, 1 Ch. Ca. 155, where, however, the name of the case is omitted, and the cause is said to have been on demurrer; whereas it appears from other parts of the report to have been on a plea.

(*d*) *Seymour* v. *Nosworthy*, Mich. Hil. 1669; 3 Ch. Rep. 40; Nels. 135; Freem. Ch. Rep. 128; 2 Eq. Ca. Ab. 69.

(*e*) Afterwards Lord Chancellor and Earl of Nottingham

was to be brought back to that state where it first went wrong.

Whereupon he discharged all former orders for examining witnesses at large, and confined (*a*) all examinations to the matter of the defendant's plea, which, by the justice of a Court of equity, ought to conclude the plaintiff, unless he could disprove it. And a bill of the same nature having been brought in the Court of Exchequer, and there, after full examination, dismissed, it seemed very hard that the dismission was without prejudice, because no cross bill can or ought to be received after publication, to examine the same witnesses again; for that might be a means to introduce subornation and perjury, even by the order of this Court, and no precedents can be found to warrant such practice.

(*a*) "Confirmed," evidently by mistake in the report.

Therefore the defendant having *pleaded* this dismission in bar of any further examination, and *that he is a purchaser bonâ fide, without notice of any renovation*, and afterwards for the Court to save the benefit of this plea, by way of answer, and yet to allow an examination to the whole matter which had been pleaded in bar to such examination (all which had formerly been done in this cause), was in effect to surprise the defendant, and, unawares, to draw him off from that which was his most material defence.

The cause being then set right before the Court upon the true merits thereof, there were only two points which were considerable:

1st, What the law of this Court is concerning purchasers;

2nd, Whether the defendant was a purchaser within that law.

A purchaser bona fide, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute, mortgage, or any other incum-

As to the first point, a purchaser bonâ fide, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a Court of equity by setting aside such incumbrances; for equity will not disarm a pur-

brance; and, if he can defend himself at law by any such incumbrances bought in, his adversary will never be aided in a Court of equity in setting them aside; for equity will not disarm a purchaser, but assist him.

chaser, but assist him. And precedents of this nature are very ancient and numerous, viz., where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another.

And this rule in a Court of equity, is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, nonclaims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and to strengthen the rights of purchasers.

As to the second point, the Court declared, that the defendant had sufficiently proved his plea, and himself to be a purchaser within the protection of this Court, because no fraud or circumvention appeared; and it was evident that the defendant had paid several great sums to discharge statutes which encumbered those lands, over and above what was paid to Mrs. Jane Berkley for her estate for life and to Henry Hill for his reversion; and though the lands were proved to be of much greater value at this time, by the falling in of several lives than what they were at the time of the purchase, yet that will not alter the case in equity; because *in purchases the question is not, whether the consideration be adequate, but whether it be valuable* (*a*) *: for if it be such a consideration as will make the defendant a purchaser within the statute* 27*th Eliz.* (*b*), *and bring him within the protection of that law, he ought not to be impeached in equity.*

(*a*) See *Copis* v. *Middleton*, 2 Madd. 410, 432.

(*b*) In the report by mistake cited as 21 Eliz.

(*c*) Proceedings were afterwards taken at law in this long-contested case. See *Hitchins* v. *Basset*, 3 Mod. 203; 4 Jac. 2; B. R. 1688; Salk. 592; Trin. 5; W. & M. B. R. 1 Show. 537. And ultimately, upon a special verdict, the Court was of opinion that there was no revocation; and upon a writ of error, the judgment in B. R. was affirmed by the House of Lords. See *Sir Edward Hungerford* v. *Nosworthy*, Show. P. C. 146; and see 1 Vern. 351.

And since Henry Hill had nothing to subsist on during his minority but this reversion, and being a bastard, could have no kindred by the law, and probably but few friends, there was some hazard of the money which was advanced during his minority, if he died before the fine and recovery suffered.

Therefore, the Court allowed the plea and dismissed the bill, and suppressed all the depositions taken in this cause before April last, and all since, but only such which relate to this plea of this defendant (*c*).

In the principal case, Lord *Nottingham* acted upon the well-known rule, that equity will give no assistance—that is, no assistance to the legal title—against a bonâ fide purchaser without notice of an adverse title, and his statement of the law of the Court upon the subject is both succinct and accurate. Lord *Rosslyn*, C., thus comments on and adopts it: "In *Basset* v. *Nosworthy* (Ca. t. Finch, 102), which produced many points, the plaintiff took up the cause as heir of Lady Seymour, claiming under a legal title; the defendants set up a purchase for valuable consideration without notice; Lord *Bridgman* had overruled the plea, in consequence of which a great variety of proceedings took place in this Court. It came before Lord *Nottingham*. He reversed Lord *Bridgman's* order, and suppressed all the proceedings that took place in consequence of the production and discovery. 2 Ves. jun. 457; and see *Phillips* v. *Phillips*, 4 De G. F. & J. 216.

The plea that a defendant is a purchaser for valuable consideration without notice has been held equally good whether a bill were filed for relief or discovery.

It proceeded, moreover, upon the supposition that the plaintiff had a full title to the relief he prayed, and that the defendant could set up no defence in bar to that title, but that the defendant having an equal title to the protection of a Court of equity to defend his possession as the plaintiff had to the assistance of the Court to assert his right, the Court would not interfere on either side. This was particularly the case where the defendant claimed under a purchase or mortgage for valuable consideration without notice of the plaintiff's title, which he might plead in bar of the suit. Mitf. Plead., 274.

The defence of being purchasers for value without notice has been set up not only by purchasers strictly so called and mortgagees, but also by lessees, (*In re King's Leasehold Estates*, 16 L. R. Eq. 525), and by parties claiming under a settlement made previous to and in consideration of marriage (*Harding* v. *Hardrett*, Rep. t. *Finch*, 9; and see *Vane* v. *Vane*, 8 L. R. Ch. App. 383), or under a post-nuptial settlement made in pursuance of an agreement entered into before marriage. *Lord Keeper* v. *Wyld*, 1 Vern. 139.

The defence also has been set up not only by a purchaser without notice obtaining the legal estate from a person affected by notice (*Harrison* v. *Forth*, Prec. Ch. 51, 1 Eq. Ca. Ab. 331, pl. 6), but also by a purchaser with notice obtaining the legal estate from a person who acquired it without notice. *Lowther* v. *Carlton*, 2 Atk. 242, and see note to *Le Neve* v. *Le Neve*, post, p. 32, and cases there cited.

Where the consideration is valuable, equity has never inquired

whether it was adequate; because, as was laid down in the principal case, "the question is not whether the consideration be adequate, but whether it be valuable; for if it be such a consideration as will make the defendant a purchaser within the statute 27 Eliz. c. 4, and bring him within the protection of that law, he ought not to be impeached in equity." *More* v. *Mayhow*, 1 Ch. Ca. 34; *Wagstaff* v. *Read*, 2 Ch. Ca. 156; *Bullock* v. *Sadlier*, Amb. 764; *Mildmay* v. *Mildmay*, Amb. 767, cited.

The consideration money, moreover, must have been actually paid; it is not sufficient that it was merely secured to be paid. *Hardingham* v. *Nicholls*, 3 Atk. 304; *Molony* v. *Kernan*, 2 D. & War. 31.

A person cannot be held to be purchaser without notice, if he had notice of the plaintiff's claim either before the execution of the purchase deed or the payment of the consideration: for if he had notice before either the execution of the deed, *or* the payment of the consideration, he would be bound thereby. *Lady Bodmin* v. *Vandebendy*, 1 Vern. 179; *Jones* v. *Thomas*, 3 P. Wms. 243; *Attorney-General* v. *Gower*, 2 Eq. Ca. Ab. 685, pl. 11; *More* v. *Mayhow*, 1 Ch. Ca. 34; *Story* v. *Lord Windsor*, 2 Atk. 630.

It may be here mentioned that the defence that a person is purchaser for valuable consideration will not prevent the Court from protecting property pending litigation. Thus in *Greenslade* v. *Dare*, 17 Beav. 502, where a bill was filed to impeach a conveyance of an advowson, Sir *John Romilly* M.R., restrained the institution of a clerk presented by a person who set up the defence that he was a purchaser for valuable consideration without notice, "Although," said his Honor, "this Court regards with favour the case of a purchaser for valuable consideration without notice, yet there being a real question in the cause between the plaintiff and the defendant, it does not allow the defendant to take the fruit, on an allegation on his part, even though supported by evidence, until the hearing of the cause, for then, and not until then, is the question in the cause to be determined." Upon the hearing the bill was dismissed with costs, 20 Beav. 284.

This defence on the part of purchasers has been usually set up with success in three classes of cases. 1st, where an application has been made to the *auxiliary* jurisdiction of the Court of Chancery. 2ndly, where one of several purchasers or incumbrances has got in the legal estate. 3rdly, when there are circumstances that give rise to an equity as distinguished from an equitable estate.

1. *Where application has been made to the auxiliary jurisdiction of the Court of Chancery.*] It

might have been supposed, when a person having the legal estate, and whose conduct had not been such as to give rise to any equity against him, sought the aid of equity against a bonâ fide purchaser that the Court acting up to the maxim, "*where equities are equal, the law shall prevail,*" would, whether the bill were for discovery or relief, give aid against the purchaser. The authorities, however, have determined otherwise. In the principal case, it will be observed, the plaintiff, claiming under a legal title as heir, sought the assistance of the Court; but Lord *Nottingham* left him to get whatever remedy he could at law. *Heath* v. *Crealock*, 18 L. R. Eq. 215, 242; 10 L. R. Ch. App. 22, 34.

Upon the same principle, in *Burlace* v. *Cooke*, Freem. Ch. Ca. 24, where an heir exhibited a bill for discovery of evidence concerning lands of his ancestor's, demanding a sight of his writings, the defendant swore that he was a purchaser of the lands, but Lord *Nottingham* said that the heir should not see them. For although the heir primâ facie had a legal title, he might go into a Court of law if he pleased; but this Court would not compel the showing of writings to any person unless he had an equitable title, as a mortgagee; and that was the difference between a legal and equitable title. In *Rogers* v. *Seale*, Freem. Ch. Ca. 84, Lord *Nottingham*, on the contrary, made this distinction, "that where the plaintiff hath a title in law, there, though the defendant doth purchase without notice, yet he shall discover writings; but otherwise, it is if the plaintiff hath only a title in equity; for there, if the defendant purchased without notice, he shall never discover, nor make good the plaintiff's title." These two first decisions of Lord *Nottingham*, both of which are badly reported, are clearly contradictory.

In *Parker* v. *Blythmore*, Prec. Ch. 58, the plaintiff had a legal title, but the deed under which he claimed was lost. Upon his filing a bill setting up the deed, Sir *John Trevor*, M.R., was of opinion that the plea of the defendant, that he was a purchaser for valuable consideration without notice, was good; but it was not necessary actually to decide the question, as the plaintiff, by replying to the plea, had admitted its validity.

In *Jerrard* v. *Saunders*, 2 Ves. jun. 454 (where, however, *Parker* v. *Blythmore* was not cited), Lord *Rosslyn* said he had looked into *Rogers* v. *Seale*, Freem. Ch. Ca. 84; that it was impossible it could be the determination of Lord *Nottingham*, that, if the plaintiff has a *legal* title, the defendant could not protect himself as a purchaser for valuable consideration, but he might if the plaintiff had an equitable title; that it was directly contrary to what he laid

down in *Burlace* v. *Cooke* (Freem. Ch. Ca. 24), soon after he got the Great Seal; that the very reverse was often stated by him; that it was laid down by him, that, against a purchaser for valuable consideration, this Court had no jurisdiction; that *Fagg's case* (cited 1 Vern. 52) was determined by him; the defendant had picked up from the conveyancer's table the deed that affected his title, and though he got it in that manner, Lord *Nottingham* would not oblige him to set it forth. However, in *Strode* v. *Blackburne*, 3 Ves. 222, Lord *Rosslyn* said, that the plea of purchase for valuable consideration without notice, was *a shield to the possession*, and that he found it very difficult to imagine a case in which it could be used for any other purpose than to defend the *actual possession;* and accordingly in that case, where a bill being filed by the tenant for life in possession, under a settlement for discovery or delivery of the title-deeds, the defendant pleaded a mortgage in fee by a former tenant for life alleging himself to be seised in fee, without notice of the settlement; his Lordship ordered the plea to stand for an answer, with liberty to except.

It has, however, been clearly settled that the defence of being a purchaser for value without notice could be set up, by a defendant against a plaintiff *in possession* of the property in question, under a legal title, and the Court of Chancery would not exercise its ordinary jurisdiction of compelling the defendant to make discovery, or deliver up the title deeds to the plaintiff, but would leave the latter to his remedy at law to recover the deeds or their value in detinue or trover. See *Walwyn* v. *Lee*, 9 Ves. 24, there a tenant in tail in *possession* under a marriage settlement, filed a bill for discovery and delivery of title-deeds of an estate which had been mortgaged by his father, who was tenant for life under a settlement, and a private Act of Parliament. The defendant pleaded that the plaintiff's father, alleging himself to be seised in fee, and being in actual possession of the premises as apparent owner, and being also in actual possession of the title-deeds relating thereto, as apparent owner thereof, and having the disposal thereof, executed the several mortgages (stating them) under which the defendant claimed, and averred that the defendant, and the other mortgagees, through whom he derived, had no notice. It was argued for the plaintiff, that, as the plaintiff neither was in possession, nor had the means of procuring it, the Court ought not to permit him to keep the deeds for the sole purpose of extortion. Lord *Eldon*, however, clearly overruling *Strode* v. *Blackburne*, allowed the plea. "This bill," said his Lordship, "is filed by a person having got possession. If the principle is, that this Court

will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail, when his father's life estate determines? His legal rights are, that he shall have possession of the estate: I do not know that I am entitled to say, of the title-deeds, but that he shall recover in trover the value of the deeds, or in detinue, in which the judgment is for the deeds, or the value. But, without attending to the imperfection of the law in such actions, which is probably the ground of the jurisdiction here for the specific delivery of the thing, *I will suppose his right at law to be the specific delivery.* It is true, he is not seeking in equity to recover possession of the estate. But he is seeking to recover something, which he cannot recover at law, the value of which non constat he can recover at law without the discovery of the deeds. Is it of necessity, then, that this Court must hold as against a purchaser for valuable consideration without notice, that, if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by this Court, and thrown in to the person who has got from him the possession of the estate? I do not go further to consider, whether the possession can be for ever withheld from him, reserving that, and doubting whether, upon the argument of this plea, the Court has any right to discuss that question, or to take upon itself to say, as the ground upon which it is in this state of things to proceed, that the possession may be for ever withheld from him. Is it not worth consideration, whether the very principle of this plea is not this: 'I have honestly and bonâ fide paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing bonâ fide;'

"Is it not worth consideration, whether every plea of purchase for valuable consideration without notice does not admit that the defendant has no title? If he has a good title, why not discover? I apprehend there is sufficient ground for saying, *a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it.* I doubt, therefore, the argument calling upon the Court to presume that this man can bring no ejectment; that, if he did, he could not recover; that he has not now the legal fee; that he has not some term vested in him; that he may not be able to procure either; and presuming that, at the hazard of preventing him

from doing that very thing, if he is at this moment engaged in the endeavour to do it. It is asked whether the Court is to permit extortion, by enabling the defendant to withhold the deeds from the owner? Is not the very doubt, whether this Court will call upon the defendant to admit that the plaintiff is the owner? Next, the possession of the deeds at least is a thing purchased with the estate; and if it happens that the purchase misses its object to this extent, that the purchaser has had the possession taken from him without the assistance of this Court, is there a clear principle, that therefore, the possession of the deeds shall, with the assistance of the Court, be recovered by that person who so obtained possession of the estate? I am not sure that follows as a principle of sound equity, if the principle of the Court is, that, *against a purchaser for valuable consideration without notice this Court gives no assistance.* Feeling this case to be of great importance, with reference to the transactions of the world, especially if I shall be compelled to infringe upon an authority to which I look with great respect, but which at this moment I cannot think consistent with the doctrine of this Court as to a purchaser for valuable consideration without notice, I am obliged to take some further time." The plea having stood a considerable time for judgment was allowed.

The subject afterwards met with full consideration by Lord Chancellor *Sugden,* in the case of *Joyce* v. *De Moleyns,* 2 J. & L. 374, where the doctrine laid down in *Walwyn* v. *Lee* was approved of and acted upon. There, the heir-at-law obtained possession of title-deeds relating to impropriate tithes, of which his second brother, under the will of their father, was tenant for life, and deposited them with bankers by way of equitable mortgage, to secure a sum which they advanced to him. Upon a bill being filed by the administrator of a bond-creditor of the father, for the administration of his estate, and praying that the bankers might be decreed to deliver up the deeds, the bankers insisted that they were purchasers for valuable consideration, without notice of the will, or of the title of any persons claiming thereunder, or of the demands of the plaintiff; and submitted that the bill should either be dismissed, or that the plaintiff should redeem them. And Lord Chancellor *Sugden* dismissed the bill as against the bankers, with costs. "It is clear," observed his Lordship, "that the persons entitled to the tithes may maintain trover for the deeds. There is no question as to their title to recover at law; but I apprehend that *the defence of a purchase for value without notice, is a shield, as well against a legal as an equitable title.* There has been a considerable

difference of opinion upon the subject amongst judges. I must decide the question for myself: and I have always considered the true rule to be that which I have stated. Therefore, I think that *the mere circumstance that this is a legal right*, is not a bar to the defence set up, if in other respects it is a good defence. That it is a good defence, cannot be denied. Suppose a tenant for life under a will, with remainder over; and that the tenant for life, being the heir-at-law of the testator, conveys the inheritance to a purchaser without notice, the remainderman cannot have any relief in equity against the purchaser. He must establish his title outside of this Court, as well as he can. It is the same with respect to title deeds. Deeds are chattels; and, where no adverse claimant interferes, the person entitled to the estate is entitled to the deeds. But the person who has possession of the deeds may deal with them as with any other chattels, subject to the rights of those who are interested in them. Here a person obtains the possession of title deeds having no title to the estate; another person advances money to him upon the security of a deposit of the deeds. The rule, therefore, comes into operation (for it applies equally to real estate and to chattels), that if a man advance money bonâ fide, and without notice of the infirmity of the title of the seller, he will be protected in this Court, *and the parties having title must seek relief elsewhere*. . . . In answer to the objection made by the defendants, it is urged that they are equitable mortgagees, and brought before the Court in that character, and that the Master will, under the decree, report on their title; and so they may, under the decree, have what is their right. That, however, is merely begging the question; for, if their title as purchasers for value enables them to say that the bill must be dismissed as against them, then the plaintiff offers them nothing, for he says that the person who pledged the deeds had no interest of any kind in the estate: therefore, though the plaintiff treats them as equitable mortgagees of the estate, yet at the hearing he denies them that character; and they cannot fill the character of equitable mortgagees of the deeds, for the person depositing them had no title. The defendants, therefore, use the possession of the deeds, as they have a right to do, as a shield to protect them against the plaintiffs. They can make no use of the deeds themselves; they cannot maintain possession of them against the true owner: but in this Court they have a right to say that they ought not to be compelled to deliver them up, as they obtained them bonâ fide and without notice." On the following day his Lordship said, that Lord *Eldon* had decided the very point in *Walwyn* v. *Lee*, 9

Ves. 24, and added, that in *Bernard* v. *Drought*, 1 Moll. 38, Sir *A. Hart* extended the doctrine to the case of a solicitor's lien, but in *Smith* v. *Chichester*, 2 D. & War. 393, he considered that it had been carried too far.

So, in *Bowen* v. *Evans*, 1 J. & L. 264, Lord Chancellor *Sugden* said that in his opinion, whether the purchaser has the legal estate, or only an equitable interest, he may, by way of defence, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title. See also *Payne* v. *Compton*, 2 Y. & C., Exch. Ca. 457; *Attorney-General* v. *Wilkins*, 17 Beav. 285; *Lane* v. *Jackson*, 20 Beav. 535; *Hope* v. *Liddel*, 21 Beav. 183; *Penny* v. *Watts*, 1 Mac. & G. 150; *Gomm* v. *Parrott*, 5 W. R. (C. P.) 882, 3 Jur. N. S. 1150, where this doctrine has been approved of and followed.

And the rule in favour of purchasers applies to personal as well as to real estate: *Dawson* v. *Prince*, 2 De G. & Jo. 41.

Where a trustee has made good a breach of trust with regard to one trust fund, by the application for that purpose of funds belonging to another trust, the cestuis que trustent of the first fund will be considered as purchasers for value without notice, and the cestuis que trustent of the second fund will not be able to reclaim any part of it so applied in making good the breach of trust. Thus, in *Thorndike* v. *Hunt*, 3 De G. & Jo. 563, a trustee of two different settlements, having applied to his own use funds subject to one of the settlements, replaced it by funds which, under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into Court on a motion. It was held by the Lords Justices, reversing the decision of Sir *John Romilly*, M.R., that the transfer was equivalent to an alienation for value without notice, and that the cestuis que trustent under the other settlement could not follow the trust fund. See also *Case* v. *James*, 29 Beav. 512, 3 De G. F. & J. 256.

It seems, however, that a person cannot plead that he is a purchaser for valuable consideration without notice, where he purchases and pays the purchase-money to a pretended agent of an apparent owner, without his authority, the apparent owner being merely a grantee under a fraudulent deed, who had never been in possession: *Ogilvie* v. *Jeaffreson*, 2 Giff. 353, 380.

There has been one important exception to the rule acted upon in the principal case, for it has

been held that it does not apply where the Court of Chancery has exercised a legal jurisdiction *concurrently* with Courts of law.

Thus, where the Court of Chancery had concurrent jurisdiction with the Courts of law, in matters of dower or tithes, it has refused to allow the plea of purchase for value without notice.

In *Williams* v. *Lambe*, 3 Bro. C. C. 264, a widow filed a bill against a purchaser from her husband, claiming her dower. The defendant pleaded, that he was a purchaser of the estate (subject to a mortgage), for valuable consideration, without notice of the vendor being married. Lord *Thurlow*, however, overruled the plea, observing, that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; he thought, where a party in pursuing a *legal title*, as dower is, that plea does not apply, it *being only a bar to an equitable not to a legal claim*. He therefore overruled the plea, though he said he could not see how the plaintiff could proceed without making the mortgagee a party, as, if it turned out that the mortgage (being in fee) was before the marriage, there would be an end to her title.

So in *Collins* v. *Archer*, 1 Russ. & My. 284. There, a rector, in 1811, demised his rectory to A. for a term of years, to secure the due payment of an annuity. In 1814 he for valuable consideration demised the tithes of certain lands within the rectory to the occupier, B., who, at the time, had no notice of the prior charge. The annuity fell into arrear in 1816, and in 1817 the rector took the benefit of the Insolvent Act. B. remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment until 1827, when A. filed against him a bill for an account; in answer to which B. insisted that he was a purchaser for valuable consideration without notice. But it was held by Sir *John Leach*, M.R., that the defendant ought to account for the tithes for the six years before the filing of the bill. "Following," said his Honor, "the case of *Williams* v. *Lambe*, and the general principle of a Court of equity, I am of opinion that that defence is of no avail against the legal title."

Although the reasoning upon which they were founded according to authorities already cited was erroneous, the decisions in the cases of *Williams* v. *Lambe*, and *Collins* v. *Archer* appear to have been right, because, to use the words of Lord *Westbury*, C. in *Phillips* v. *Phillips*, 4 De G. F. & J. 217, "in those cases a Court of equity was not asked to give to the plaintiff any equitable as distinguished from legal relief."

2. *Where one of several purchasers or incumbrancers has got in the legal estate.*] Nothing can be clearer than that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase is entitled to priority in equity, as well as at law, according to the well-known maxim, *where equities are equal, the law shall prevail. Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 259.

Moreover where a man who has bonâ fide paid money without notice of any other title, though at the time of the payment he as purchaser gets nothing but an equitable title, he may afterwards get in a legal title if he can, and may hold it, though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself (*Blackwood* v. *London Chartered Bank of Australia*, 5 L. R. P. C. C. 111), and the Court of equity will not prevent his protecting himself by means of the legal title he has so acquired, against a person claiming under a prior equitable title, because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he has obtained at law by his superior activity or diligence. See *Goldborn* v. *Alcock*, 2 Sim. 552; *Marsh* v. *Lee*, ante, vol. i., p. 659, and note.

And it is clear that a purchaser who pays, and procures the legal estate from, an unsatisfied mortgagee, may hold it as against all mesne incumbrances of which he had no notice, before he completed his purchase, even if that were done pendente lite, provided it were done before a decree to settle priorities: *Bates* v. *Johnson*, Johns. 304; *Prosser* v. *Rice*, 28 Beav. 68; *Young* v. *Young*, 3 L. R. Eq. 801; *Pease* v. *Jackson*, 3 L. R. Ch. App. 576; *Marsh* v. *Lee*, ante, vol. i., p. 659, and note.

To so great an extent has equity favoured purchasers bonâ fide without notice, that it appears by *Culpepper's case*, cited by Lords Commissioners *Trevor* and *Rawlinson*, in *Sanders* v. *Deligne*, Freem. Ch. Rep. 123, that where a man had bought gavelkind land of the eldest son, and paid his purchase-money without knowledge that it was gavelkind, and afterwards for a song bought in the titles of the younger brothers, who were ignorant of their titles, it was yet held, that they could not be relieved afterwards in equity; for it was said that the purchaser, having honestly paid his money without notice, might use what means he could to fortify his title. In *Sir John Fagg's case*, 1 Vern. 52, cited, "a purchaser came into a man's study, and there laid hands on a statute that

would have fallen on his estate, and put it in his pocket; and in that case, he having thereby obtained an advantage in law, though so unfairly and by so ill a practice, the Court would not take that advantage from him;" *S. C.*, nom. *Sherly* v. *Fagg*, 1 Ch. Ca. 68: and in *Harcourt* v. *Knowel*, cited 2 Vern. 159, a purchaser was allowed to take advantage of a release obtained from the grantee of a rent-charge without consideration, and by fraud. And see *Siddon* v. *Charnells*, Bunb. 298. These, however, are extreme cases, showing, indeed, how partial equity was to purchasers, but extending the doctrine of protection to them farther than it would be carried at the present day: see *Carter* v. *Carter*, 3 K. & J. 617, 636, 637.

Where the asserted equitable title of the purchaser, who had got in the legal estate, depended upon a forged will, he was held entitled to the protection of the Court. See *Jones* v. *Powles*, 3 My. & K. 581: in that case a person advanced money upon the mortgage of an estate, claimed by the mortgagor who was in possession, under a will, which ultimately turned out to be forged, and got a conveyance of the legal estate, then outstanding, in a mortgagee, whose debt had been satisfied. Upon a bill being filed by the heiress-at-law, it was held, by Sir *John Leach*, M.R., that the mortgagee, being a purchaser without notice of the plaintiff's title, could protect herself by the legal estate. "My impression," said his Honor, "at the opening of this case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor or those under whom he claimed: but upon full consideration of all the authorities which have been referred to, and the dicta of judges and text writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence." See 1 J. & L. 264.

The result was the same where the asserted equitable title depended upon a misrepresentation of facts. Thus in the recent case of *Young* v. *Young*, 3 L. R. Eq. 801, a testator, in 1832, devised his estate (which was then subject to a mortgage to one Talford), to his wife for life, and then to his

children. The will was never proved, and no notice of it was entered on the Court roll. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851, the son, falsely representing himself to be in possession of the estate as heir of his father, procured a further advance upon mortgage of the estate, from W. Longrigg, who paid off the first mortgage to Talford, in whom the legal estate was vested by customary grant and admittance, and having taken a grant of the estate from Talford and the son, was, thereupon, admitted tenant of the property. Longrigg, when he advanced the money was in perfect ignorance of the existence of the will, and believed that the son was the owner of the estate as heir of his father. The widow having died, it was held by Sir *R. Malins*, V.-C., that Longrigg having the legal estate, without notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance. "Here," said his Honor, "the heir-at-law was in possession, and seems to have represented that he was in possession as heir, which is equivalent to a representation that there was no will, and, being in such possession, he applies for a further advance. The will was not proved, and there was no entry of it on the Court rolls; consequently, there can be no negligence attributable to Mr. Longrigg, and I must consider that he has all the rights that a purchaser for valuable consideration would have."

Although the decisions are conflicting, the better opinion seems to be that a purchaser will not be presumed to have notice of a trust merely because he gets the legal estate through an instrument of whose existence he was not aware when he took his conveyance, although upon the face of such instrument the trust is disclosed, and it follows, therefore, that in such a case he may successfully defend himself as a purchaser for value without notice. A different view, however, of the law was taken in the case of *Carter* v. *Carter*, 3 K. & J. 617, there the testator died in 1847, leaving a will dated January, 1846, by which he gave a beneficial share in an eighth of real estates to John Carter. Thereupon, John Carter, believing himself to be the beneficial owner, conveyed his share to the defendant as mortgagee. Afterwards, a later will of the testator, dated in April, 1846, was discovered, by which the estates were devised to John Carter and two others upon certain trusts. The two other trustees disclaimed, and John Carter, thereupon, became the sole trustee, and the legal estate was vested in him, which he had already conveyed to his mortgagee. It was held by Sir *W. Page*

Wood, V.-C., that although the defendant had acquired the legal estate in one-eighth of the estate for valuable consideration, as it were by accident and without notice that the former will had been revoked, so that his conscience was not affected by any of the trusts to which, by the subsequent will, the estate was subjected, he must hold subject to those trusts, since the will by which they were created was the very instrument upon which his title to the legal estate depended. "The only legal estate," said his Honor, "he (the defendant) can avail himself of, is a legal estate under a conveyance, which on the very face of it, betrays the trust; and the question is, whether you are obliged to say, 'I have no other conveyance than this: this is my legal title,' such a legal title can be held a protection from the claims of the cestuis que trustent. In other words, on a bill filed by the cestuis que trustent for the execution of the trusts of the will, can any purchaser plead a purchase of the trustees' legal estate without notice of trusts; because the trustee affected to convey a different estate from that which he in fact conveyed. Now, no case has ever been brought up to that; and looking to the distinction drawn between the case of a trust expressed on the face of the instrument, and cases where there is merely the general direction to hold in trust for the persons ultimately to be entitled—two cases of an extremely different character—it does not appear to me, that if you are desirous to rely for your title on that which on the very face of it, when produced, discloses the equitable interests, you can be heard to say, 'I claim the estate under this instrument, and I disclaim every charge that appears upon the face of it; or aver ignorance of the deed which constitutes your title.'"

The opinion, however, expressed by the learned judge in this case was not followed in the more recent case of *Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 259. There three trustees of a marriage settlement advanced the trust-money to Rawlins upon the security of a mortgage in fee of certain property, the mortgage *deed disclosing the fact that the sum advanced was trust money.* Two of the trustees died, and Rawlins, who had been a solicitor, by connivance with the surviving trustee, who was a solicitor, and had got the title deeds made out an abstract of title earlier than the mortgage, thus showing a title in fee simple in himself. The surviving trustee of the settlement afterwards reconveyed part of the property to Rawlins in consideration of a sum of money. Rawlins then conveyed that part of the property to new mortgagees, concealing with the connivance of the surviving

trustee, both the prior mortgage and the re-conveyance. Upon a bill being filed by the cestui que trusts under the settlement against the surviving trustee and the second mortgagees, the latter pleaded that they were purchasers for value without notice. It was held by the Court of appeal in Chancery (Lord *Hatherley*, C., *James*, L.J., and *Mellish*, L.J.), reversing the decree of Lord *Romilly*, M.R., (reported 11 L. R. Eq. 53), which followed the decision of *Carter* v. *Carter* (3 K. & J. 617), that the plea ought to be allowed, and that the Court could not interfere to take away the legal estate which passed to the new mortgagees under the conveyance. Lord *Hatherley*, C., in his judgment, endeavoured to distinguish the case from *Carter* v. *Carter*, and *Mellish*, L.J., considered it to be unnecessary to give any opinion whether that case was rightly decided or not. But *James*, L.J., expressed his disapprobation of that case in somewhat strong terms, and thus comments upon it: "In the case of *Carter* v. *Carter*," says his Lordship, "which was decided by the present Lord Chancellor, and which was followed by the Master of the Rolls in this case, and with which I am bound to say I am unable to agree, an exception from the rule was under the circumstances supposed to exist. It is very clearly expressed in a few lines of the judgment in that case; 'But here the purchaser taking the conveyance under one will, supposed by all parties to be really the last will of the testator, finds himself driven to rely upon another, and a second will containing on the face of it all the trusts which the testator has created;' and that circumstance is supposed to create the exception. To my mind, there are to that supposition two short and conclusive answers—the one, a matter of principle, and the other, a matter of fact. My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly and justly, I am not going to tell you. I have got the deeds; I defend them, and you will never be able to produce secondary evidence of them. I am not obliged to produce them at all; probably, before you get half way through your action of ejectment, you will find a jus tertii which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, and no one can determine that tenancy without notice, and no one can give that notice but myself; I will not give that notice, and no Court has any power to compel me to give

it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me.' That seems to be exactly the position of such a purchaser as this.

"The purchaser in *Carter* v. *Carter*, did not rely on the will which created the trust; he relied on another title; for the will formed the title of the adverse party, and the answer to that adverse party is, by the good luck which sometimes attends honest men, 'though you produce an instrument which points out your title, and gives the property to some one else, yet I am prepared with a legal defence in a conveyance which was executed before.' It appears to me, that there is no right in this Court to prevent the purchaser from setting up that defence to the claim so made against him. If there ever was a case in which, according to my judgment, any Court ought to be in favour of a purchaser and against such a title, it is a case in which a testator has through the grossest negligence, allowed two wills to exist after his death, so that some members of his family produce one will, apparently making out a perfectly good title to a mortgagee or purchaser, and then, when a mortgagee or purchaser has been induced, unwittingly, to pay or advance his money, some other members of the family produce the other will, which has been suppressed or concealed during the whole of that time, and thus seek to take the estate away from the mortgagee or purchaser. It seems to me to be a very ingenious device by which a testator would be able to give his property twice over to his family; but in my opinion, it is a device which ought not to be encouraged in any way in equity. I am, therefore, of opinion, that whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the property, he is entitled to the benefit of that accident; just as a purchaser would be entitled to avail himself of the possession so acquired, without any reference to the rights of the persons who may be otherwise interested." Sed vide *Monckton* v. *Braddell*, 7 I. R. Eq. 30.

And not only where the purchaser has actually obtained, but where he has the best right to call for the legal estate, will he be entitled to the protection of equity: *Willoughby* v. *Willoughby*, 1 T. R. 763; *Blake* v. *Sir Edward Hungerford*, Prec. Ch. 158; *Charlton* v. *Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Ves. 609; *Shine* v. *Gough*, 1 Ball & B. 436; *Bowen* v. *Evans*, 1 J. & L. 264; *Tildesley* v. *Lodge*, 3 Sm. & G. 543. And see *ante*, vol. i. p. 673.

But though a purchaser bonâ fide without notice may, after notice, obtain the legal estate, buy

in an incumbrance, or lay hold on any plank to protect himself, "yet he shall not protect himself by taking a conveyance from a trustee after he had notice of the trust; for by taking a conveyance, with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust" (*Saunders* v. *Dehew*, 2 Vern. 271; *S.C.*, nom. *Sanders* v. *Deligne & Barnes*, Freem. C. C. 123; *Allen* v. *Knight*, 5 Hare, 272; affirmed by Lord *Cottenham* on appeal, 11 Jur. 527; *Baillie* v. *M'Kewan*, 35 Beav. 177; *Mumford* v. *Stohwasser*, 18 L. R. Eq. 556); and a trustee for successive incumbrancers cannot by conveying the legal estates to one of them give him priority over the other: *Sharples* v. *Adams*, 32 Beav. 213; *Collyer* v. *Finch*, 19 Beav. 500; 5 Ho. Lo. Ca. 905. See also *Maxfield* v. *Burton*, 17 L. R. Eq. 15, 19, and the observations therein on *Sharples* v. *Adams*; *Monckton* v. *Braddell*, 7 I. Rep. Eq. 30, reversing *S. C.* 6 I. Rep. Eq. 352.

The principle upon which these cases proceed does not appear to have been observed in some of the old cases, in which a trustee of a term to attend the inheritance was allowed to assign in such a manner as to give preference. Those were really cases of constructive notice because the person taking the assignment must have known that the person assigning was trustee for someone: per Sir *G. Jessel*, M.R., in *Mumford* v. *Stohwasser*, 18 L. R. Eq. 562, and see *Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 259.

In the converse case of a trustee knowing that he was a trustee assigning, without receiving value at the same time, the legal estate to a person who did not know that he was a trustee, that person having previously acquired an equitable interest, Sir *G. Jessel*, M.R., has said that he would hold that such person being the second equitable incumbrancer or the purchaser of the equity did not thereby gain priority. *Mumford* v. *Stohwasser*, 18 L. R. Eq. 563.

But as the first mortgagee is not a trustee for the second, although he have notice of his mortgage, a third mortgagee advancing his money without notice of the second may gain priority over it by taking a conveyance of the first: *Peacock* v. *Burt*, 4 L. J. N. S. Ch. 33 (Coote, Mortg. Append.).

It has been observed by a learned judge that there does not appear to be any case in which a purchaser obtaining a conveyance of a mere dry trust estate from a trustee of a satisfied term, or from a mortgagee whose mortgage has been satisfied, (such trustee or mortgagee having at the time when he made the conveyance, notice of an intervening charge or trust), has been held entitled to protect himself from such charge or trust by means of the legal es-

tate which he has so obtained. Per Sir *W. P. Wood*, V.-C., in *Carter* v. *Carter*, 3 K. & J. 640.

In a more recent case, however, where the case of *Carter* v. *Carter*, 8 K & J. 640, may be considered to be over-ruled it has on the other hand been laid down in the Court of Appeal that where a trustee, in breach of trust, conveys away a legal estate which he possesses, and that legal estate comes into the possession of a purchaser for valuable consideration without notice, that purchaser can hold the property against the cestuis que trusts who were defrauded by the conveyance of the trustee; and that it makes no difference whatever that if the purchaser is challenged in a Court of law, and an action of ejectment is brought against him, he may have to rely upon some deed which was in fact concealed from him, and of which he had neither knowledge nor means of knowledge. Per *Mellish*, L.J., in *Pilcher* v. *Rawlins*, 7 L. R. Ch. App. 274.

A purchaser, however, without notice cannot avail himself of the legal estate, which, by the fraud of another, has been obtained from the holder, for the protection of the purchaser, but has not actually been conveyed to him. See *Eyre* v. *Burmester*, 10 Ho. Lo. Ca. 90. In that case Eyre was the holder of a mortgage on lands given to him by John Sadleir who was largely his debtor. John Sadleir afterwards mortgaged these lands to the directors of a banking company as security for some fresh advances. Before these advances were actually made, the solicitor for the directors discovered that the lands had been previously mortgaged to Eyre. The directors refused to complete the transaction with John Sadleir unless Eyre's interest in the lands was released. John Sadleir represented to them that it would be easy to procure the release, as Eyre's mortgage was only a collateral security, and he applied to Eyre, who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between Eyre and John Sadleir, the latter pretended to give substituted securities, among others, railway shares and a promissory note. The release was executed by Eyre. The substituted securities, the shares and the note, proved to be forgeries. It was held by the House of Lords, reversing the decree of the Lord Chancellor of Ireland, that Eyre had not, by executing the release, lost his right against the mortgaged lands, the release having been obtained from him by fraud, that even if John Sadleir had conveyed the released lands to the directors they could only have claimed under him against Eyre, and that the release, valid against John Sadleir and those who claimed under him, was invalid as

against Eyre, who claimed not only not under John Sadleir, but against him, by a title paramount. See also *Heath* v. *Crealock*, 10 L. R. Ch. App. 22, 34.

It may be here mentioned that an attempt was made to abolish the doctrine of tacking by Sect. 7 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) repealed by the Land Transfer Act, 1875, (38 & 39 Vict. c. 87), except as to anything duly done thereunder. See note to *Marsh* v. *Lee*, vol. i., p. 678.

The principle, however, of the cases that decide, that the defence of being a purchaser for valuable consideration without notice, can be made by persons not having the legal estate, is not applicable to cases where a legal mortgagee files a bill of foreclosure against a subsequent mortgagee or purchaser who has advanced his money without notice of the prior incumbrance. See *Finch* v. *Shaw*, and *Colyer* v. *Finch*, 19 Beav. 500; there Finch, the plaintiff in the first suit in 1842, became first legal mortgagee of an estate of the defendant Shaw, and Colyer, the plaintiff in the second suit, became purchaser of the estate in 1849. It was held by Sir *John Romilly*, M.R., that Colyer could not set up as a defence to a bill of foreclosure by the first mortgagee, that he was a purchaser for valuable consideration without notice of the mortgage. His Honor, after stating that he had no doubt as to the propriety of the decisions with respect to purchasers for valuable consideration without notice, observed, "It would be a new and a very dangerous doctrine, to say, that where a person has mortgaged property to one, and given him a legal mortgage, and has afterwards mortgaged the same property to a second, concealing the existence of the first mortgage, the first mortgagee is to be deprived of his ordinary rights in this Court, incidental to his mortgage. I have found no case that leads to that conclusion, and on the contrary, it appears to me inconsistent with the whole doctrine of this Court relating to tacking." . . . And after observing that there were several cases upon the subject, which might require some nicety of distinction to reconcile precisely, and noticing the cases of *Williams* v. *Lambe* (3 Bro. C. C. 264) and *Collins* v. *Archer* (1 Russ. & My. 284), his Honor added, "The distinction I apprehend to be this:—if the suit be for the enforcement of a legal claim for the establishment of a legal right, then, although this Court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy, or an equitable right,

which can only be enforced in this Court, I have not found any case, nor am I aware of any, where this Court will refuse to enforce the equitable remedy which is incidental to the legal right." The case of *Colyer* v. *Finch* was on appeal affirmed by the House of Lords (5 H. L. Cas. 905); and Lord *Cranworth*, C., observed that the reasons of the Master of the Rolls were no doubt perfectly satisfactory, but that he should proceed on a shorter ground, "For the purpose," said his Lordship, "of the question, whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage; and that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say, 'You shall redeem now, or you shall never redeem.' Therefore I think that is a ground which entirely puts an end to all questions as to Mr. Finch's suit, and that he would be entitled, unless so far as it is interfering with the other suit, to the decree which the Master of the Rolls has given him; namely, the ordinary foreclosure decree." See also *Burlace* v. *Cooke*, Freem. Ch. Ca. 24, ante, p. 7.

But although a legal mortgagee is entitled to an order for foreclosure against a purchaser for value without notice, he will not be entitled to an order for the delivery of the title deeds (*Heath* v. *Crealock*, 10 L. R. Ch. App. 22, varying the decision of *Bacon*, V.-C., reported 18 L. R. Eq. 215; *Waldy* v. *Gray*, 20 L. R. Eq. 238), nor will the Court in such a case under 15 & 16 Vict. c. 86, s. 48, order a sale instead of foreclosure, because a Court of equity is not in the habit of ordering a sale unless it can go on and complete the sale in every necessary way, giving possession and insuring that the title deeds shall be handed over, and in such a case as against purchasers for value without notice, the Court cannot do either the one or the other, Ib. See also *Head* v. *Egerton*, 3 P. Wms. 280.

The defence, moreover, of a person being a purchaser for valuable consideration without notice, cannot, where the legal estate is outstanding, be used by a person having equal equities against an equitable incumbrancer, who is prior to him in point of date. See *Phillips* v. *Phillips*, 4 De G. F. & Jo. 208; 31 L. J. Ch. (N. S.) 325; 8 Jur. (N. S.) 145. There, A. being entitled to the equity of redemption in certain lands, by a deed of family arrangement dated in

February, 1820, granted to his brother B. an annuity of 20*l.* charged on those lands, and payable on the death of his mother, C. By a settlement made on his marriage in May, 1821, A. settled the above lands, subject to the mortgage existing thereon, and he at the same time covenanted that they were not otherwise incumbered. A. died in 1825, and C. died in 1839. The first payment of the annuity became due in March, 1840. In 1859 B. filed a bill against those claiming under the settlement for payment of the annuity. The defendants set up orally at the bar the defence, that they were purchasers for valuable consideration without notice of B.'s annuity. It was held by Lord *Westbury*, C., that even assuming such defence could be set up orally at the hearing (but which he held could not), it was not available, inasmuch as the defendant was only the purchaser of an equitable interest. "I take it," said his Lordship, "to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies *qui prior est in tempore potior est in jure*. The first grantee is *potior*, that is *potentior*. He has a better and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognised in the case of *Brace* v. *The Duchess of Marlborough* (2 P. Wms. 491); and they are further illustrated by the familiar doctrine of this Court as to the tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer at the time of his incumbrance and payment of his money had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has

acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title ; for if the first mortgagee has not the legal title, the third mortgagee, by payment off of the first, acquires no priority over the second. Now the defence of a purchaser for valuable consideration is the creature of the Court of equity, and it can never be used in a manner at variance with the elementary rules which have been already stated. . . . . It was indeed said at the bar that the defendants being in possession had a legal advantage in respect of that possession of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and it is to be awarded by the Court to one or to the other. But the subject of controversy, and the means of determining the right to that subject, are perfectly different. The argument, in fact, amounts to this : 'I ought not to be deprived of possession, because I have possession.' The purchaser will not be deprived of anything that gives him the legal right to the possession, but the possession itself must not be confounded with the right to it. The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground whatever for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this Court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument. I have no difficulty in holding that the plea of purchase for valuable consideration is, upon principle, not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised." See, also, *Vorley* v. *Cooke*, 1 Giff. 230 ; *Parker* v. *Clarke*, 30 Beav. 54.

The case, however, of *Phillips* v. *Phillips*, has been strongly disapproved of by Lord *St. Leonards*, who observes that "till the case of *Phillips* v. *Phillips* the validity of the defence against an equitable title appears not to have been questioned." V. & P. 798, 14th ed.

Where, moreover, in consequence of a fund being in Court (*Stackhouse* v. *Countess of Jersey*,

1 J. & H. 721), or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare, and does declare, the right to the fund or estate in question, in such cases as the Court is called upon to make, and does make, a decree against some one or more of such purchasers for value, such a decree would be obviously incomplete in a material particular if, while declaring the plaintiff to be absolutely entitled to the whole beneficial interest in the estate, it left the title deeds in the possession of one of the defendants, claiming to hold them under an adverse title which the same decree declared to have no foundation; the Court therefore will, in such cases, order the delivery up of the title deeds. Per Lord *Hatherley*, L.C., in *Newton* v. *Newton*, 4 L. R. Ch. App. 144. Suppose the owner of an equitable estate for value conveys the whole estate to A., and then does the same to B., and again conveys the whole estate to C., for valuable consideration, having, in fact, nothing whatever to convey to B. or to C.; then neither B. nor C. can hold the title deeds of the property against A. But the Court will, on declaring who is the real owner, declare that B. or C. shall deliver up to A. the title deeds belonging to that estate, of which A. is the sole and exclusive owner. Per Lord *Romilly*, M.R., in *Newton* v. *Newton*, 6 L. R. Eq. 141; see also *Frazer* v. *Jones*, 17 L. J. Ch. (N. S.) 353.

Where, however, the person creating a charge in favour of a subsequent claimant, had any interest whatever in the subject-matter which he proposed to charge, then the person in whose favour he has created this latter incumbrance, and who has got possession of the title-deeds belonging to the estate, may hold them till he is redeemed or foreclosed; and in such cases the Court will not go into the question of the greater or lesser amount of the prior charge, but if he had a beneficial interest in the property, or a right to redeem it, that is sufficient to give the last incumbrancer a right to hold the deeds. For instance, if the equitable owner of an estate creates a first charge on it in favour of A., and a second in favour of B., and a third in favour of C., to whom he delivers up the custody of the title deeds, whether this order of priorities is originally undisputed, or whether it is settled by the decree of the Court, C. cannot be compelled to deliver up the title deeds until he is foreclosed or redeemed, because there is a possibility of interest in the estate remaining to him after payment of A. and B. Per Lord *Romilly*, M.R., in *Newton* v. *Newton*, 6 L. R. Eq. 141; see also

Thorpe v. *Holdsworth*, 7 L. R. Eq. 139.

3. *Where there are circumstances that give rise to an equity as distinguished from an equitable estate.*]—It is clear that although a Court of equity will assist a widow by putting a term out of her way, where third parties are not interested, it will not give that assistance against a purchaser: *D'Arcy* v. *Blake*, 2 S. & L. 388; *Lady Radnor* v. *Vandebendy*, Prec. Ch. 65; Show. P. C. 69; and see *Anderson* v. *Pignet*, 8 L. R. Ch. App., reversing *S. C.* 11 L. R. Eq. 329.

In *Baker* v. *Morgans*, 2 Dow, 326, Baker, in 1781, by an ejectment for non-payment of rent, entered upon the possession of a widow, tenant for life of a lease for lives renewable for ever, remainder to her children, who were infants. Baker demised part of the premises to J. C. Beresford, and part to J. Coghlan. The children, in 1806, long after they came of age, filed their bill for relief against Baker, Beresford, and Coghlan; but it was held by the House of Lords, reversing a decree of the Irish Court of Exchequer, that there was no ground for interference in equity, Lord *Redesdale* observing, that the chief question as to the interference of equity in such cases, had come before him in the case of *O'Connors* v. *Lord Bandon* (2 S. & L. 679); that it was only a question at law, and that the length of time during which one of them had been of age before proceeding commenced, would be a strong objection, even at law. "He could not," he added, "dismiss the subject without adverting to the situation in which Beresford and Coghlan were placed by the decree. It was important to keep in view, that they were both purchasers for valuable consideration. Both had taken possession, and expended money on the premises; and this was the first time when equity had turned a purchaser for valuable consideration out of possession when the legal title was in him. The effect of turning them out of possession was to vest a right of action in them against Baker, who would thus be involved in difficulties beyond description. Was a purchaser for valuable consideration bound to see that the whole of a proceeding at law under which the vendor or lessor was in possession, was perfectly regular? There never was a time when equity so dealt with purchasers for valuable consideration. Even if this ground, then, was tenable as against Baker, it was not tenable as against them. But there was nothing here to warrant the plaintiffs to proceed in equity in any way; the proceeding, if any were competent, must be at law. They did not state that they wanted any necessary instrument; there was no affidavit to the bill of any such being

lost; and it even appeared by their own showing, that they had evidence to proceed by ejectment, if they had so chosen. Equity, therefore, could not interfere."

In many other respects favour was shown to bonâ fide purchasers. Thus, a commission of bankruptcy would not formerly have been superseded for fraud, if there were purchasers under it; for, under the old law a commission being superseded, all fell with it. *Ex parte Edwards*, 10 Ves. 104; *Ex parte Leman*, 13 Ves. 271; *Ex parte Rawson*, 1 V. & B. 160; *Ex parte Latour*, 1 M. & B. 89.

Nor will a Court of equity relieve against a mere accident, (*Harry* v. *Woodhouse*, Sel. Ch. Ca. 80); or rectify a mistake (*Bell* v. *Cundall*, Amb. 101), so as to affect a purchaser without notice. The mistake or ignorance of parties to a conveyance of their claims, will not turn to the prejudice of a bonâ fide purchaser: *Malden* v. *Menill*, 2 Atk. 8; *Marshall* v. *Collett*, 1 Y. & C. Exch. Ca. 238. So, in *Sturge* v. *Starr*, 2 My. & K. 195, a man already married, performed the ceremony of marriage with a woman, and joined with her in assigning her life interest in a trust fund to a purchaser; it was held, that though she might not have executed such an instrument, had she been aware of the fraud practised upon her, that fraud could not affect the rights of a bonâ fide purchaser.

It may appear difficult to reconcile all the cases upon this subject with each other. Lord *Westbury*, however, in the important case of *Phillips* v. *Phillips*, 4 De G. F. & Jo. 208; 8 Jur. N. S. 145; 31 L. J. Ch. N. S. 321, gives the following summary of the law on this subject:—"The defence of a purchase for valuable consideration is the creature of the Court of equity. . . . It seems at first to have been used as a shield against the claim in equity of persons having a legal title. *Basset* v. *Nosworthy*, Rep. temp. Finch, 102, *S. C.* 2 White and Tudor's Leading Cases in Equity, 1, is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance together with the maxim I have referred to (*qui prior est tempore potior est jure*) probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three classes of cases, in which the use of this defence is most familiar—first, where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case of *Basset* v. *Nosworthy*), or by a tenant for life for the delivery of title deeds (which was the case of *Walwyn* v. *Lee*), and the defendant pleads that he is a bonâ fide purchaser for valuable consideration without notice. In such case the defence is good, and the

reason given is, that as against a purchaser for valuable consideration without notice, the Court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction *concurrently* with Courts of law. Thus it was decided by Lord *Thurlow* in *Williams* v. *Lambe* (3 Bro. C. C. 264), that the defence could not be pleaded to a bill for dower; and by Sir *J. Leach* in *Collins* v. *Archer* (1 Russ. & My. 284), that it was no answer to a bill for tithes. In those cases a Court of equity was not asked to give to the plaintiff any equitable, as distinguished from legal relief. The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming in equity, and one who is later or last in time succeeds in obtaining an outstanding legal estate, not held upon existing trusts, or a judgment or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice, for the principle is, that a Court of equity will not disarm a purchaser—that is, will not take from him the shield of any legal advantage. This is the common doctrine of the tabula in naufragio. Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake, and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice—the Court will not interfere. Now these are the three cases in which the defence in question is most commonly found."

4. *Effect of the Supreme Court of Judicature Acts.*]—As the defence of purchase for valuable consideration without notice in the first class of cases before considered, assumes that the defendant has no defence at law, the question may now be raised whether under the Judicature Act, by which every judge of the High Court of Justice must recognise and give effect to all legal claims and demands, estates and titles (36 & 37 Vict. c. 66, s. 24, subs. 5), the Chancery, as well as every other division of the Court, ought not to decide every case upon its actual merits irrespective of such defence. If, however, it should be held that, under the 2nd subsection of s. 24 of 36 & 37 Vict. c. 66, a defendant may set up by way of equitable defence, in every division of the Court, the defence that he is a

purchaser for value without notice, the plaintiff, by a species of legislative side-wind, will have been deprived of the means of enforcing rights, which formerly *e concessis* he had, and might enforce at law.

5. *How the defence may be set up.*]—As apparently pleas can no longer be used under the Judicature Acts, the defence of being a purchaser for value without notice can now only be taken advantage of by, 1, a demurrer, if it clearly appear upon the face of the statement of complaint that the defendant was a purchaser for valuable consideration without notice. See Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77, First sched., order xix), Mitf. Tr. Pl. 199, 4th ed. 2. If a purchaser, without notice, cannot protect himself by demurrer (which he would rarely be able to do), he may defend himself by his statement of defence, a new name for an answer (Ib. and see *Att.-Gen.* v. *Williams*, 17 Beav. 285, 291), and it is presumed that if he puts in a statement of defence, he must still, according to the old general rule, make a full statement equivalent to answering fully, although he might by demurrer (and formerly by plea) have protected himself. See *Ovey* v. *Leighton*, 2 S. & S. 234; *Lancaster* v. *Evors*, 1 Ph. 352. *Lord Ranelife* v. *Parkyns*, 6 Dow, 230.

A defendant, who may have a right, by setting up the defence in his statement that he is a purchaser for value without notice, to protect himself from the production of title deeds, will not be able to do so as to those the contents of which he has set forth in his statement, because when a defendant professes to set out a deed the plaintiff has a right to see whether it is stated correctly or not: *Hunt* v. *Elmes*, 27 Beav. 62, 64, 2 De G. F. & Jo. 578; and see *Latimer* v. *Neate*, 11 Bligh, 154, 4 C. & F. 570; but see Wigram on Discovery, 352, 2nd ed.

And it would seem still that if a defendant put in a statement but did not set up the defence, that he is a purchaser for value without notice, he cannot afterwards insist on that defence. *Phillips* v. *Phillips*, 4 De G. F. & Jo. 208; 31 L. J. N. S. (Ch.) 321; 8 Jur. (N. S.) 145; *Lyne* v. *Lyne*, 21 Beav. 318; 8 De G. Mac. & G. 553.

6. *Assistance given by Courts of Equity to bonâ fide purchasers.*]—Equity will not only stand neutral, and render no aid against a purchaser, it will also, as laid down by Lord *Nottingham* in the principal case, assist him. Thus, upon the application of a bonâ fide purchaser without notice, ancient statutes (*Pembroke* v. *Eyre*, Toth. 158; *Burge* v. *Wolfe*, Toth. 160), sleeping mortgages, or incumbrances under which no claim has for a long time been made

(*Rutter* v. *Bartley*, Toth. 160. *Abdy* v. *Loveday*, Rep. t. Finch, 250; *Sibson* v. *Fletcher*, 1 Ch. Rep. 59; *Lord Dillon* v. *Costelloe*, 2 Moll. 512; *Wallace* v. *Lord Donegal*, 1 D. & Walsh, 461), have been decreed by the Court to be delivered up, cancelled, or vacated.

In the principal case, the Lord Keeper justly remarked, that the rule by which a Court of equity affords protection to purchasers, is agreeable to the wisdom of the common law, where the maxims which refer to descents, discontinuances, non-claims, and collateral warranties, were only the wise arts and intentions of the law to protect the possession and strengthen the rights of purchasers. The same object has been constantly kept in view by the Legislature, by which many statutes have been enacted for the protection and relief of purchasers.

As to what amounts to notice, see note to *Le Neve* v. *Le Neve*, post, p. 43.

LE NEVE *v.* LE NEVE.

Dec. 9th, 1747.

[REPORTED AMB. 436.]

NOTICE.]—*Lands in register county, settled by a deed which is not registered, are settled upon a second marriage, with notice of the former settlement, and the second settlement is registered pursuant to the statute 7th Anne, c. 20. The former settlement shall be preferred in equity. Notice to an agent or trustee is notice to the principal.*

S. C., 3 Atk. 646; 1 Ves. 64.

LORD CHANCELLOR HARDWICKE.—The bill was brought by the plaintiffs Peter Le Neve and Hugh Pigot and Elizabeth his wife, late Elizabeth Le Neve, as the only surviving children of the defendant Edward Le Neve, by Henrietta, his late wife.

The end of the bill, in general, is, to have the execution of trust of leasehold estates settled upon the late wife of Edward Le Neve and the issue of that marriage, by articles previous to the marriage, dated 1st July, 1718; and that the conveyances made by the defendant Edward Le Neve and the defendant Mary, his now wife, to trustees, may be set aside and delivered up, being made after notice of the articles of the 1st of July, 1718, or of the other conveyances made in pursuance thereof; and to have the leasehold exonerated and disincumbered.

The facts are that, in 1718, the defendant Edward Le Neve intermarried with his first wife, Henrietta Le Neve, who had a considerable fortune; and articles were executed previous to the marriage, dated the 1st July, 1718, whereby the father of Edward, in consideration of Henrietta's fortune, &c., covenanted with trustees to convey to them several estates, and some leasehold, amongst

the rest, near Soho Square, in the county of Middlesex; to permit Edward Le Neve the younger to receive the rents and profits during his own life, and after his death to pay to Henrietta 250*l.* a year, in case she survived Edward; and, after the decease of Edward and Henrietta, then the said estates should remain to their issue in such manner as Edward the younger should by will or otherwise appoint; and, for want of such issue, to the use of Edward Le Neve the father, and his heirs.

The 16th June, 1719, a settlement was made in pursuance of the articles.

The marriage took effect; and Edward and Henrietta had issue, plaintiffs Peter and Elizabeth. Henrietta died July, 1740, leaving no other children.

Twenty-five years after the first marriage, Edward Le Neve entered into a treaty of marriage with the defendant Mary, and by articles dated the 16th of November, 1743, previous to the marriage, Edward, in consideration of such marriage, covenanted with the trustees, the defendants Dandridge and Norton, to convey these very leasehold estates near Soho Square to them, their executors, &c., within three months after the marriage, in trust to pay to the defendant Mary, out of the rents of these messuages, in case she survived him, a clear annuity of 150*l.* for her life, for her jointure, &c.

The marriage took effect, and three months after, on the 20th of January, 1744, a settlement was made pursuant to the articles.

The settled estate, being houses in Middlesex, was subject to the Register Act, the 7th Anne, cap. 20.

The second articles and settlement were registered, but not the first.

Edward has mortgaged the house likewise.

The bill is brought in order to set the second articles and settlement out of the way, and that they may be postponed to the first articles and settlement; upon this equity, that the defendant Mary Le Neve had notice of them.

The counsel for the plaintiffs admit that the registering of the second articles and settlement has, in point of law, affected the leasehold estates, as the 7th Anne, c. 20, gives the legal estate where the effect of the registering has placed it.

The question is, Whether equity will enable the children of the first marriage to get the better of the defendant's legal right? And this will depend upon the question of notice:—

1st, Whether it appears sufficiently that Joseph Norton was attorney for the defendant Mary in the transaction of her marriage?

2ndly, Whether Norton himself had sufficient notice of the first articles and settlement?

3rdly, Whether that will affect Mary as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

First, it will depend on the answer of the defendant Mary.

She has in general denied any notice of the first articles and settlement till six months after the marriage, and says, "that the defendant Joseph Norton was so far from being employed as solicitor for her, in transacting the business of the marriage articles and settlement, that he had been for a considerable time before employed as attorney for the defendant Edward Le Neve, her husband; that, being at the time of the marriage concerned for her husband, she was thereupon induced to place confidence in him, and her husband assured her he would take care there should be a handsome provision made for her, and recommended Norton as a proper person to prepare the deeds whereby such settlement was to be made upon her, to which she consented: and that Norton assured her that he had taken care to secure for her 150*l.* a year by way of jointure, and did not then, or at any time before her intended marriage, give her any notice of any former settlement."

It is insisted by the defendant Mary's counsel, that Joseph Norton was not her attorney or agent, but her

husband's, and that the attorney for one party having notice will not affect her with notice.

I am of opinion she has admitted enough on her side to make him attorney or agent for her. If she placed confidence in Joseph Norton, no matter on whose recommendation,—if she relied enough on her husband to take his recommendation, it is sufficient; or otherwise it would be mischievous and inconvenient if this Court was to take into their consideration from whom the recommendation comes; for in purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice as much as if different counsel and agents had been employed.

Where the same counsel or agent is employed on both sides, each side is affected with the notice which that agent or counsel has.

It is material to see how far the cases have gone on this point. Two have been cited: *Brotherton* v. *Hatt* 2 Vern. 574, and *Jennings* v. *Moore*, *Blincorne* (*a*) *and Others*, 2 Vern. 609. [*S. C.*, 2 Bro. P. C. 278, Toml. ed.] The first was shortly this:—A. makes three several mortgages to B., C., and D., and in the last mortgage B. is a party, and agrees, after he is paid he will stand a trustee for D. Decreed, that C. shall be paid before D., for, all the securities being transacted by the same scrivener, notice to him was notice to D.

(*a*) Nom. *Blenkarne* v. *Jennens.*

See how far this goes:—the same scriveners were witnesses, and engrossed all the securities, and were in the nature of agents for all the lenders, and very likely for the borrower himself; and notwithstanding it does not appear Mrs. Hatt had personal notice, "yet notice to the agent is notice to the party, and, consequently, they that lend last must come last, having notice of what was before lent; and if any one after notice lend more money although he should obtain the legal estate, yet he would in equity stand affected with the notice, and be bound thereby."

The second case was no more than this:—Blincorne having notice of an incumbrance, purchases in the name of Moore, and then agrees that Moore shall be the purchaser, and he accordingly pays the purchase-money

without notice of the incumbrance. Though Moore did not employ Blincorne, nor know anything of the purchase till after it was made, yet Moore approving of it afterwards made Blincorne his agent ab initio, and therefore shall be affected with the notice to Blincorne.

The last goes a great way: for Moore knew nothing of the transaction, and yet the Court held, that his approving it afterwards made Blincorne his agent ab initio. This carries it further than the present case; but the first is a clear authority.

These cases, therefore, sufficiently prove, that it is not at all material to the plaintiffs on whose advice or recommendation the defendant Mary intrusted Norton; nor does it make any difference that it is the recommendation of the husband any more than of any other person.

The second consideration is (as it appears clearly that Norton was employed for defendant Mary), whether there is sufficient evidence of notice to him?

The testimony of one witness cannot prevail against a clear denial in the answer (*East India Company* v. *Donald*, 9 Ves. 275); but where the answer is not a positive denial of the same fact, it is different (*Hughes* v. *Garner*, 2 Y. & C. Exch. Ca. 328). But the Court has made a decree on the testimony of one witness, uncontradicted by the answer.

An objection has been taken by defendant Mary's counsel, that, as notice hath been denied by her answer, if it be sworn to by one witness only, that being but oath against oath, cannot prevail to establish the fact.

The general rule, to be sure, is so, but it admits of this distinction:—where the denial of a defendant is clear, it has been adhered to; but where the answer is not a positive denial of the same fact, but only as to part, as in the present case, as to the notice to herself only, it makes a difference.

And there are many cases where the Court, upon the testimony of one witness, whose credit is unimpeached, and what he swears is uncontradicted by the answer, have decreed upon this single evidence.

The defendant Mary denies notice to herself; but whether there was notice to another person, her agent, she passes by without giving any answer.

This is a denial, indeed, as to herself, but it is at the same time what is called at law a negative pregnant, that there was notice to her agent.

As to the evidence of notice to Norton, it is extremely

strong; for he swears that he had notice of the first articles some time before the second marriage, and *that he had then a copy thereof from the defendant Edward Le Neve, in order to take counsel's opinion thereon, how to secure against the effect of them, and to contrive in what manner they might get the better of these articles;* and, therefore, as to Norton, there cannot be a stronger notice.

The third and last general question is, whether the notice to Norton will affect the defendant Mary, as a purchaser, and postpone her articles and settlement, notwithstanding the Register Act?

This depends on two things:—

1st, Whether any notice whatsoever would be sufficient to take from the defendant the benefit of the Register Act?

2nd, Whether personal notice to the defendant Mary is requisite to postpone her?—or whether notice to her agent is sufficient to do it likewise?

As to the 1st, it is a question of great extent and consequence.

The preamble of the statute of the 7th Anne, c. 20, is in substance:—"Whereas, by the different and secret ways of conveying lands, &c., such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, *by prior and secret conveyances,* and fraudulent incumbrances." Then comes the enacting clause:—"That a memorial of all deeds and conveyances which, after the 27th of September, 1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, lands, &c., in the county of Middlesex, may be any way affected in law or equity, may be registered in such manner as is after directed; and that every such deed or conveyance that shall, at any time after, &c., be made and executed, shall be *adjudged fraudulent and void against any subsequent purchaser or mortgagee* for valuable consideration, unless such memorial be registered as by this Act is directed,

before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," &c.

What appears, by the preamble, to be the intention of the Act?

The intent of the Register Act is to secure against prior secret conveyances and fraudulent incumbrances.

Plainly, to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent incumbrances.

When a purchaser who registers has no notice of a prior unregistered conveyance, his conveyance shall prevail; *contra*, if he has notice.

Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced.

The Registry Act gives the legal estate according to priority of registration, but leaves open an equity to a prior unregistered purchaser.

The enacting clause says *that every such deed shall be void against any subsequent purchaser or mortgagee*, unless the memorial thereof be registered, &c.; that is, it gives him the legal estate, but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding.

Construction of the Act of Enrolments (27 Hen. 8).

This case has been very properly compared to cases on the 27 Hen. 8, c. 16, for enrolment of bargains and sales.

That Act is formed pretty much in the same manner with this.

The words of the enacting clause:—"That from, &c., no manors, lands, tenements, &c., shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, *or any use thereof* to be made thereof, by reason only of any bargain and sale thereof, except the same bargain and sale be by writing, indented, sealed, and inrolled in one of the King's Courts of Record at Westminster, or else within the same county, &c., where the same manors, &c., so bargained and sold do lie, &c.; and the same inrolment to be had and made within six months next after the date of the same writings, indented, &c., *nor any use shall pass thereof from one to another.*"

What is the meaning of this?

Before the making of the Act, any paper writing passed the use from the bargainor to the bargainee, whereby great mischief arose; for it entangled the purchasers, affected and injured the Crown, and was contrary to the rule of law, which required notoriety in purchases by feoffment and livery, &c.

If a subsequent bargainee is affected with notice of a prior, he is as much affected as if the prior purchase had been by feoffment, &c.

But what has been the construction of this statute ever since? Why, if a subsequent bargainee has notice of a prior, he is equally affected with that notice as if the prior purchase had been a conveyance by feoffment and livery, &c.

Operation of the Registry Act and the Act of Enrolment the same.

The operation of both Acts of Parliament and the construction of them is the same; and it would be a most mischievous thing if a person, taking that advantage of the legal form appointed by an Act of Parliament, might under that protect himself against a person who had a prior equity, of which he had notice.

The cases put by the Attorney-General are very material:—

"Suppose," said he, "the defendant Mary had, by letter of attorney, empowered Norton to transact the affair with her husband, and he by means of this agency comes to the knowledge of the prior articles and settlement, would not this affect the principal? Or suppose a purchaser of lands in a register county orders his attorney to register it, and he neglects to do it, and then buys the estate himself, and registers his own conveyance, shall this be allowed to prevail?"

It certainly shall not; for such a purchaser is out of the consequences which the Register Act guards against, of imposition from a prior secret conveyance, as he had personal knowledge of the first.

There have been three cases on the Register Act:—

1st, *Lord Forbes* v. *Denniston*, 4 Bro. P. C. 189, Toml. ed.

2nd, *Blades* v. *Blades*, 1 Eq. Ca. Abr. 358, pl. 12.

3rd, *Cheval* v. *Nichols*, 10th December, 1725, in the Exchequer, 1 Stra. 664.

(*a*) *Lord Forbes* v. *Denniston.*

The first (*a*) arose originally in Ireland, where there is a general Register Act, and heard on appeal to the House of Lords, in England, 22nd and 23rd February, 1722.

The Earl of Granard, father of Lord Forbes, was seised of a large estate of which he was tenant for life, with remainder to his first and every other son in tail, and had a power of leasing for lives at the best rent.

The Register Act in Ireland passed the 6th Anne, c. 2, Ir.; Lord Granard granted a lease for three lives at the rent of 30*l.* a year, which was not registered.

His Lordship, being greatly in debt, came to an agreement with Lord Forbes, his eldest son, by the agency of Mr. Steward, to take upon him the payment of certain debts of his father, and so secure a jointure to his mother-in-law, and an annuity to his father.

The estate was conveyed to Mr. Justice Doyne and Mr. Justice Nutt, as trustees, during the life of the father.

Mr. Steward had notice of this lease during the treaty between Lord Granard and Lord Forbes.

The conveyance to the trustees being registered, they brought an ejectment against the lessee of the leasehold estate: and it was heard before Lord *Middleton*, Lord Chancellor of Ireland, in February, 1721, who then made a declaration rather than a decree, that the conveyance was void as against the lessee. It came on again before him the 17th of February, 1721, and he then determined, there was full notice of the lease to Lord Forbes, and awarded a perpetual injunction from time to time.

The judgment of the House of Lords was, That the said decree be reversed, and that all proceedings at law of the appellants against the respondent should, during the life of Lord Granard, be stayed, on lessee's paying the rents, performing the covenants, &c.; but that after the death of Lord Granard, Lord Forbes might be at liberty to try the tenant's right to the lease.

The decree was reversed, not because Lord *Middleton* had proceeded on a wrong principle, but had drawn a wrong inference from it; for Lord Forbes did not insist

merely on the register, but that the lease was made contrary to the power; and therefore the Lord Chancellor of Ireland was mistaken, and wrong in decreeing the lease to be good in every respect: and the House of Lords set the decree right only as to this particular part, that, after the death of Lord Granard, the estate determined; and therefore left it open to Lord Forbes to dispute whether it was a lease pursuant to the power, but gave no relief as to the Register Act.

The case of *Blades* v. *Blades* (*a*) came before Lord Chancellor *King*, 2nd May, 1727.

(*a*) 1 Eq. Ca. Ab. 358, pl. 12.

William Blades, in 1716, devised certain lands to his wife for her life, and after her death to his nine children. The wife enters, but does not register the will. The heir-at-law mortgages the estate, and has it registered, and, upon a bill brought against him, denies notice of the will. But it was proved in evidence that he had notice: and the Court said, that, having notice of the first purchase (though it was not registered), bound him; and that getting his own purchase first registered was a fraud; the design of those Acts being only to give parties notice who might otherwise without such registry be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have any notice thereof in any manner, though not by the registry; and that they would never suffer any Act of Parliament made to prevent fraud to be a protection to fraud; and therefore decreed for plaintiff, *looking upon the transaction between the heir-at-law and mortgagee to be collusive.*

I mention this, not only as a material authority, but as determined by Lord *King*, who, we all know, was as willing to adhere to the common law as any judge that ever sat here.

The other case, of *Cheval* v. *Nichols* (*b*), was in the Court of Exchequer, the 10th of December, 1725, before Lord Chief Baron *Gilbert*, and is a clear authority for giving relief against the Register Act upon an equity of notice. But then there were charges of fraudulent cir-

(*b*) 1 Stra. 664.

cumstances besides, and therefore not so similar to the present.

Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent. The ground of it is plainly this: That the *taking of a legal estate after notice of a prior right, makes a person a malâ fide purchaser;* and not, that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself: for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate.

Roman law of "dolus malus."

And this exactly agrees with the definition of the civil law of *dolus malus*, Dig. Lib. 4, tit. 3, § 2.: "*Dolum malum Servius quidem ita definit, machinationem quandam alterius decipiendi causâ, cum aliud simulatur, et aliud agitur. Labeo autem, posse et sine simulatione id agi ut quis circumveniatur: posse et sine dolo malo aliud agi, aliud simulari: sicuti faciunt, qui per ejusmodi dissimulationem deserviant et tuentur vel sua vel aliena. Itaque ipse sic definiit dolum malum* esse omnem calliditatem fallaciam machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. *Labeonis definitio vera est.*"

Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum.* It is a maxim, too, in our law, that *fraus et dolus nemini patrocinari debent.* Vide Co., 3 Rep. 78, 7 Rep. 38.

Fraud or mala fides is the ground which governs in cases of notice.

Fraud, or mala fides, therefore, is the true ground on which the Court is governed in the cases of notice; and it is a consequence of the decision of the former question that notice to the agent is sufficient; for if the ground is the fraud, or *mala fides*, of the party, then it is all one whether by the party himself or his agent: still it is a *machinatio ad circumveniendum*, and the putting *a copy of the first articles and settlement into Norton's hands, to take the opinion of counsel in what manner they could be set aside, is a contrivance to circumvent.*

It has been said, if this woman has been imposed on by her husband, she, instead of cheating, has been cheated.

But, then, who ought to suffer?—the person intrusting an agent, or a stranger who did not employ him? He, certainly, who trusts most ought to suffer most.

Of two innocent parties, the person employing the party committing a fraud, and not the person who is a mere stranger to him, should suffer.

Mrs. Hatt, the third mortgagee in the case in 2 Vern. 574, mentioned before, was imposed upon; and so was Moore, in the other case reported there (*a*), clearly imposed on: and yet, if this was to be any excuse, it would make all the cases of notice very precarious; for it seldom happens but the agent has imposed on his principal; and, notwithstanding that, the person trusting ought to suffer for his ill-placed confidence.

(*a*) *Jennings* v. *Moore*, 2 Vern. 609.

Notice to an agent is notice to the principal.

Therefore, in both respects, as agent and trustee, notice to Joseph Norton is notice to defendant Mary likewise. And as to the Registry Act, here is sufficient equity in the plaintiff to postpone the second articles and settlement, notwithstanding those only have been registered. And decreed accordingly.

No equitable doctrine is better established than that so clearly and forcibly laid down by Lord *Hardwicke* in the principal case, viz.: *that the person who purchases an estate* (*although for valuable consideration*) *after notice of a prior equitable right, makes himself a malâ fide purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest*, but will be held a trustee for the benefit of the person whose right he sought to defeat. "If," says his Lordship, "a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, *machinatur ad circumveniendum;* and it is a maxim in our law, that *fraus et dolus nemini patrocinari debent.* Fraud, or *mala fides*, therefore, is the true ground on which the Court is governed in cases of notice."

It may be laid down as a general rule, that a purchaser, with notice of a right in another, is in equity liable, to the same extent, and in the same manner, as the person from whom he made the purchase. For instance, if a person contracts to sell an estate, or to grant leases thereof, a purchaser, with notice of such contracts, is liable to the same equity, stands in the same

place, and is bound to do that which the vendor, whom he represents, would be bound to do by decree. Thus, in an early case, A. contracted with B. to purchase lands of him; and afterwards C., on behalf of his son, purchased the same lands, and took a conveyance from B. to his (C.'s) son in fee. On a bill by A. to be relieved against this conveyance, the son pleaded himself to be a purchaser bonâ fide, without any notice of B.'s contract with the plaintiff, and without any trust for his father. But, it appearing that C., the father, had notice of the plaintiff's contract before he purchased for his son, the Court decreed in favour of the plaintiff: *Merry* v. *Abney*, 1 Ch. Ca. 38. See also *Ferrars* v. *Cherry*, 2 Vern. 384; *Jackson's case*, Lane, 60; *Earl Brooke* v. *Bulkeley*, 2 Ves. 498; *Daniels* v. *Davison*, 16 Ves. 249; *Crofton* v. *Ormsby*, 2 S. & L. 583; *Kennedy* v. *Daly*, 1 S. & L. 355; *Field* v. *Boland*, 1 D. & Walsh, 37; *Potter* v. *Sanders*, 6 Hare, 1.

Upon the same principle, an estate in the hands of a subsequent purchaser, or mortgagee, with notice of a prior defective mortgage, will be bound by it. Thus, in a case where a person lent money on a surrender of copyholds which became void for want of presentment, and afterwards another person purchased the same lands from the mortgagor, with notice of the prior surrender, and took a surrender and was admitted, the Court decreed the subsequent purchaser either to pay the mortgagee his money, or to surrender to him the legal estate: *Jennings* v. *Moore*, 2 Vern. 609; *S. C.*, 2 Bro. P. C. 278, Toml. ed.

So also, a purchaser or mortgagee of the legal estate, with notice of an equitable mortgage by deposit of title deeds, will be held a trustee for the equitable mortgagee to the amount of his charge: *Birch* v. *Ellames*, 2 Anst. 427.

So, a purchaser having notice of an equitable lien for unpaid purchase-money will be bound by it: *Mackreth* v. *Symmons*, 15 Ves. 349; ante, vol. i. p. 357; *Grant* v. *Mills*, 2 V. & B. 306.

So also, a purchaser with notice of a trust will be bound in the same manner as the person from whom he purchased: *Dunbar* v. *Tredennick*, 2 Ball & B. 319; *Pawlett* v. *Attorney-General*, Hard. 465; *Burgess* v. *Wheate*, 1 Eden, 195; *Bovey* v. *Smith*, 1 Vern. 149; *Mansell* v. *Mansell*, 2 P. Wms. 681; *Phayre* v. *Peree*, 3 Dow, 129; *Adair* v. *Shaw*, 1 S. & L. 262; *Wigg* v. *Wigg*, 1 Atk. 382; *Mead* v. *Lord Orrery*, 3 Atk. 238; *Mackreth* v. *Symmons*, 15 Ves. 350; *Saunders* v. *Dehew*, 2 Vern. 271; and see ante pp. 19, 20.

Although *at law*, a second conveyance of property in a register county, even with notice of the first, if first registered would gain priority (*Doe* v. *Allsop*, 5 B. & Ald.

142), nevertheless, in equity, registration is no protection against an unregistered assurance, of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security: *Cheval* v. *Nichols*, 1 Stra. 664; *Blades* v. *Blades*, 1 Eq. Ca. Ab. 358; *Sheldon* v. *Cox*, Amb. 624.

In the principal case, a registered conveyance in a register county — Middlesex — was postponed to an unregistered conveyance, of which the purchaser had notice. The decisions on this subject, according to a very eminent judge, seem to have carried the doctrine of equity with respect to notice to a great length, and even to have infringed upon the policy of the Registration Acts. (As to Middlesex, 7 Anne, c. 20; Yorkshire, West-Riding, 5 Anne, c. 18, and 6 Anne, c. 35; East-Riding and Kingston-on-Hull, 6 Anne, c. 35; North-Riding, 8 Geo. II., c. 6.) "It has," says Sir *William Grant*, M. R., "been much doubted whether Courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, 'We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.'" *Wyatt* v. *Barwell*, 19 Ves. 439; and see *Chadwick* v. *Turner*, 34 Beav. 634; 1 L. R. Ch. App. 310; *Neve* v. *Pennell*, 2 Hem. & Mill. 170; *Rolland* v. *Hart*, 6 L. R. Ch. App. 678; *Majoribanks* v. *Hovenden*, Dru. Ch. Rep. t. Sug. 11, 22. However, *Le Neve* v. *Le Neve* has been always considered a binding authority. See Co. Litt. 290 b., n. 13; *Ford* v. *White*, 16 Beav. 120, 123, 124; *Benham* v. *Keane*, 1 J. & H. 685, 701, 3 De G. F. & Jo. 318.

But the Courts, upon the principle laid down by *Grant*, M. R., in *Wyatt* v. *Barwell*, 19 Ves. 439, have held that there must be actual notice clearly proved implying fraud in the person registering the second conveyance, to deprive him of priority thereby gained over the first conveyance, and that mere suspicion of fraud (*Hine* v. *Dodd*, 2 Atk. 275), a mere assertion by a third person that some other person has a title, (*Jolland* v. *Stainbridge*, 3 Ves. 478); or mere constructive notice, which in other cases may arise from not inquiring after or getting in title deeds (*Chadwick* v. *Turner*, 1 L. R. Ch. App. 310; *Russell* v. *Cushell*, 7 L. R. Ho. Lo. 145 cited; *Agra Bank* (*Limited*) v. *Barry*, 6 I. Rep. Eq. 128, 7 L. R. Ho. Lo. 135; *Reilly* v. *Garnett*, 7 I. R. Eq. 1; overruling *Wormald* v. *Maitland*, 35 L. J. Ch. 69, 13 W. R. (V.-C. S.) 832; *Re Allen's Estates*, 1 I. R. Eq. 455; see post, p. 50) will not have the same

effect as actual notice to the party himself or to his solicitor or agent as in the principal case (see *ante*, p. 35) against a registered deed. *Sheldon* v. *Cox*, Amb. 624; *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364; *Lenehan* v. *McCabe*, 2 Ir. Eq. Rep. 342; *Ratcliffe* v. *Barnard*, 6 L. R. Ch. App. 652.

Where a person has taken a conveyance for valuable consideration without notice of a prior unregistered deed, he may, upon acquiring subsequent notice, gain priority by registering his conveyance first. See *Elsey* v. *Lutyens*, 8 Hare, 159; where it was held that a conveyance of lands in Middlesex, by settlement upon the marriage of the settlor, registered under the statute 7th Anne, c. 20, was effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of the settlement.

So likewise a subsequent incumbrancer who, at the time of taking his security, has no notice of the prior incumbrance, may by properly registering his security, though after notice, obtain priority over the prior incumbrancer, if the security of the latter be *defectively* registered: *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

And a mere agreement for a mortgage or equitable mortgage which it has been decided requires registration (*Neve* v. *Pennell*, 2 H. & M. 170), entered into or made without notice of a prior equitable mortgage, will, if registered before it, gain priority. See *In re Wight's Mortgage Trust*, 16 L. R. Eq. 41; *Moore* v. *Culverhouse*, 27 Beav. 639; overruling *Wright* v. *Stanfield*, 27 Beav. 8; and see *Credland* v. *Potter*, 18 L. R. Eq. 351, 10 L. R. Ch. App. 8; under the Yorkshire Registry Act, 2 & 3 Anne, c. 4.

Under the English Acts registration is not of itself notice, so that a prior equitable incumbrance will not, although registered, affect a subsequent purchaser without notice who has obtained the legal estate, and will therefore be entitled to priority: *Morecock* v. *Dickins*, Amb. 678.

There is, however, a material difference between the Register Act of Ireland and the Register Acts of England. By the Irish Registration Act, 6 Anne, c. 2, Ir., an absolute priority is expressly given to the instruments first registered, so that a subsequent purchaser for value having the legal estate, although he has not notice of an equitable estate previously registered, will be bound by, and compelled to give effect to it, under the words of the Act, and not upon the ground of implied notice from registration, as registration of itself is no more notice under the Irish than under any English Act. See *Bushell* v. *Bushell*, 1 S. & L. 98; *Latouche* v. *Lord Dunsany*, Id. 159, 160;

Drew v. *Lord Norbury*, 9 Ir. Eq. Rep. 171 ; 3 J. & L. 267 ; *Thompson* v. *Simpson*, 1 Dru. & War. 459; *Mill* v. *Hill*, 15 Ir. Eq. Rep. 107 ; 3 H. L. Cas. 828 ; *Hunter* v. *Kennedy*, 1 Ir. Ch. Rep. 148 ; *Corbett* v. *De Cantillon*, 5 Ir. Ch. Rep. 126 ; *Re Driscoll*, 1 I. R. Eq. 285.

But notwithstanding the apparent stringency of the Irish Act, if a person in Ireland registers a deed, and if at the time he so registers the deed either he himself, or his agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which though executed is not registered, the registration which he actually effects will not give him priority over that earlier deed. Per Lord *Cairns*, C., in *Agra Bank Limited* v. *Barry*, 7 L. R. Ho. Lo. 148. See also *Lord Forbes* v. *Denniston*, 4 Bro. P. C. 189, Toml. ed.

But as in the case of the English Registration Acts, mere constructive notice will not have the same effect as actual notice against a registered deed. See *Agra Bank Limited* v. *Barry*, 6 Ir. Rep. Eq. 128, 7 L. R. Ho. Lo. 136; *In re M'Kinney*, 6 I. R. Eq. 445. *Coates* v. *Kenna*, 6 I. R. Eq. 401 ; *Bushell* v. *Bushell*, 1 S. & L. 103.

Under the English Registration Acts a first mortgagee who has registered his mortgage, may tack a subsequent advance if he has no actual notice of an intermediate equitable incumbrance. See *Bedford* v. *Bacchus*, 2 Eq. Ca. Ab. 615; Amb. 680, cited. There a first mortgagee of lands in Middlesex having registered his mortgage, lent a further sum, without actual notice of a second mortgage, which had been registered. It was held by Lord *King*, C., that the first mortgagee ought not to be affected by constructive notice of the second mortgage, and that the rule of equity took place, and the first mortgagee was entitled to be paid his whole money before the second mortgage. See also *Wrightson* v. *Hudson*, 2 Eq. Ca. Ap. 659; *In re Russell Road Purchase Moneys*, 12 L. R. Eq. 78, 83.

Under the Irish Act, however, the doctrine of tacking has no application as under the English Acts, since absolute priority is given to the mesne incumbrancer who registers over a subsequent advance by a first registered mortgagee without notice : *Bushell* v. *Bushell*, 1 S. & L. 90 ; *Latouche* v. *Dunsany*, Ib. 137. And see *Carlisle* v. *Whaley*, 2 L. R. Ho. Lo. 391.

The operation of the English Local Registry Acts has been partially limited by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87) which enacts that any land situate within the jurisdiction of any of the English local registries (Middlesex and Yorkshire) shall if registered under that Act, from and after the date of the registration thereof, be exempt from such jurisdiction, and no

document relating to any such registered land executed, and no testamentary instrument relating to any such registered land coming into operation subsequently to such date as last aforesaid, shall be required to be registered in any of the said local registries. Sect. 127.

It has been long since settled, that if a person purchases for valuable consideration with notice, from a person who bought without notice, he may shelter himself under the first purchaser, for otherwise, a bonâ fide purchaser would be unable to deal with his property, and the sale of estates would be very much clogged: (*Lowther* v. *Carlton*, 2 Atk. 242;) and, without exception, even in the case of a charity (*Attorney-General* v. *Wilkins*, 17 Beav. 293; but see *East Grinstead's case*, Duke, 64), if a person who has notice sells to a bonâ fide purchaser for a valuable consideration, without notice, the latter may protect his title. See *Harrison* v. *Forth*, Prec. Ch. 51, the leading case upon both branches of this doctrine. There A. purchased an estate, with notice of an incumbrance, or that it was redeemable, and then sold to B., who had no notice; who afterwards sold it to C., who had notice; the Master of the Rolls held that the first notice to A., the first purchaser, was thereby revived, and that C., the last purchaser, should be liable to the incumbrance or redemption as if it had never been in the hands of one who had no notice; but afterwards, on appeal to Lord Keeper *Somers*, it being urged, that, in such case, an innocent purchaser without notice might be forced to keep his estate and could not sell it, and should be accountable for all the profits received ab initio, his Lordship held, that though A. and C. had notice, yet if B. had no notice, the plaintiff could not be relieved against the defendant C. The doctrine laid down in this case has ever since been adhered to; see *Brandlyn* v. *Ord*, 1 West Rep. 512; *S. C.* 1 Atk. 571; *Lowther* v. *Carlton*, 2 Atk. 242; *Ferrars* v. *Cherry*, 2 Vern. 383; *Mertins* v. *Jolliffe*, Amb. 313; *Sweet* v. *Southcote*, 2 Bro. C. C. 66; *M'Queen* v. *Farquhar*, 11 Ves. 467, 478.

Since, however, as a general rule persons taking equitable interests take subject to all the equities affecting them, an equitable incumbrancer on property, who has distinct notice of a prior incumbrance, cannot by concealing his knowledge from a party claiming under him, make his security more extensive, or give a better right to his assignee than that which he himself possesses. Thus, in *Ford* v. *White*, 16 Beav. 120, property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s incumbrance. C. registered his mortgage before

B., and afterwards assigned to D., who had no notice of B.'s mortgage. It was held by Sir *John Romilly*, M. R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B.

Moreover, if a trustee conveys to a person who has no notice of the trust, and then takes a reconveyance, he having notice of the trust, it attaches on him: *Kennedy* v. *Daly*, 1 S. & L. 379.

A purchaser for valuable consideration of an estate, even with notice of a voluntary settlement, will not be affected by it: *Buckle* v. *Mitchell*, 18 Ves. 100; ante, vol. i. p. 317.

The vendor of land who has contracted to sell it, may convey to the purchaser, and receive the balance of the purchase-money, without regard to the receipt of a notice that the purchaser had agreed to assign the contract to secure sums of money advanced to him. See *M'Creight* v. *Foster*, 5 L. R. Ch. App. 604; affirmed Dom. Proc. nom. *Shaw* v. *Foster*, 5 L. R. Ho. Lo. 321.

The same principle applies when the purchaser has before completion agreed to sell the estate, and has received part of the purchase-money. *Crabtree* v. *Poole*, 12 L. R. Eq. 13.

As to the time of notice being had.]—Notice before actual payment of the purchase-money, even although it may have been secured or before a conveyance is actually executed, will be binding in the same manner as notice had before the contract; for, although the purchaser had no remedy at law against the payment of the money for which he gave his security, yet he would be entitled to relief in equity, on bringing his bill and showing that though he has given a security for his purchase-money, yet he had since had notice of an incumbrance; under which circumstances the Court would stop payment of the money due on the security: *Tourville* v. *Naish*, 3 P. Wms. 307; *Story* v. *Lord Windsor*, 2 Atk. 630; *More* v. *Mayhow*, 1 Ch. Ca. 34; *Jones* v. *Stanley*, 2 Eq. Ca. Ab. 685, pl. 9. So, where notice is had before the execution of the conveyance, or its due acknowledgment by a married woman (*Sharpe* v. *Foy*, 4 L. R. Ch. App. 35, 37), it is equally binding, although the purchase-money may have been paid before notice: *Wigg* v. *Wigg*, 1 Atk. 382, 384; and see *Rayne* v. *Baker*, 1 Giff. 241; *Illdesley* v. *Lodge*, 3 Sm. & G. 543.

Next, as to what constitutes notice.]—Notice is either actual or constructive.

I. *As to actual notice*, it will be unnecessary to say anything except this: that mere vague reports from strangers, or mere

general assertions that some other persons claim a title, are not sufficient to affect a person with actual notice (*Wildgoose* v. *Wayland*, Gouldsb. 147, pl. 67; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Fry* v. *Porter*, 1 Mod. 300; *Butcher* v. *Stapely*, 1 Vern. 363). Such notice, in order to be binding, must proceed from some person interested in the property: *Barnhart* v. *Greenshields*, 9 Moore's P. C. C. 36; *The Natal Land, &c., Company* v. *Good*, 2 L. R. P. C. 121, 129.

II. *As to constructive notice.*—Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent, that the Court will not even allow of its being controverted: per *Eyre*, C. B., in *Plumb* v. *Fluitt*, 2 Anst. 438; and see *Kennedy* v. *Green*, 3 My. & K. 719. It is by no means an easy matter to say what amounts to constructive notice; for much depends upon the circumstances of each particular case, and the position of the persons concerned in it.

It is proposed to consider constructive notice as arising, 1st, from negligence or fraud; 2nd, from recitals or reference; 3rd, from tenancy; 4th, from the relation between the parties, as principal and agent, or solicitor and client; 5th, from matter of Record.

1. *Constructive notice by negligence or fraud.*]—Whatever is sufficient to put a person upon inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it. Thus, if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice of what the trust is: *Anon.* Freem. Ch. Ca. 137, c. 171.

The state of the property may be such as to put a purchaser upon inquiry. Thus the purchaser of a house has been held to have notice of an agreement to grant an easement for the passage of smoke to an adjoining owner, from the mere fact of there being fourteen chimney-pots on the top of the house, whereas there were only twelve flues in the house, *Hervey* v. *Smith*, 22 Beav. 299; and see *Davies* v. *Scar*, 7 L. R. Eq. 427, where it was held that the state of the property at the time of the purchase was such as ought to have led him to a knowledge of an easement of necessity, and he was therefore held to be fixed with constructive notice thereof.

Upon the same principle notice that the title deeds are in another man's possession may be held to be notice of any claim which he has upon the estate, especially if the person having such notice appears studiously to have avoided inquiry for what purposes they were deposited, or the conveyance to him is to secure an antecedent debt: (*Birch* v. *Ellames*, 2 Anst.

427; *Hiern* v. *Mill*, 13 Ves. 114; *Dryden* v. *Frost*, 3 My. & Cr. 670, 673; *Maxfield* v. *Burton*, 17 L. R. Eq. 15); but the mere absence of the title deeds has never been held sufficient per se to affect a party with notice, if he has bonâ fide inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; for in that case the Court cannot impute fraud, or gross or wilful negligence to him (*Plumb* v. *Fluitt*, 2 Anst. 432; *Evans* v. *Bicknell*, 6 Ves. 174; *Farrow* v. *Rees*, 4 Beav. 18; *Hewitt* v. *Loosemore*, 9 Hare, 449, 458; *Finch* v. *Shaw*, 19 Beav. 500; *S. C.*, nom. *Colyer* v. *Finch*, 5 H. L. Cas. 905; *Roberts* v. *Croft*, 24 Beav. 223, 2 De G. & Jo. 1; *Perry Herrick* v. *Attwood*, 2 De G. & Jo. 37; *Carter* v. *Carter*, 3 K. & J. 646; *Hunt* v. *Elmes*, 28 Beav. 631; 2 De G. F. & Jo. 578; *Espin* v. *Pemberton*, 4 Drew. 333; 3 De G. & Jo. 547; *Atterbury* v. *Wallis*, 8 De G. Mac. & G. 454; *Hopgood* v. *Ernest*, 3 De G. Jo. & Sm. 116; 13 W. R. (L. J.) 1004; *Hipkins* v. *Amery*, 2 Giff. 292; *Dowle* v. *Saunders*, 2 Hem. & Mill. 242.

But the Court will impute fraud, or gross and wilful negligence to a person dealing respecting an estate, if he omits all inquiries as to the deeds, and will hold him to have notice of those circumstances which, had he not neglected his duty, would have come to his knowledge. *Worthington* v. *Morgan*, 16 Sim. 547; *Hewitt* v. *Loosemore*, 9 Hare, 458; *Finch* v. *Shaw*, 19 Beav. 511; *Allen* v. *Knight*, 5 Hare, 272; 11 Jur. 527, and see note to *Russell* v. *Russell*, vol. i. p. 687; *Whitbread* v. *Jordan*, 1 Y. & C., Exch. Ca. 303; *Jones* v. *Williams*, 24 Beav. 47; *Peto* v. *Hammond*, 30 Beav. 495; and see *Jones* v. *Smith*, 1 Hare, 64; 1 Ph. 255.

Special conditions of sale, limiting the extent of title, will be no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he has notice: *Peto* v. *Hammond*, 30 Beav. 495.

Anything out of the ordinary course, such as the unusual position of the indorsed receipt, may be held to affect a person with notice of a fraud affecting the deed as it ought to have induced his solicitor to have made further inquiries which would have led to its discovery, *Kennedy* v. *Green*, 3 My. & K. 699; *Robinson* v. *Briggs*, 1 Sm. & G. 188.

If, however, the peculiarity in a deed is not in any way connected with the circumstances under which the deed might be set aside, it will not affect a purchaser with notice of such circumstances. Thus, the absence in a deed of the receipt for the consideration, although it is notice of its non-payment, is not constructive notice of other irregularities in the transaction, as notice that the grantor was of unsound mind, or that he was in-

duced to execute the deed under undue influence, *Greenslade* v. *Dare*, 20 Beav. 284.

Upon the same principle, although a purchaser who omits to call for the title deeds will be affected with the knowledge which he might have obtained by inquiry, that they were in the possession of some holder for value, he will not be affected with the knowledge of a fraud committed by the person of whom he was bound to make the inquiry: *Hipkins* v. *Amery*, 2 Giff. 292, 301.

Nor will a purchaser be affected with notice of a prior equitable mortgage, by his knowledge that the title deeds were in the possession of the equitable mortgagee, if the latter by reason of his being the largest co-owner of the property was the person who, independent of the mortgage, was intitled to their custody. *Ex parte Hardy*, 2 D. & C. 393, 394.

2. *Constructive notice by recital or reference.*]—Where the purchaser cannot make out a title but by a deed, which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia* that he sought not after it: *Moore* v. *Bennett*, 2 Ch. Ca. 246; *Bacon* v. *Bacon*, Tothill, 133; and it is immaterial whether the deed leads him to the knowledge of that fact by description of the parties, in recital, or otherwise. Thus, in *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 287, a party purchased with actual notice of a specific mortgage. The deed creating this mortgage referred to other incumbrances. The question was, whether the purchaser was to be affected with notice of the incumbrances which the deed creating the mortgage disclosed. The language of the *Lord Chancellor*, in that case, lays down an important and well-established rule, namely, "that the purchaser could not be ignorant of the mortgage, and ought to have seen that, and that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him." So, in *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291, the mortgagee of a lease which recited the surrender of a former lease, which was in consideration of the surrender of the former lease in which the plaintiff's title appeared, was held to have notice of that title. This case decides, in effect, that a purchaser who has actual notice of one instrument affecting an estate, has constructive notice of all other instruments to which an examination of the first could have led him. And see *Nixon* v. *Robinson*, 2 J. & L. 14; *Roddy* v. *Williams*, 3 J. & L. 1; *Hope* v. *Liddell*, 21 Beav. 183; *Barber* v. *Brown*, 3 Jur. N. S. 18.

So, in *Davies* v. *Thomas*, 2Y.

& C. Exch. Ca. 234, the purchaser had actual notice that the property in question was affected by a marriage settlement, and this settlement, when referred to, gave notice of a will. The Court decided that the purchaser had notice of the will. This case, however, has been questioned. See vol. i., p. 358. In *Eyre* v. *Dolphin*, 2 Ball & B. 290, the tenant for life under a settlement renewed a lease of the settled property in his own name, and for his own benefit. The Court held, that he was a trustee of the renewed lease for the parties interested under the settlement. The Court also held (a point upon which there could be no doubt), that a purchaser from the tenant for life, with actual notice of the above facts, could be in no better position than the tenant for life himself. See also *Parker* v. *Brooke*, 9 Ves. 583. In *Malpas* v. *Ackland*, 3 Russ. 273, the lessee accepted a lease of the premises, and the lease contained a recital, that Hannam, one of the parties to the lease, was seised to him and his heirs of the leasehold premises, "upon trust for the use and behoof of W. Malpas and Susannah his wife, and George Colman (three other parties to the lease), for such estates in possession, reversion, or remainder, as they become entitled to after the decease of Mary Colman, and that the trust had devolved on Hannam." The Court held, that the lessee was affected with notice of the trust, whatever that trust might be.

And notice of a post-nuptial settlement has been held to be notice of an agreement for a settlement before marriage, although not recited. See *Ferrars* v. *Cherry*, 2 Vern. 383. There the defendant purchased an estate, with notice of a post-nuptial settlement, which comprised the estate in dispute; it was argued in his behalf, that there was no recital of the articles for a settlement entered into before the marriage; and that, for aught appeared to the defendant, the deed was fraudulent as against a purchaser; but the Court held, that he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary or made pursuant to an agreement before marriage, and, having notice of the deed, must purchase at his peril, and be bound by the effect and consequence of the deed. See Raithby's note on this case, 2 Vern. 384, 3rd ed.

A purchaser will have notice of a will, by the concurrence in his conveyance of persons interested under that title as devisees (*Burgoyne* v. *Hatton*, Barn. Ch. Rep. 237); and the circumstance that, upon a renewal of a lease, the lessors are not the same persons who were lessors in the original lease, is one which ought to lead the lessee to inquire into their

title, and is sufficient to fix him with notice of a trust: *Attorney-General* v. *Hall*, 16 Beav. 388; sed vide *Howarth* v. *Dean*, 1 Eden, 355. So, the fact of a married woman being party to an underlease has been held notice of her title: *Steedman* v. *Poole*, 6 Hare, 193: 16 L. J. N. S. Ch. 348. See also, *Cosser* v. *Collinge*, 3 My. & K. 283.

A purchaser with notice of a deed, is bound by all its contents. Thus, notice of a lease necessarily imparts notice of the covenants contained in it: *Taylor* v. *Stibbert*, 2 Ves. jun. 437; see also *Hall* v. *Smith*, 14 Ves. 426; *Pope* v. *Garland*, 4 Y. & C. 394; *Walter* v. *Maunde*, 1 J. & W. 181; *Spunner* v. *Walsh*, 10 Ir. Eq. Rep. 386, 400; *Tanner* v. *Florence*, 1 Ch. Ca. 259; *Lewis* v. *Bond*, 18 Beav. 85; *Wilbraham* v. *Livesey*, Ib. 206; *Cosser* v. *Collinge*, 3 M. & K. 282; *Martin* v. *Cotter*, 3 J. & L. 506; *Grosvenor* v. *Green*, 5 Jur. N. S. 117; *Vignolles* v. *Bowen*, 12 Ir. Eq. Rep. 194; *Vaughan* v. *Magill*, Ib. 200; *Stewart* v. *Marquis of Conyngham*, 1 Ir. Ch. Rep. 207, 534; *Smith* v. *Capron*, 7 Hare, 191; *Drysdale* v. *Mace*, 2 Sm. & G. 225; *Cox* v. *Coventon*, 31 Beav. 379; *Clements* v. *Welles*, 1 L. R. Eq. 200, 35 Beav. 513.

In cases, however, where specific performance of a contract is sought to be enforced, the rule that notice of a lease will affect the purchaser with notice of the covenants contained in it, is not of universal application, for there may have been such a degree of misrepresentation in the particulars of sale, as for instance when a lease contains unusual covenants, as may induce the Court to refuse its assistance. "I can imagine," said Lord Chancellor *Sugden*, "a covenant in a lease, which would so deteriorate the property as to destroy the interest of the seller in it; and the particulars might state some of the covenants, and omit that. Such a description might amount to fraud in the sale. I agree that if a purchaser had notice that the property was held under a lease, he cannot object that he had no notice of any particular covenant therein contained. He must look closely, and be active, in order to ascertain whether there is any such as would materially prejudice him. The rule perhaps has been carried a little too far. It is a question of bona fides. *Where the purchaser has completed his purchase the rule is right;* but *where the purchaser is only bidding for something*, and has not been informed of the obligations to which he will be liable in becoming the purchaser, it is always a question of bona fides:" *Martin* v. *Cotter*, 3 J. & L. 506. And see *Bessonet* v. *Robins*, Sausse & Sc. 142; *Van* v. *Corpe*, 3 My. & K. 269, 277; *Pope* v. *Garland*, 4 Y. & C. 401; *Flight* v. *Barton*, 3 My. & K. 282; *Darlington* v. *Hamilton*, Kay, 550.

Upon the same principle it has been held by Sir *John Romilly*,

M. R., in *Wilbraham* v. *Livesey*, 18 Beav. 206, that although a person who contracts for a lease from another, with the knowledge that he holds under a leasehold title, has notice of the ordinary covenants in the original lease, he will not be held to have notice of peculiar and unusual covenants. "In this case," said his Honor, "though there is distinct notice that the plaintiff was lessee, there was no notice except of ordinary and usual covenants, and covenants in restraint of trade are not usual covenants, although in some localities they are common. The case might be varied by the particular situation of the property, as if a house were situated in Grosvenor Square, I do not say, that a covenant against converting the house into a shop would be unusual; but it cannot be said that a covenant in restraint of trade, in a situation where trade is usually carried on, is a usual and ordinary covenant."

Notice of an intention to prepare a deed will not, it seems, be notice of the deed if afterwards executed. Thus, in *Cothay* v. *Sydenham*, 2 Bro. C. C. 391, a purchaser had notice that a *draft* of a deed was prepared, but not that a deed was executed; and it was held that he was not bound by notice of the deed, although in fact it was executed. "If," said Lord *Thurlow*, "the notice had been of a deed actually executed, it certainly would do, but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case or reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation."

Although, as we have already seen, where a party has notice of a deed, which from the nature of it *must affect* the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers, nevertheless where a party has notice of a deed which *does not necessarily* affect the property, and is told, that in fact it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the representation to be true, he will not be fixed with notice of the contents of the instrument. Thus, in *Jones* v. *Smith*, 1 Hare, 43, Smith, before advancing money on a mortgage, inquired of Jones the mortgagor and his wife, whether any settlement had been made upon their marriage; and was informed that a settlement had been made, *but of the wife's fortune only, and that it did not include the husband's estate*, which was proposed as the security; and he afterwards advanced the mortgage money without having seen the settlement or known its contents, upon the security of a term prior in date to the settlement. It was held, by Sir *J. Wigram*,

V. C., that the mortgagee was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. "This case," said his Honor, "cannot be brought within the scope of the authorities which at once establish and limit the cases to which the doctrine of constructive notice is applied. For, first, it is incontrovertibly clear, that Smith had not actual notice of the mortgaged property being in any way affected by the plaintiff's interest. The contrary of this has not been suggested, and the point, therefore, requires no observation. Therefore, secondly, if Smith's estate is to be affected by the plaintiff's claim, it must be upon the ground of his having purposely avoided inquiry, in order to avoid discovery. But is such a supposition consistent with a single fact in this case? His debt was not like that of Boulnois, in *Whitbread* v. *Jordan* (1 Y. & C. Exch. Ca. 303), an antecedent debt, for which he might be glad to get any security. The advance of his money was contemporaneous with the mortgage which secures it. His mortgagor was a needy man, and the evidence proves that Smith, at the time for treating for the first mortgage, so considered him. The letter of October, 1826, which the plaintiff has put in evidence, suggests the fraud which was practised upon Smith; and the evidence of Sarah Jones proves the suggestions in that letter to be true. Where is the ground for questioning the honesty and *bona fides* of Smith, even if his caution could be successfully impeached? How can anything, exceeding want of caution, be imputed to the man who parts with his money upon the bare faith of a security, without any assignable motive? The only knowledge Smith had was, that there was a settlement. But the contemporaneous assertion respecting that settlement was, that it related to other property than the husband's. A simple denial by Jones and his wife, that there was any settlement affecting Jones's property, would clearly have made Smith safe. How can it be argued, that such denial is qualified by the statement that there is a settlement relating to other property? Nay, more, is not the apparent candour of that statement calculated rather to inspire confidence than to excite suspicion and lay a foundation for inquiry? If Smith was bound to inquire after one deed of which he was told nothing, except that it did not relate to Jones's estate, why, upon the same principle, should he not be bound to examine any other deed, of the mere existence of which he had notice? If notice of the existence of a settlement, declared not to affect the husband's estate, is to put a purchaser upon inquiry, only because it may by possibility affect it, how can the plaintiff stop short

of the conclusion, that marriage alone should be constructive notice of any settlement that may have been executed? And why, upon the same principle, should not every man who deals with his neighbour, without knowing he is married, be affected with notice of his marriage, (if any), and thence with notice of the contents of the settlement? The basis of the plaintiff's argument is this: that a purchaser is imperatively bound to inquire, wherever he has notice of a fact which by bare possibility may affect the subject of his purchase. . . . . The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present. I should myself incline to limit the cases to which the doctrine is applied, rather than to extend them, were it not that the principle upon which these cases are decided, is sound in itself, and that it is better to carry out a sound principle to its just limits, even at the occasional expense of individual hardship, than render the law uncertain and fluctuating, by arbitrarily refusing to apply an acknowledged principle to cases within its range." This case, on appeal, was affirmed by Lord *Lyndhurst*, 1 Ph. 244. See also, *Allen* v. *Knight*, 5 Hare, 272, 11 Jur. 527; *Bird* v. *Fox*, 11 Hare, 40; *Ware* v. *Lord Egmont*, 4 De G. Mac. & G. 460, 473, 474; *Harryman* v. *Collins*, 18 Beav. 11; *Re Bright's Trusts*, 21 Beav. 430.

The same principle is applicable as between vendor and purchaser in cases of sales of property: thus, although where a deed is simply referred to in particulars of sale, without mentioning its contents, and the deed can be examined by the purchaser, he will be bound by everything contained in the deed; yet if the vendor, instead of referring the purchaser to the deed to ascertain its contents, himself states what the contents are, the purchaser is not bound to examine the deed, but may reasonably trust to the representation of it contained in the particulars of sale, as being the correct statement of its contents: *Cox* v. *Coventon*, 31 Beav. 378, and see *Grosvenor* v. *Green*, 28 L. J. Ch. (N. S.) 173.

Whether a purchaser from an heir-at-law, with notice of a will by the ancestor, under whom the heir claimed, would be affected with notice of the contents of that will, although he was ignorant of such contents, and even misled by the heir at the time of his purchase, must, it seems, depend upon circumstances. If the testator had been long dead, and the heir long in possession, and the other circumstances of the case such as to leave the purchaser in credit for perfect good faith, a Court of equity would not interfere against the legal title, only

because the purchaser had notice of a will, respecting which he was misled. If the death of the testator were recent, other considerations might arise affecting the purchaser with the imputation of a fraudulent blindness. Per Sir *James Wigram*, V.C., in *Jones* v. *Smith*, 1 Hare, 60; and see *West* v. *Reid*, 2 Hare, 257; *Jones* v. *Williams*, 24 Beav. 47; *sed vide Broadbent* v. *Barlow*, 3 De G. F. & J. 570; 7 Jur. N. S. 478; *Burgoyne* v. *Hatton*, Barn. Ch. Rep. 237.

The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees in conducting the sale,—such circumstances being entirely collateral to any question of title: *Borell* v. *Dann*, 2 Hare, 440.

The purchaser of a charity lease takes, with notice of the facts thereon, showing its equitable invalidity (*Attorney-General* v. *Pargeter*, 6 Beav. 150; *Attorney-General* v. *Pilgrim*, 12 Beav. 57). Secus, where the facts depend on circumstances dehors the lease, *Attorney-General* v. *Backhouse*, 17 Ves. 293; 3 Ridg. P. C. 512.

It has been held that where a purchaser takes with notice of an instrument, he takes with notice of whatever equity affects the property under that instrument. See *Hamilton* v. *Royse*, 2 S. & L. 315, there an estate subject to judgments was settled by A. the owner in consideration of an estate conveyed to him in fee, it was held by Lord *Redesdale*, C., that the latter estate was subject in equity to the judgments which were *at law* a charge upon the former, and that a purchaser of the estate from A. with notice of the settlement, was liable to the judgments although he had not notice of the particular judgments. His Lordship said that a purchaser took subject to all the equities to which the vendor was subject, and of which the purchaser had notice. That the purchaser took under the settlement, and without it had no title; consequently he took with notice of that settlement, and taking with notice thereof he took with notice of a clear equity against the estate which he had purchased, that is, that whatever incumbrances affected the estate put into settlement, were to be made good out of the purchased estate, which, having been given as part of the consideration for the settlement of the other estate, must in the hands of the vendor be liable to that equity. It did not follow that he had notice of this particular incumbrance, but he had notice that the lands put into settlement were to be indemnified out of the lands he had purchased against any incumbrance affecting such settled estates, and created by the vendor. That this was an equity, of which every purchaser under a settlement

must have notice; as it was a clear rule that a man could not claim under a deed and avoid the deed; that he must submit to the whole, and he had notice of everything of which the vendor had notice.

This case, however, has been disapproved of by Lord *St. Leonards*, who observes, that it was an opinion not intended to decide the case, although it was acquiesced in, and that it carried the rule much further than was warranted either by principle or authority. 3 Sug. V. & P. 475, 10th ed., and see *Averall* v. *Wade*, Ll. & G. C. t. Sugd. 252; Sug. V. & P. 776, 14th ed.

The mere execution of a deed as a witness will not, it seems, according to the better opinion, fix the witness with notice of the provisions in a deed; for, as observed by Lord *Thurlow*, "a witness in practice is not privy to the contents of a deed." *Beckett* v. *Cordley*, 1 Bro. C. C. 357; *Welford* v. *Beezeley*, 1 Ves. 6; *Colman* v. *Sarrel*, 1 Ves. jun. 55; *Biddulph* v. *St. John*, 2 S. & L. 532; *Rancliffe* v. *Parkyns*, 6 Dow, 224; sed vide *Mocatta* v. *Murgatroyd*, 1 P. Wms. 392.

It seems that a purchaser is bound by notice of articles, although the construction thereof is dubious. See vol. i. p. 44: and *Davies* v. *Davies*, 4 Beav. 84; *Thompson* v. *Simpson*, 1 D. & W. 491: *Abbot* v. *Geraghty*, 4 Ir. Ch. Rep. 15, 24, 25.

A general recital in a deed, that there were mortgages on the estate, was held to affect parties claiming under the deed with notice: *Farrow* v. *Rees*, 4 Beav. 18; *Lacey* v. *Ingle*, 2 Ph. C. C. 413; *Gibson* v. *Ingo*, 6 Hare, 124; and see *Eland* v. *Eland*, 1 Beav. 235.

If a man agrees to purchase under the limitations in a deed, which makes it necessary upon that transaction for him to look into that deed, and the deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments; for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of everything contained in it affecting his purchase. *Hamilton* v. *Royse*, 2 S. & L. 327; and see *Mertins* v. *Jolliffe*, Amb. 311. See also and consider *Ingram* v. *Pelham*, Amb. 153.

And a purchaser will be affected with notice of incumbrances by a recital which describes them inaccurately. Thus, in *Taylor* v. *Baker*, 5 Price, 306, a person had made an equitable mortgage to A., and afterwards giving a security to another person, stated that he had given a judgment or warrant of attorney to A. for money borrowed of him; and this was held to be sufficient notice of the mortgage.

So, inaccurate recitals of an instrument, as a will, affect a purchaser with notice of its true con-

tents: *Hope* v. *Liddell*, 21 Beav. 183; and a recital that a person was seised "for the term of his life with the power of jointuring" was held to affect a purchaser with notice of the settlement. *Bury* v. *Bury*, 3 Sug. V. & P. append. xxviii. 10th ed. Upon the same principle was decided the well-known case of *Penny* v. *Watts*, 1 Hall & T. 266; 1 Mac. & G. 150. There, on the marriage of the defendant with A., who, under the will of her former husband, was entitled to certain real estates, charged with a legacy of 2000*l*., payable to B., a feme sole, the defendant had notice that B., while sole, had released this legacy to A., and that A. had in consequence devised to B. a certain part of the real estates; it was held, by Lord *Cottenham*, reversing the decision of Sir *J. L. Knight Bruce*, V. C. (reported 2 De G. & Sm. 501), that the knowledge of these facts rendered it incumbent on the defendant to have made further inquiries, and affected him with constructive notice of an equitable title acquired by the husband of B., under a subsequent agreement with A. to have the devised estate conveyed to him. And see *Heathorn* v. *Darling*, 1 Moo. P. C. C. 5; *Ladbroke* v. *Lee*, 4 De G. & S. 106; *Tildesley* v. *Lodge*, 3 Sm. & Giff. 543.

Upon the same principle it was held that notice of a charge to an indefinite amount, although the notice was inaccurate as to the particulars or extent of the charge, was sufficient to put upon inquiry a party dealing for the property subject to the charge; and though the actual charge afterwards appeared to be incorrectly described in the notice, it was nevertheless sufficient, as a ground for giving priority for the true amount of the charge, as against the party who received the incorrect notice, but made no inquiry: *Gibson* v. *Ingo*, 6 Hare, 112, 124. And see *Gurney* v. *Lord Oranmore*, 5 Ir. Ch. Rep. 436; *Jones* v. *Williams*, 24 Beav. 47; *Armstrong* v. *Lyn*, 9 I. R. Eq. 186.

With reference to the case of *Penny* v. *Watts*, it must be remarked, that it has been considered as having carried the doctrine of notice too far (Sugd. V. & P. 766, 14th ed.). And in a case in Ireland, Lord Chancellor *Brady* said, that it seemed to require much examination before it could be received as established law. *Abbott* v. *Geraghty*, 4 Ir. Ch. Rep. 23. And in another case, a purchaser was held not to be fixed with notice of a deed by evidence that he had notice of an annuity created by that deed, which, from the notice given of its existence, appeared to have expired many years before the purchase: *Stephenson* v. *Royce*, 5 Ir. Ch. Rep. 401.

And it has been recently held, that if a man in purchasing or taking a mortgage over a large estate as to which the title is

furnished to him, chooses, as to a small portion, to be content with a short title, he will not as to all the rest of the estate be affected with notice of something which he might have found out if he had investigated the earlier title to the small portion. Per Lord *Hatherley*, L. C., in *Hunter* v. *Walters*, 7 L. R. Ch. App. 83.

3. *Constructive notice by tenancy.*]—As a general rule if a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land; for possession is primâ facie seisin, and the purchaser has, therefore, actual notice of a fact by which the property is affected, and he is bound to ascertain the truth. Thus, if a person purchases property in the occupation of one whom he supposes to be only a tenant from year to year, he will be held to have notice of a lease under which he holds, and of the contents of it: *Taylor* v. *Stibbert*, 2 Ves. jun. 437, 440; where Lord *Rosslyn* says, "I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have. It has been determined, that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire." And see *Jones* v. *Smith*, 1 Hare, 60; *Holmes* v. *Powell*, 8 De. G. Mac. & G. 572; *Mumford* v. *Stohwasser*, 18 L. R. Eq. 556; *Carrol* v. *Keays*, 8 I. R. Eq. 97; *Reilly* v. *Garnett*, 7 I. R. Eq. 1.

And the rule extends not only to interests connected with the tenancy of the occupier, but also to interests which he may have under collateral agreements. Thus, if the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant which would have led him to a knowledge of it (*Daniels* v. *Davison*, 16 Ves. 249; *S.C.*, 17 Ves. 433; *Douglas* v. *Witterwronge*, 16 Ves. 254, cited; *Lewis* v. *Bond*, 18 Beav. 85; *Wilbraham*

v. *Livesey*, Ib. 206; and see *Crofton* v. *Ormsby*, 2 S. & L. 583; *Meux* v. *Maltby*, 2 Swanst. 281; *Powell* v. *Dillon*, 2 Ball & B. 416; *Bailey* v. *Richardson*, 9 Hare, 734, and the comments thereon in *Barnhart* v. *Greenshields*, 9 Moore, P. C. C. 33, 34; *Thomas* v. *Davies*, 9 W. R. (V. C. S.) 831); even although the interests which the tenant may have were posterior to the lease under which he held: *Allen* v. *Anthony*, 1 Mer. 282.

The rule is also applicable where two persons who are tenants in common of property are carrying on business upon it, as their possession will be constructive notice of the title of the partnership. See *Cavander* v. *Bulteel*, 9 L. R. Ch. App. 79. There Bewlay and the plaintiff, who were tenants in common in fee in equal shares of certain property, entered into a partnership, and it was agreed by the articles that the premises should be partnership property. The business of the partnership was carried on there. Subsequently, in order to secure a private debt, Bewlay mortgaged his moiety of the property to the defendants, *who knew that the property was the place of business of the firm.* Some years afterwards Bewlay absconded, and the plaintiff was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him. It was held by the Lords Justices, reversing the decision of Sir *J. Wickens*, V. C., that, as the mortgagees, when they took their security, knew that the firm was in possession of the property, they had constructive notice of the title of the partnership, and that their claim must be postponed to that of the plaintiff. Lord Justice *James*, after observing that it was admitted that the defendants at the time when the mortgage was written had notice that the firm, quâ firm, was in possession of the premises, observes, "The question is whether this constitutes notice of the rights of the partners as between themselves in this property. I am of opinion that, in holding that it does, we are not extending the rule in *Daniels* v. *Davison* (16 Ves. 249), that if a person is in possession of property, notice of the title under which he is in possession must be attributed to every one who deals with that property. It was urged that this rule cannot apply where two persons who are tenants in common of property are carrying on business upon it; but the title of partnership, quâ partnership, is quite a distinct thing from the legal title to the freehold. The partnership is a distinct thing; the partnership must be presumed to be legally in possession of the entirety of the property for the purposes of the trade, and, therefore, quâ partnership, to have some interest in the entirety.

The same result then must follow as in other cases, where a person is in possession of property—every one who deals with a third party in respect of that property is put upon inquiry what the interest of the person in possession is."

Although the case of *Daniels* v. *Davison* (16 Ves. 249) has been followed, it has always been considered an extreme case, beyond which the doctrine ought not to be extended. Accordingly it was said by Lord *Cottenham*, then Master of the Rolls, that "although it is true that where a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; yet, if at the time of the purchase, the tenant in possession was not the original lessee, but merely held under a derivative lease, and had no knowledge of the covenant contained in the original lease, it had never been considered want of due diligence in the purchaser, which was to fix him with implied notice, if he did not pursue his inquiries through every derivative lessee, until he arrived at the person entitled to the original lease, which could alone convey to him information of the covenant:" *Hanbury* v. *Litchfield*, 2 My. & K. 633; *Jones* v. *Smith*, 1 Hare, 62. And, in *Penny* v. *Watts*, 2 De G. & Sm. 150; 1 Mac. & G. 150; 1 Hall & T. 266, it seems to have been considered doubtful whether the mere occupation by a person of property would be notice of an agreement not connected with his occupation. And see *Nelthorpe* v. *Holgate*, 1 Coll. 203.

The doctrine, moreover, laid down in *Daniels* v. *Davison* is not applicable as between vendor and purchaser whilst the matter rests in contract. It is true that Lord *Romilly*, M. R., in *James* v. *Lichfield*, 9 L. R. Eq. 51, where a vendor contracted to sell certain property, which the purchaser knew to be in the occupation of a tenant, held that the purchaser was thereby affected with notice of an agreement for a lease which the tenant had, and refused to make a decree for specific performance upon a bill filed by the purchaser unless he elected to take the property without compensation in respect of the agreement for a lease, as his Lordship considered that the duty to inquire as to the interest of the tenant in possession applied to the case between vendor and purchaser, as well as between purchaser and tenant, and that no distinction could be properly drawn in a Court of equity, on the ground that the matter rested in contract, and that the conveyance of the legal estate had not been made to the purchaser. This decision, moreover, was followed in the Court of Common Pleas in *Phillips* v. *Miller*, 9 L. R. C. P. 196.

These cases, however, must be considered as overruled by the case of *Caballero* v. *Henty*, 9 L.

R. Ch. App. 447. There the conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which, eight years, were unexpired. It was held by the Lords Justices, affirming the decision of Sir *G. Jessel*, M. R., that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and that in such a case the vendor could not enforce specific performance. "There is no pretence," said *James*, L. J., "for the case made by the plaintiff, that a person who wants to buy such property, and has notice of the occupation of the tenant, is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition *James* v. *Lichfield* (9 L. R. Eq. 51) was cited as an authority. In that case there certainly are some dicta which nearly go to that extent, and which support the notion that the doctrine of *Daniels* v. *Davison* (16 Ves. 249) applies as between vendor and purchaser, and whilst the matter still rests in contract. It is not necessary now to deal with that case, but I am not at present prepared to assent to any such propositions. The doctrine in question seems to me to refer to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired you would have found out all about it.' During the argument, I referred to a passage in *Sugden's Vendors and Purchasers* (7th ed. p. 745; 14th ed. p. 774), which seems to show that a purchaser is not bound to go to the tenant to inquire. At all events the vendor cannot enforce such an agreement as this." See *Martyr* v. *Lawrence*, 2 De G. Jo. & Sm. 261; *Hughes* v. *Jones*, 3 De G. F. & Jo. 307.

It has been recently laid down that "the question of notice concerning the right to an easement is like those cases in which notice of possession by a tenant of land is notice of the terms of his holding:" per Sir *W. Page Wood*, V. C., in *Hervey* v. *Smith*, 1 K. & J. 394; see *S. C.*, 22 Beav. 299; *Kyle* v. *O'Connor*, 16 Ir. Ch. Rep. 46; *Davies* v. *Sear*, 7 L. R. Eq. 427.

So, where the mortgagee of a burial ground had notice of the purposes to which it was devoted,

he was held to be bound by rights of burial temporary or in perpetuity granted by his mortgagor while left in possession: *Moreland* v. *Richardson*, 24 Beav. 33.

If the possession is vacant, the purchaser is not bound to inquire as to the title of the last occupier, and will, therefore, not have constructive notice of the information he might have obtained by such inquiry. Thus in *Miles* v. *Langley*, 1 Russ. & My. 39, where a person purchased an estate described as "late the residence of Thomas Hellicar," and it appeared that Thomas Hellicar had, theretofore, held and occupied the land in question under an agreement; it was argued upon the authority of *Daniels* v. *Davison*, that the purchaser was bound to have inquired what the interest of Hellicar was under his "late occupation;" but Sir *J. Leach*, V.-C., held, that the obligation to inquire did not arise in the case of vacant possession. His Honor said, that Lord *Eldon's* principle, in *Daniels* v. *Davison*, could not, where the possession was vacant, be extended to the last occupier. This decision was affirmed by Lord *Brougham* (2 Russ. & My. 626), upon the express ground that a contrary decision would have extended the doctrine laid down in *Daniels* v. *Davison;* for, in that case, the purchaser had, whereas, in *Miles* v. *Langley*, he had not, actual notice of a fact affecting the subject-matter of the contract. See *Jones* v. *Smith*, 8 Hare, 62. *Martyr* v. *Lawrence*, 2 De G. Jo. & Sm. 261; *Hughes* v. *Jones*, 3 De G. F. & J. 307.

Notice, however, that an occupier holds as tenant of a particular person is notice of the title of the latter. (*Bailey* v. *Richardson*, 9 Hare, 734.) So also notice that the tenants paid their rents to anyone is notice of the instrument under which they were compelled to pay them, and of the rights of all parties thereunder. *Knight* v. *Bowyer*, 2 De G. & Jo. 421; 23 Beav. 609. See also *Attorney-General* v. *Stephens*, 1 K. & J. 750, reversed on other points, 6 De G. Mac. & G. 111.

Where a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held, nor is it necessary that such possession should be continually visible or actively asserted. See *Holmes* v. *Powell*, 8 De G. Mac. & G. 572. There the purchasers of mines took possession under the agreement for purchase without any conveyance. Afterwards a person purchased the land without any exception of the mines. It was held by the Lords Justices of the Court of Appeal, affirming the decision of Sir *John Stuart*, V.-C., that the purchaser of the land

took with notice of the agreement, and was bound specifically to perform it. But see the remark of *James*, L. J., in *Cavander* v. *Bulteel*, 9 L. R. Eq. 82.

Moreover, a lessee (*Feilden* v. *Slater*, 7 L. R. Eq. 523), sub-lessee (*Parker* v. *Whyte*, 1 H. & M. 167), or tenant from year to year (*Wilson* v. *Hart*, 1 L. R. Ch. App. 463; *Ib.* 2 H. & M. 551), who enters without inquiries, will be taken to have notice of that which he would have found out if he had made such inquiries: and see *Clements* v. *Welles*, 1 L. R. Eq. 200; 35 Beav. 513.

The following summary of the law, by Lord Justice *Turner*, is both clear and accurate: "It cannot, I think, be denied that, generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor, or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases, ought not to be held to apply in the case of a tenant from year to year. The difference in the cases seems to me to be only in the quantum of injury which falls upon the party to whom the rule is applied." *Wilson* v. *Hart*, 1 L. R. Ch. App. 467.

The possession, however, by a vendor of an estate which he has sold will not be constructive notice of any lien he may have for unpaid purchase-money, if he has signed the usual receipt on the conveyance for the whole purchase-money; for, after that, no man could be expected to inquire whether the purchase-money had been paid: *White* v. *Wakefield*, 7 Sim. 401. And see *Rice* v. *Rice*, 2 Drew. 1; *Muir* v. *Jolly*, 26 Beav. 143; *Wilson* v. *Keating*, 4 De G. & Jo. 588; and the note to *Mackreth* v. *Symmons*, vol. i. p. 324.

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title (per *Wigram*, V.-C., in *Jones* v. *Smith*, 1 Hare, 63); nor will a purchaser bonâ fide and without notice be affected by the mere circumstance of the vendor having been out of possession many years: *Oxwith* v. *Plumer*, Bac. Abr., tit. "Mortgage" (E.), sect. 3; *S. C.*, 2 Vern. 636; *S. C.*, Gilb. Eq. Rep. 13; and see the remarks on this case in *Barnhart* v. *Greenshields*, 9 Moore's P. C. C. 34, 35; and in the *Attorney-General* v. *Backhouse*, 17 Ves. 293, where the question arose upon the validity of a lease of charity-lands. Lord *Eldon*, speaking of the position of the assignee of the lease, said, "Though the purchaser of a lease has never been

considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, I am not aware of any case that has gone the length that he is to take notice of all those circumstances under which the lessor derived that title."

4. *Constructive notice between principal and agent.*]—It is clear, as is laid down in the principal case, that notice to an agent, attorney, or counsel of a purchaser, is constructive notice to their principal; for, if it were otherwise, it would cause great inconvenience, and notice would be avoided in every case by employing agents: *Sheldon* v. *Cox*, 2 Eden, 228; *Newstead* v. *Searles*, 1 Atk. 265; *Tunstall* v. *Trappes*, 3 Sim. 301; *Dryden* v. *Frost*, 3 M. & C. 670; *Lenehan* v. *M'Cabe*, 2 Ir. Eq. Rep. 342; *Rickards* v. *Gledstanes*, 3 Giff. 298; *Atterbury* v. *Wallis*, 8 De G. Mac. & G. 454; *Vane* v. *Vane*, 8 L. R. Ch. App. 383.

The same rule applies if, as in the principal case, they are concerned for both vendor and purchaser in the same transaction (*Sheldon* v. *Cox*, 2 Eden, 224; *Fuller* v. *Bennet*, 2 Hare, 402; *M'Mahon* v. *M'Elroy*, 5 I. R. Eq. 1); even if they be themselves the vendors (*Majoribanks* v. *Hovenden*, 6 Ir. Eq. Rep. 238; Dru. 11; *Atkins* v. *Delmege*, 12 Ir. Eq. Rep. 1; *Twycross* v. *Moore*, 13 Ir. Eq. Rep. 250; *Robinson* v. *Briggs*, 1 Sm. & Giff. 188; *Tucker* v. *Henzill*, 4 Ir. Ch. Rep. 513; *Spencer* v. *Topham*, 2 Jur. N. S. 865; *In re Rorke*, 13 Ir. Ch. R. 273; 14 Ir. Ch. Rep. 442), or when the same solicitor acts both for the mortgagor and mortgagee (*Tweedale* v. *Tweedale*, 23 Beav. 341).

The mere fact, however, of the mortgagor being a solicitor and himself preparing the deed, and of the mortgagee employing no independent professional adviser has been held insufficient to fix the latter with notice of a prior incumbrance known only to the solicitor. *Espin* v. *Pemberton*, 4 Drew. 333; 3 De G. & Jo. 547.

Notice to a solicitor in the country is notice to a person acting in a cause by his town agent (*Norris* v. *Le Neve*, 3 Atk. 26); and notice is binding even upon infants, where a sale is made under a decree of the Court (*Toulmin* v. *Steere*, 3 Mer. 210); or although the conveyance is made to a third person (*Coote* v. *Mammon*, 5 Bro. P. C. 355, Toml. ed.).

And where moneys which formed part of a larger sum placed by a client in the hands of his solicitor for the purposes of investment, were lent by him on the security of a mortgage in which he had affected to act as principal, the client was held to be bound by the notice of all the circumstances which came within the solicitor's knowledge: *Spaight* v. *Cowne*, 1 Hem. & Mill. 359.

However, notice to counsel, agents, or solicitors must, in order to affect their employer, have been given or imparted to them in the same transaction; for, if the law were otherwise, "it would," as observed by Lord *Hardwicke*, "make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions:" *Warrick* v. *Warrick*, 3 Atk. 294; *Fitzgerald* v. *Falconberge*, Fitzgibb. 207; *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; *Steed* v. *Whitaker*, Barnard. Ch. Rep. 220; *Hine* v. *Dodd*, 2 Atk. 275; *Ashley* v. *Bailey*, 2 Ves. 368; *Lowther* v. *Carlton*, 2 Atk. 242; *Fuller* v. *Bennet*, 2 Hare, 394; *Tylee* v. *Webb*, 6 Beav. 552; *S. C.*, 14 Beav. 14; *Finch* v. *Shaw*, 19 Beav. 500; 5 H. L. Cas. 905; *In re Smallman's Estate*, 2 I. R. Eq. 34.

The same exception seems to apply, even if the notice is personal: as, "if a man purchase an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase." Per Lord *Redesdale* in *Hamilton* v. *Royse*, 2 S. & L. 327.

Where, however, one transaction is closely followed by, and connected with another; or where it is clear that a previous transaction is present to the mind of the solicitor when engaged in another transaction, there is no ground for the distinction by which the rule that notice to the solicitor is notice to the client, has been restricted to the same transaction. Per Lord *Langdale*, M. R., in *Hargreaves* v. *Rothwell*, 1 Kee. 159; and see *Brotherton* v. *Hatt*, 2 Vern. 574; *Mountford* v. *Scott*, T. & R. 274; and see *Winter* v. *Lord Anson*, 3 Russ. 488, 493; *Lenehan* v. *M'Cabe*, 2 Ir. Eq. Rep. 342; *Nixon* v. *Hamilton*, 2 D. & Walsh, 364; *Perkins* v. *Bradley*, 1 Hare, 219; *Majoribanks* v. *Hovenden*, 6 Ir. Eq. Rep. 238; *M'Mahon* v. *M'Elroy*, 5 I. R. Eq. 1; *Fuller* v. *Bennett*, 2 Hare, 394; *Wilde* v. *Gibson*, 1 Ho. Lo Ca. 605; *Gerrard* v. *O'Reilly*, 3 D. & War. 414.

In order to affect a person with constructive notice of facts within the knowledge of his solicitor, it is necessary not only that the knowledge should be derived from the same transaction, but it must be material to that transaction, and such as it was the duty of

the agent to communicate. See *Wyllie* v. *Pollen*, 32 L. J. Ch. (N. S.) 782, where it was held by Lord *Westbury*, C., that the transferee of a mortgage would not be affected by the knowledge of the solicitor acting for him in the transfer of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer.

The circumstance of only one solicitor acting in a transaction does not necessarily constitute him the solicitor of both parties, so as to affect one with notice of facts known to the others. *Perry* v. *Holl*, 2 De G. F. & Jo. 38.

The employment of a solicitor to do a merely ministerial act, such as the procuring the execution of a deed, does not constitute him solicitor to the party executing the deed so as to affect him with constructive knowledge of matters within the knowledge of the solicitor: *Wyllie* v. *Pollen*, 32 L. J. Ch. (N. S.) 782.

Where a solicitor acting for both parties, has notice of a document, and with the consent of one of such parties conceals his knowledge from the other party, the latter party will not be affected with constructive notice of such document: *Sharpe* v. *Foy*, 4 L. R. Ch. App. 35.

And where a solicitor, employed both by the mortgagor and mortgagee, was himself the author of a fraud, Lord *Brougham*, differing in this respect from the opinion of Sir *J. Leach*, M. R., held, that although the solicitor had actual and full notice of his own fraud, the mortgagee was not cognisant in law, and, constructively, merely because his solicitor, himself the contriver, the actor, and gainer of the transaction, knew it well; but his Lordship affirmed the judgment of the Master of the Rolls on another ground, viz., that it was apparent on the face of the deed that a fraud had been committed, which ought to have led to further inquiries, and the mortgagee was, therefore, constructively affected in the same manner as if he had employed another solicitor: *Kennedy* v. *Green*, 3 My. & K. 699. And see *Jones* v. *Smith*, 1 Ph. 256; *Neesom* v. *Clarkson*, 2 Hare, 163; *Frail* v. *Ellis*, 16 Beav. 350; *Hiorns* v. *Holtom*, 16 Beav. 259; *Greenslade* v. *Dare*, 20 Beav. 284, 291; *Spencer* v. *Topham*, 2 Jur. N. S. 865; *Robinson* v. *Briggs*, 1 Sm. & Giff. 188; *Hewitt* v. *Loosemore*, 9 Hare, 449, 455; *Thompson* v. *Cartwright*, 33 Beav. 178; 2 De G. Jo. & Sm. 10; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; *In re European Bank*, 5 L. R. Ch. App. 358; *Sankey* v. *Alexander*, 9 I. R. Eq. 259. See also *Waldy* v. *Gray*, 20 L. R. Eq. 238, where *Bacon*, V.-C., thus states the principle laid down in *Kennedy* v. *Green*. "If a professional man is employed in a transaction, the law imputes to

the client who employs him the knowledge which the solicitor so employed possesses. But then that is subject to this plain qualification: If the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact."

The principle, however, laid down in *Kennedy* v. *Green*, has been held not to apply unless it be made out that a distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him. See *Atterbury* v. *Wallis*, 8 De G. Mac. & G. 454: there a solicitor took a mortgage of an equity of redemption and submortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as the solicitor for all the parties to the transaction, and suppressing all mention of the sub-mortgage. It was held by the Lords Justices of the Court of Appeal, that the new mortgagee was affected by the solicitor's knowledge of the submortgage (his conduct not excluding the effect of such notice), and took subject to it, except to the extent of the money paid by him in satisfaction of the first mortgage.

In this case it will be observed that the submortgage was not of itself a fraud, which it was necessary to conceal from the new mortgagee, who might have been willing to have advanced his money subject thereto, hence it was not sufficient of itself to rebut the ordinary presumption of disclosure by the solicitor so as to affect his client with notice. See also *Hewitt* v. *Loosemore*, 9 Hare, 449; *Rolland* v. *Hart*, 6 L. R. Ch. App. 678. But see *Thompson* v. *Cartwright*, 33 Beav. 178; 2 De G. Jo. & Sm. 10.

And it has been decided, that a client will be affected with constructive notice of a trust, the existence of which is known to his solicitor, even although the solicitor may have committed a fraud in relation to that trust. Thus, in *Boursot* v. *Savage*, 2 L. R. Eq. 134, Holmer, one of three trustees, executed an assignment of leasehold property held jointly by them, to Savage, a purchaser, and forged the signatures of his two co-trustees, and also the requisite assent of the cestui que trust, to the sale. Holmer was a solicitor, and acted as such on behalf of the purchaser. It was held by Sir *R. T. Kindersley*, V.-C., that the purchaser had constructive notice of the trust through the knowledge of his solicitor, and ordered a re-conveyance of the legal interest in one third of the property which passed to the purchaser. "Supposing," said his Honor "that actual

knowledge of the existence of a trust cannot be imputed to the defendant Savage, still I think he is affected by constructive notice. He employed Holmer as his solicitor in the transaction of the purchase; and according to the doctrine of equity, a purchaser has constructive notice of that which his solicitor, in the transaction of the purchase, knows with respect to the existence of the rights which other persons have in the property. Take the simplest case: Suppose the purchaser's solicitor happens, by reason of his connection with the property, to be aware that the vendor has created an equitable mortgage. Is it possible to contend that the purchaser would not be held to be affected with constructive notice of the existence of such mortgage? It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this:—that the probability is so strong, that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this:—that my solicitor is *alter ego;* he is myself, I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But, whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable.

"It is insisted, however, that because Holmer was committing a fraud, the client is not to be affected with constructive notice of a fraud committed by his solicitor. But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there is no fraud, the fact that the solicitor is committing a fraud, in relation to that trust, cannot afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice; and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not."

The mere fact of two companies having the same solicitor, or same directors in common, does not affect each company with notice of everything that is done by the other: *In re Marseilles Extension Railway Company,* 7 L. R. Ch. App. 161; and see *In re European Bank,* 5 L. R. Ch. App. 358.

As to constructive notice in dealings with executors, adminis-

trators, and trustees, see note to *Elliot* v. *Merryman*, vol. i. p. 69—105.

5. *As to constructive notice by record.*]—A public Act of Parliament is of itself full notice, but not a private Act (*Earl of Pomfret* v. *Lord Windsor*, 2 Ves. 480); nor, it seems, is a private Act made a public one, *Hesse* v. *Stevenson*, 3 Bos. & Pull. 565, 578; *Attorney-General* v. *Marrett*, 10 Ir. Eq. Rep. 167.

Nor will an act (*Wilkes* v. *Bodington*, 2 Vern. 599; *Collet* v. *De Gols*, Ca. t. Talb. 65; *Ex parte Knott*, 11 Ves. 609; but see 1 S. & L. 152; *Ex parte Herbert*, 13 Ves. 183) or commission (*Hitchcock* v. *Sedgwick*, 2 Vern. 156; reversed Dom. Proc., House of Lords Journ., vol. 14, p. 601; 3 My. & K. 591; *Sowerby* v. *Brooks*, 4 B. & Ald. 523; *In re Barr's Trusts*, 4 K. & J. 219) of bankruptcy of itself amount to notice.

With regard to the protection given by recent Bankruptcy Acts to parties dealing with bankrupts, see 12 & 13 Vict. c. 106, s. 133 (repealed by 32 & 33 Vict. c. 83) and 32 & 33 Vict. c. 71, ss. 94, 95.

Although the contrary has been held (*Pearce* v. *Newlyn*, 3 Madd. 189), it appears to be now settled that court rolls of a manor do not give constructive notice of their contents: *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377.

The registration of deeds, as before observed, will not of itself be notice so as to affect a purchaser taking the legal estate: (*Bushell* v. *Bushell*, 1 S. & L. 103; *Ford* v. *White*, 16 Beav. 120); but if a purchaser search the register he will be presumed to have notice, unless the presumption be rebutted by his showing that the search was made for a period only in which the registered deeds are not included: *Hodgson* v. *Dean*, 2 S. & S. 221; and see *Lane* v. *Jackson*, 20 Beav. 535.

Nor will a judgment be notice (*Churchil* v. *Grove*, 1 Ch. Ca. 35; Freem. Ch. Ca. 176; *Lane* v. *Jackson*, 26 Beav. 535; 1 & 2 Vict. c. 110, s. 13), unless a search have been made for judgments, in which case notice may be presumed (*Procter* v. *Cooper*, 2 Drew. 1; 18 Jur. 444; 1 Jur. N. S. 149); but it seems that a title depending on the fact of the vendor having been a purchaser without notice of a registered judgment, cannot be forced upon a purchaser (*Freer* v. *Hesse*, 4 De G. Mac. & G. 495; and see *The Governors of the Grey Coat Hospital* v. *The Westminster Improvement Commissioners*, 1 De G. & Jo. 531; *Knight* v. *Pocock*, 24 Beav. 436); and although, under the old law, a purchaser would be bound by a judgment, even though not docketed, if he had notice of it (*Davis* v. *Strathmore*, 16 Ves. 419), he will not under 3 & 4 Vict. c. 82, s. 2, *even with notice*, be affected by a judg-

ment, unless duly registered. And see 18 & 19 Vict. c. 15, s. 4, and *Lee* v. *Green*, 6 De G. Mac. & G. 155, 168.

By 3 & 4 Vict. c. 82, notice of an unregistered decree, as well as of an unregistered judgment, will not, as against purchasers, mortgagees, or creditors, give such decree or judgment any effect under 1 & 2 Vict. c. 110.

And judgments and decrees not duly re-registered within five years will be void as against subsequent purchasers, mortgagees, and creditors, though they will not lose their priority over previous purchasers, mortgagees, and creditors (2 & 3 Vict. c. 11, s. 4; *Beavan* v. *The Earl of Oxford*, 6 De G. Mac. & G. 492; *Hickson* v. *Collis*, 1 J. & L. 94, 113; Sugd. V. & P. 426, 13th ed.; sed vide *Shaw* v. *Neale*, 20 Beav. 157; *S.C.*, 6 Ho. Lo. Ca. 581). And re-registration is equally necessary as to judgments removed from the inferior courts (18 & 19 Vict. c. 15, s. 7), and as to judgments in the counties palatine (*Ib.* s. 3).

However, by 23 & 24 Vict. c. 38, no judgment, statute, or recognisance is to affect any land of whatever tenure as to a bonâ fide purchaser for valuable consideration, or a mortgagee, although with notice, unless a writ of execution thereof be registered and issued within three calendar months from the time of the registering, and before the execution of the conveyance or mortgage, and payment of the purchase or mortgage money (sect. 1). And by the Law of Judgments Amendment Act (27 & 28 Vict. c. 112), it is enacted that no judgment, statute, or recognisance to be entered up after the passing of that act (29th July, 1864) shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance (sect. 1). Writs of execution, or other process of execution of any such judgment, statute, or recognisance must be registered in manner prescribed by 23 & 24 Vict. c. 38 (sect. 3); and the creditor to whom land is delivered in execution is entitled to obtain a summary order from the Court of Chancery for sale (sect. 4). Other creditors on judgment, statute, or recognisance, having a charge on the land, must be served with notice of the sale, and the persons entitled to the proceeds of the sale are to be paid according to their priorities (sect. 5); and every person claiming any interest in the land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, will be bound by the order for sale, and by all proceedings consequent thereon (sect. 6).

As to the re-registration of Crown debts, see 22 & 23 Vict.

c. 35, s. 22 ; and 34 & 35 Vict. c. 72 (An Act for the further protection of purchasers against Crown debts, Ireland), partially repealing 7 & 8 Vict c. 90 (Ireland).

And for further information on the subject, see Prideaux on Judgments and Crown Debts, 6th ed. ; 1 Prideaux's Precedents on Conveyancing, 4th ed., p. 130.

As to the effect of judgments registered under the provisions of the Irish Acts, 3 & 4 Vict. c. 105, and 13 & 14 Vict. c. 29, see *Eyre* v. *M'Dowell*, 9 Ho. Lo. Ca. 619, and the cases there cited. See also 11 & 12 Vict. c. 120; 34 & 35 Vict. c. 72.

Lis pendens, which formerly took effect upon the filing of the bill by relation back to the service of the subpœna (*Anon.* 1 Vern. 318), and which takes effect now, it is presumed, from the service of the writ in an action, which is now the commencement of proceedings in Chancery, (Rules of Supreme Court, Order 2, Rule 1), affects a person who purchases from a party during the pendency of a suit, so that he is bound by the decree that may be made against the person from whom he derives his title. *The Bishop of Winchester* v. *Paine*, 11 Ves. 197.

Now, by 2 & 3 Vict. c. 11, s. 7, *lis pendens* will not affect a purchaser, without express notice, unless it be properly registered; but even if it be not registered, he will be affected by express notice.

The filing of a special case, and the entering of appearances thereto by persons named as defendants, is to be taken as a *lis pendens*, and in order to be binding on purchasers or mortgagees without notice, it must be registered under 2 & 3 Vict. c. 11. See 13 & 14 Vict. c. 35, s. 17; Rules of the Supreme Court, Order 34.

It should always be borne in mind in considering this subject, that the doctrine as to the effect of *lis pendens* on the title of an alienee is founded, not on any principles of Courts of equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit or not. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before a final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence : *Bellamy* v. *Sabine*, 1 De G. & Jo. 578.

The question has been raised how far a purchaser from a defendant *pendente lite* is affected by the right of another defendant in the same suit. It seems where a person without notice of a suit, purchases from one of the de-

fendants property which is the subject of it, he is not, in consequence of the pendency of the suit, affected by an equitable title of another defendant which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any of the purposes of the suit to give effect: *Bellamy* v. *Sabine*, 1 De G. & Jo. 566.

Where, however, the suit is such that an adjudication will take place between defendants with regard to the subject-matter of the suit, an alienee from one of the defendants will be affected by the *lis pendens* if duly registered. See *Tyler* v. *Thomas* (25 Beav. 47).

Pending litigation not only cannot the defendant affect the rights of the plaintiff to the property in dispute, but the same principle is applicable against a plaintiff, so as to prevent him from alienating to the prejudice of the defendant, where, from the nature of the suit, he may have in the result a right against the plaintiff, as on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by the alienation of the devisee (plaintiff) *pendente lite*: *Bellamy* v. *Sabine*, 1 De G. & Jo. 580; and see *Garth* v. *Ward*, 2 Atk. 174.

A *lis pendens* is applicable to property in relation to which a direct question is raised in the suit. Where, for instance, devisees filed a bill to establish a will against an heir at law in possession, the estates devised by the will would be affected by the *lis pendens*, and a purchaser either from the devisees or heir at law would be bound by it (*Garth* v. *Ward*, 2 Atk. 175). So in the case of a mortgagor who filed a bill for redemption of a mortgage, if during such suit he should assign the equity of redemption, and in the final hearing of the cause there should be a decree against the mortgagor, the assignee of the equity of redemption would be bound by the decree. *Ib.* See also *The Bishop of Winchester* v. *Paine*, 11 Ves. 194.

And an assignee will be equally affected where he enters into the contract before the commencement of the suit, and it is completed afterwards. *Norris* v. *Lord Dudley Stuart*, 16 Beav. 359, 363.

A general bill for the account of personal estate or of real or personal estate, both consisting of various parts, has been held not to create such a *lis pendens* as would affect a purchaser from a devisee. *Walker* v. *Flamstead*, 2 Ld. Ken., 2nd part, 57, 59. So likewise where there had been a decree for general administration, but without any injunction or the appointment of a receiver, the power of the executor to deal with the assets was held not to be taken away, and a purchaser from him not to be affected by the doc-

trine of *lis pendens: Berry* v. *Gibbons*, 8 L. R. Ch. App. 747.

But in the case of proceedings charging a particular estate with a particular trust it is otherwise. *Walker* v. *Flamstead*, 2 Ld. Ken., 2nd part, 60. Or, in other words, some specific claim must have been made in the suit to the particular subject sought to be affected by *lis pendens*. *Reed* v. *Freer*, 13 L. J. (Ch.) 417; *Holt* v. *Dewell*, 4 Hare, 446. And see *Mead* v. *Lord Orrery*, 3 Atk. 213.

Thus if money be secured upon an estate, and there is a question depending in the Court upon the right of or about that money, but *no question relating to the estate* upon which it is secured (being wholly a collateral matter), a purchaser of the estate pending that suit will not, it seems, be affected with notice by such implication as the law creates by the pendency of a suit. *Worsley* v. *The Earl of Scarborough*, 3 Atk. 392. So a suit to carry out the trusts of a deed by which a legacy passed by a general assignment, but in which no specific claim was made to the legacy, was held not to be notice of the assignment. *Houlditch* v. *Wallace*, 5 C. & F. 629; *Holt* v. *Dewell*, 4 Hare, 446.

In an ordinary case of a partnership suit, where the whole accounts of the partnership are to be taken, and a decree is made against a defendant, and he does not pay the money, there may be means of enforcing that decree against his real estate, but there cannot be any registration as a *lis pendens* of a mere partnership suit so as to affect the real estate of one of the partners. Per *Turner*, L. J., in *In re Barned's Banking Company, Ex parte Thornton*, 2 L. R. Ch. App. 176.

Moreover, in the case of administering real and personal estate, where the plaintiff wishes to take proceedings against a debtor to the estate, he cannot register the original suit against the debtor to the estate, but he must institute a new suit against the debtor, and then register as *lis pendens* the new suit which has been instituted against him. Per *Turner*, L. J., *In re Barned's Banking Company, Ex parte Thornton*, 2 L. R. Ch. App. 177.

Upon the same principle, the registration of a petition for the winding up of a company as a *lis pendens* against individual contributories has been held not to be authorised by the 114th section of the Companies Act, 1862 (25 & 26 Vict. c. 89). See *In re Barned's Banking Company, Ex parte Thornton*, 2 L. R. Ch. 171. For a *lis pendens* being a technical expression well known, it is clear that it always implies a right or claim to charge some specific property, whereas there is not in a winding-up petition, or springing out of it, any claim to a charge upon specific property of individual contributories. *Ib.* 178.

The natural meaning of the

114th section is this, that where the Act of Parliament speaks of a petition for winding up a company, and declares that the petition shall constitute a *lis pendens*, it is assumed that the proceeding is against the company, and the declaration is that the proceeding shall be a *lis pendens* against the company. *Ib.* 179, per *Cairns*, L. J.

The 114th section of 25 & 26 Vict. c. 89, has been repealed by 30 & 31 Vict. c. 47, from and after the 15th of July, 1867.

It has been laid down that a purchaser will not be bound by all equities arising out of matters in question in the suit. *Shalcross* v. *Dixon*, 7 L. J. N. S. (Ch.) 180. In the case, however, of *Jennings* v. *Bond*, 2 Jo. & L. 720, there was a suit by a judgment creditor for an account of the testator's real and personal estate, and payment of his debts. The life estate of an executor in lands subject to the judgment, being liable to recoup assets of the testator, the executor having mortgaged his life interest after the institution of the suit, it was held that the mortgagee was affected by the *lis pendens*. See also *Drew* v. *Earl of Norbury*, 3 Jo. & L. 267.

Although a final decree is not, after the determination of the suit, binding upon a purchaser (*Worsley* v. *Earl of Scarborough*, 3 Atk. 392), a decree which is not final, or not such as puts a conclusion to the matters in question, as a decree to account, will be binding upon him: *Worsley* v. *The Earl of Scarborough*, 3 Atk. 392; *Higgins* v. *Shaw*, 2 Dru. & War. 356.

Where there has not been a close and continued prosecution of a suit, a bonâ fide purchaser will not be affected by the *lis pendens*. See *Kinsman* v. *Kinsman*, 1 Russ. & My. 607. There a testator, who died in 1780, devised one estate to W. for life, remainder to his son, an infant, in tail, and another estate to S. for life, remainder to his sons in tail. By a decree in 1792, in a creditor's suit, it was directed, that if the personal estate were insufficient for the payment of the debts, the *two* estates should contribute thereto in proportion to their respective value. And in 1798, upon further directions, the *two* estates were ordered to be sold. The estate of W. was sold, but S. concealed the title-deeds of the estate devised to him, and consequently it could not be sold for want of a title. In 1798, upon a second set of further directions, the debts were paid out of the purchase-money for the estate of W., and the Master reported what proportion of the debts and costs ought to be borne by the estate of S. W., who was a day-labourer, took no further step, and died in 1825. S. being left in possession of the estate devised to him, he and his son sold it in 1824 to a bonâ fide purchaser, without notice. The son of *W.*, shortly after his father's death, filed a supplemental

bill, to make the estate sold by S. bear its share of the burthen. It was held, however, by the Lord Chancellor, reversing the decision of the Master of the Rolls, that there was not such a *litis pendentia* at the time when the purchase was made as the purchaser was bound to take notice of. See also *Preston* v. *Tubbin*, 1 Vern. 286; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Sorrell* v. *Carpenter* 2 P. Wms. 482; *Walker* v. *Smalwood*, Amb. 676; *Garth* v. *Ward*, 2 Atk. 175. *Sed vide Martin* v. *Stiles*, 11 Ves. 200, cited *S. C.* nom. *Style* v. *Martin*, 1 Ch. Ca. 150, and the remarks thereon, 3 Sug. V. & P. 459, 10th ed.

Lord *Redesdale* appears to have held, that although a bill is dismissed, yet a party purchasing after the dismissal was a purchaser *pendente lite*, if an appeal was afterwards brought in the House of Lords, since it was still a question whether the bill was rightly dismissed (*Gore* v. *Stacpoole*, 1 Dow, 31). Lord *St. Leonards*, however, remarks that this "would seem to be carrying the doctrine too far." See 3 Sug. V. & P. 459, 460, 10th ed.

As a *lis pendens* is only a general notice of an equity to all the world, it cannot affect any particular person with a fraud, unless there was a special notice of the title in dispute to that person. Per Lord *Hardwicke*, C., in *Mead* v. *Lord Orrery*, 3 Atk. 243.

A *lis pendens*, moreover, is not notice for the purpose of postponing a registered deed, as that can only be effected by actual notice clearly proved. *Wyatt* v. *Barwell*, 19 Ves. 439. See and consider *Jennings* v. *Bond*, 2 J. & L. 720.

A registered *lis pendens* does not create a charge or a lien on property, nor does it excuse a purchaser from completing his contract, but it merely puts him upon inquiry into the validity of the plaintiff's claim. *Bull* v. *Hutchens*, 32 Beav. 615.

A purchaser for valuable consideration from the settlor, who has made a voluntary settlement, will not be affected by a suit praying an execution of the trusts of the settlement. *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180, and see *Beyfus* v. *Bullock*, 7 L. R. Eq. 391.

As the relief sought by the doctrine of *lis pendens* against a bonâ fide purchaser for value without actual notice has been considered a hard case, in a Court of Equity, the Court where the plaintiff had some defect in his proof, refused to give him leave to amend or to make any fresh proof after publication. *Sorrell* v. *Carpenter*, 2 P. Wms. 483.

As a registered *lis pendens* could not be vacated without the consent of the person by whom it was registered, and such consent was sometimes withheld, although the suit or proceeding was at an end or was not being bonâ fide prosecuted, it has been enacted

"that the Court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted bonâ fide, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it, and may, in the discretion of the Court, direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacating thereof." 30 & 31 Vict. c. 47, s. 2.

As to the liability of a solicitor for neglecting to register a *lis pendens*, see *Plant* v. *Pearman*, 41 L. J. Q. B. (N. S.) 200; 20 W. R. (Q. B.) 314.

ALDRICH *v.* COOPER.
DURHAM *v.* LANKESTER.
DURHAM *v.* ARMSTRONG.

Nov. 24, *Dec.* 7, 8, 10, 1802; *April* 26, 1803.

[Reported 8 ves. 382.]

Marshalling.]—*Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place against both the freehold and the copyhold estates, so far as the personal estate has been taken away from them by such specialty creditor.*

Mortgage of freehold estate, with a covenant for better securing the payment, to procure admission to and to surrender a copyhold estate, and in the meantime to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable.

IN these causes the usual decree was made for an account of what was due to the plaintiff Aldrich, a simple contract creditor of the intestate John Cooper, and all other the creditors; and, in case the creditors by specialty should exhaust any part of the personal estate, it was declared, that the simple contract creditors were entitled to stand in their place, &c.

The Master's report stated, that the testator died seised of freehold estates of inheritance, subject to a mortgage made by the intestate, by indentures dated the 6th of October, 1791, for 1300*l.*; by which indentures also, for better securing the payment, he covenanted with the mortgagee to procure himself to be admitted to copyhold estates, and that he would surrender them to the mortgagee; and that

until such surrender, he would stand seised of the premises in trust for the mortgagee.

The intestate died in June, 1792, not having been admitted to the copyhold estates, leaving five sisters his coheiresses-at-law, who, in September, 1792, were admitted to the copyhold estates as coheiresses of the intestate, and immediately afterwards surrendered to the mortgagee for securing what was due upon the mortgage and two bonds by the intestate to the mortgagee. The widow of the intestate took out administration, and paid out of the personal estate 767*l.* in part of the mortgage and bonds. The personal estate being exhausted, when the cause came on for further directions, a question arose, *whether the creditors by simple contract were entitled to stand in the place of the specialty creditors in respect of what they had drawn from the personal estate, against the copyhold as well as the freehold estates.*

Mr. *Romilly*, for the plaintiff, said, that, if the question as against the copyhold estate could be considered open, the principle is, that where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much, against the fund to which they otherwise could not have access; but he admitted this case could not be distinguished from *Robinson* v. *Tonge* (*a*).

(*a*) Stated in Mr. Cox's note, 1 P. Wms. 680, edit. 5.

Mr. *Pigott*, for the co-heiresses, relied upon the circumstance, that the only act as to the copyhold estate was the covenant for farther security to be admitted, and to surrender to the mortgagee, and in the meantime to stand seised in trust for him; showing the intention, that the freehold estate should be first applied as the primary fund —the copyhold being only a subsidiary security.

Lord Chancellor Eldon.—The words, "for better securing the payment," are not thrown in for the purpose of making the freehold estate applicable first; but the common form of a mortgage of freehold and copyhold estates is to make the freehold liable, with a

covenant to surrender the copyhold, in order to save the fine.

It is necessary to look into the case that has been cited. Freehold estates are not assets for simple contract debts(*a*); and I should have thought the same reasoning that governs that case would have applied to this.

(*a*) But see now 3 & 4 Will. 4, c. 104.

1802. *Dec.* 7, 8.

Mr. *Romilly* and Mr. *Stratford* for the plaintiffs.—The case before Lord *Hardwicke* certainly cannot be distinguished from this; but it is impossible to support that case upon the principles upon which the Court has always acted as to marshalling assets. That case is not reported upon this point, except in Mr. Cox's note, though it is in several books upon others; nor has the point been before the Court in any other case, nor the ground taken by Lord *Hardwicke* ever acted upon in any other instance. The principle as to marshalling assets is stated in *Lanoy* v. *The Duke of Athol* (*b*), viz., that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien. If it is sufficient to say, the creditor disappointed had no claim in law or equity upon the fund, that would be an answer in every case. In the instance of a simple contract creditor, disappointed by the specialty creditors taking payment out of the personal estate, he has no claim in law or equity upon the real estate. So a legatee, where the creditors exhaust the personal estate, has no claim but what the testator gives him. In *Lanoy* v. *The Duke of Athol*, the case is put of a mortgage of two estates, and a subsequent mortgage of one of them to another person; if that estate is insufficient to pay both, the first mortgagee shall be compelled to take satisfaction out of the other estate, in order to leave to the second mortgagee that upon which alone he can go. The same argument would occur, that the second mortgagee had contracted only for a security upon the one estate, and had no claim upon the other. So a widow is entitled to her paraphernalia, though not against creditors; but if a mortgagee chooses to take them in satisfaction of

(*b*) 2 Atk. 446.

his debt by bond or covenant, a Court of equity will ascertain the value, and make her a creditor for that upon the mortgaged estate: *Tipping* v. *Tipping* (*a*). Upon what ground, if *Robinson* v. *Tonge* is right, can she stand as a mortgagee upon the real estate? The distinction is clear, upon *Lutkins* v. *Leigh* (*b*), and *Forrester* v. *Lord Leigh* (*c*), that, though the Court will marshal for legatees against a descended estate, they will not against a devised estate; but they shall stand in the place of a mortgagee for what he takes out of the personal estate. It would be very extraordinary if the Court would marshal by placing a legatee in the situation of a mortgagee against the copyhold estate, and would not do that for creditors.

(*a*) 1 P. Wms. 729.

(*b*) Ca. t. Talb. 54.

(*c*) Amb. 171.

Mr. *Pigott* and Mr. *Fonblanque* for the defendants.—These are the copyhold estates of an intestate: no intention is demonstrated to subject them to debts by any testamentary disposition. They are not assets, either at law or in equity: not liable to debts farther than by express contract. *Robinson* v. *Tonge* is not inconsistent with the cases, considering the subjects to which they apply. Marshalling is confined to assets, and goes no further than the jurisdiction over them. Copyhold estate is not a subject of that jurisdiction, specialty creditors having no claim upon that, as they have upon freehold estate (*d*), which therefore is marshalled. The distinction is, that the specialty creditors have resort to the one fund, and not to the other. To the effect of making the copyhold estate bear its proportion of the mortgage, the heir is bound by *Robinson* v. *Tonge;* but the Court will not go farther than to prevent an election to the prejudice of other claims upon the freehold estate. It is safer to adhere to a case so precisely in point, than to unsettle this question after such a length of time, because in other cases there is an apparent contrariety of principle. There is no case in which that has been brought again before the Court, much less has that authority been impugned. In all the cases that have been put, the Court was applying the principle of marshalling assets. That phrase implies an equitable arrangement of two funds of the description of assets.

(*d*) Copyhold as well as freehold estates are now liable to the payment of debts both by specialty and simple contract. See 3 & 4 Will. 4, c. 104.

This sort of case must have arisen repeatedly; and yet there is no instance of a determination the other way, which is evidence of the general understanding.

Mr. *Romilly*, in reply.—*Robinson* v. *Tonge* is certainly a very great authority; but it is to be observed, that it was decided soon after Lord *Hardwicke* got the Great Seal; and as to the length of time, and the acquiescence under it for seventy years, during sixty years of that time it was utterly unknown. Mr. Cox, when he published his first edition of Peere Williams, had not found that case, and it was not published till 1793. There is no instance of its having been admitted or cited as an authority. No case corresponding with it can be found; neither can I show one overruling it. There is complete silence on both sides; but that is in favour of the plaintiff, as it is not probable that a note would be taken of a decision establishing no new doctrine, but merely following an established rule. So, it must be supposed there have been many instances of marshalling against copyhold estate. It is objected, that marshalling is merely a distribution of the different assets by such an arrangement as will satisfy all the creditors, and that copyhold estate is not assets. But that which is called *marshalling* is merely that rule with respect to the two funds, stated by Lord *Hardwicke* in *Lanoy* v. *The Duke of Athol*, and is called *marshalling assets*, merely as being generally applied to a case of assets. But the doctrine is applied to other cases, where the parties are living, as the case mentioned in *Lanoy* v. *The Duke of Athol*, of the two mortgages. So, where the Crown, by an extent, has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour by letting him stand in the place of the Crown upon other funds not comprised in his mortgage. Another instance is the case of a surety, who is put in the place of the creditor against the other securities, though he has no charge against them. That is the common equity: *Tynt* v. *Tynt* (*a*), and *Dering* v. *Lord Winchelsea* (*b*); in which each surety had given a

(*a*) 2 P. Wms. 542.

(*b*) 1 Cox, 318; ante, Vol. 1, p. 106.

distinct security. The same principle is applied in all these cases.

But can these copyhold estates be said, in any just sense, not to be assets? In other cases, the Court does not proceed against assets. Real estate is not assets for payment of simple contract debts. It must be contended, that even if the debtor makes the copyhold estate assets, the Court cannot marshal. Suppose he surrendered to the use of his will, and devised it for payment of specialty debts, can there be a doubt that, if the specialty creditors chose to take satisfaction out of the personal estate, the simple contract creditors would be put in their place? Why should they not, then, where he has made the copyhold estate a fund for the payment of this debt by his deed?

Lord Chancellor Eldon.—I cannot yet find this case among Lord *Hardwicke's* notes. I feel it to be my duty to understand the principle of the case before I confirm it, or to decide against it upon a principle stated from this place so clear, that there can be no doubt upon it. I was surprised at the case when it was stated. Suppose there was no freehold estate, but there was a copyhold estate, which the owner had subjected to a mortgage, and died, it is clear the mortgagee, having two funds, might, if he pleased, resort to the copyhold estate. But would this Court compel him to resort to it? If so, the Court marshals by the necessary consequences of its act. If the Court would not compel him, it is not clear that it is purely matter of his will whether the simple contract creditors shall be paid or not? That, at least, contradicts all the authorities, that if a party has two funds (not applying now to assets particularly), a person having an interest in one only has a right in equity to compel the former to resort to the other, if that is necessary for the satisfaction of both. I never understood, that if A. has two mortgages, and B. has one, the right of B. to throw A. upon the security which B. cannot touch, depends upon the circumstance whether it is a freehold or a copyhold

Instances of the rule, that a person, having a double fund, shall not, by his option, disappoint another, who has only one.

mortgage. It does not depend upon assets only: a species of marshalling being applied in other cases, though technically we do not apply that term except to assets. So, where in bankruptcy the Crown, by extent, laying hold of all the property, even against creditors, the Crown has been confined to such property as would leave the securities of incumbrancers effectual (*a*). So, in the case of the surety (*b*), it is not by force of the contract; but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage of a copyhold estate exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons.

(*a*) And see *Sagitary* v. *Hyde*, 1 Vern. 455.

(*b*) See *Dering* v. *Earl of Winchelsea*, ante, Vol. 1, p. 106, and note.

So, also, in a case which this Court calls a just distribution of the effects of a deceased person, a simple contract creditor has no manner of hold upon the freehold estate. How, then, is he allowed in this Court effectually to apply it for his satisfaction? Not upon the ground that it is assets, either by will or by contract inter vivos; but upon the ground, that the specialty or mortgage creditor, having two funds, shall not, by his will, resort to that, by going to which he will disappoint as just a creditor, who cannot resort to any other. *The principle in some degree is, that it shall not depend upon the will of one creditor to disappoint another.* Then, what is the distinction as to the copyhold estate? The question is, whether the debtor has not subjected the copyhold estate to the extent of the mortgage imposed upon it; whether he has not decided that his property, to that extent, shall be liable to some debt? And the Court will extract this farther principle, *that a creditor who can make it liable to that extent, shall not, by his will, defeat another; the former having two funds, the latter only one.* The principle is farther demonstrated by the cases of contracts by specialty that do not affect the real estate; as a bond, not mentioning heirs: there, according to Lord *Hardwicke*,

there is no marshalling, as there are not two funds, and therefore no one is disappointed by the option of another; the act of the creditor's will necessarily originating out of the security he has. *Robinson* v. *Tonge*, to a certain degree, relieves simple contract creditors. The estate is charged expressly with the payment of that debt: and therefore, if the freehold and copyhold estates go to different heirs, that charge is the foundation for this Court's applying the principle of contribution; not because it is assets, but because it is charged, not being assets. The effect of that, as to simple contract creditors, is, that resort may be given to them upon the unexhausted part of the freehold estate, as the specialty creditors are, to a certain degree, thrown upon the copyhold.

1802. *Dec.* 10.

Lord Chancellor Eldon.—I have looked into every book, and can find nothing material upon this point either in print or manuscript. No book notices that there was any such point in *Robinson* v. *Tonge;* but it is clear, from the Registrar's book, by the arrangement of the decree, that the point must have occurred. The specialty creditors insisted that they had a right to have the whole copyhold estate applied to the mortgage, in order to leave the freehold estate as assets for debts. Upon that case, if that decision had not been made, I should have thought they would have had that right. I cannot conceive the principle upon which that decision stands. Mr. Cox had it from a book of Lord *Redesdale's*, a note-book of Sir *Thomas Sewell*, who, I have no doubt, took the note himself, and preserved it as a special case. No case, therefore, can be entitled to more respect. The difficulty is this:—Suppose the personal estate to be 1500*l.* and simple contract debts to that value, and a mortgage of that amount upon freehold and copyhold estates; the mortgagee, if he pleases, may call for payment out of the estate pledged. It is clear, *if no third persons are concerned* (*a*), the Court would arrange

(*a*) As to third

between the two estates, if they went to different persons. In that case, *if no third persons were concerned*, and the estates were of equal value, that sum would be divided between them, and the simple contract creditors would receive the whole personal estate. If the mortgagee chose to exhaust the whole personal estate, the consequence, if that doctrine is right, is, that the simple contract creditors would stand in his place against the freehold estate at least, for the proportion of the mortgage that estate ought to bear. Why? That is not the act of the testator, nor of the law. There is no more a lien for them upon the freehold estate than upon the copyhold. But the Court has said, and the principle is repeated very distinctly in *The Attorney-General* v. *Tyndall* (*a*), that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds, shall take to that which, paying him, will leave another fund for another creditor. If that is so as to simple contract creditors, having no connection with the freehold estate, except that principle of equity, why is not the same principle to apply to copyhold estate? Copyhold estate is not chargeable (*b*) with debts; neither is freehold estate chargeable with simple contract debts (*c*): but this copyhold estate is expressly charged with a debt: and if freehold estate is applied to simple contract debts, because charged with another debt, why is not copyhold estate?

parties being concerned, see *Averall* v. *Wade*, L. & G. t. Sugd. 252; *Barnes* v. *Racster*, 1 Y. & C. C. C. 401.

Principle, that a creditor having two funds, shall take to that which, paying him, will leave another fund for another creditor.

(*a*) Amb. 614.

(*b*) The word "Charged" in the report is evidently used by mistake.

(*c*) But see now 3 & 4 Will. 4, c. 104, rendering freeholds and copyholds liable to all debts.

1803. *April* 26.

Lord Chancellor Eldon.—This instrument, as far as it respects the copyhold estate, is certainly an inaccurate security: for the mortgagor, covenanting to procure himself to be admitted and to surrender, and in the meantime to stand seised to the use of the mortgagee, not being himself admitted, could not with propriety be said in the meantime to stand seised, as, after admission, in a sense, he might. The effect of the deed is an agreement in equity, pledging the copyhold estate for the payment of that sum together with the freehold estate; and I state

it in these terms, as I do not understand it to be an instrument of mortgage of the freehold estate, with no more than a covenant that, if the freehold estate should be deficient, the copyhold should be a security in aid; but I look upon it as giving the mortgagee a legal estate in the freehold and an equitable estate in the copyhold; thereby giving him recourse to two funds for the payment of his debt.

The question is, whether, for the sake (if it is necessary) of discharging the debts, and particularly the simple contract debts of the mortgagor, the Court will go farther than it appears to have done in a case which I found, I confess very much to my surprise, in Mr. Cox's note. I never had heard of it before. I do not find, either in print or manuscript, that it has found its way to the notice of the public, except through the channel from which Mr. Cox derived his information. There is no other note of it. Yet there is no doubt of the authenticity of that note; for Mr. Cox has, in this, as in all other cases (which makes his work of so much value in the library of a lawyer), examined the Registrar's book, which corresponds with the note. At the same time, no notice is taken of that case, or any other of that date, in Lord *Hardwicke's* notes. In fact, however, the records of the Court prove that there was such a case. I understand, by the note, that there being no fund but the freehold and copyhold estates, and the mortgage creditor having both those estates in his mortgage, it was desired that equity, in order to satisfy the specialty creditors, would require him to take his satisfaction out of the copyhold estate alone. The principle stated by the Court, in answer, that copyhold estates are not liable, either in law or equity, to the testator's debts, farther than he subjected them thereto, is undeniably true. But the question is, how it is to be applied, when the testator has, by contract, subjected his copyhold estate to the whole of the debt; though at the same time subjecting an estate of another species also to the whole debt. I understand the opinion of the Court to have been, considering it a

due application of the principle stated by Mr. Cox, that none of the rules subject any fund to a claim to which it was not before subject; but they only take care that the election of one claimant shall not prejudice the claims of others; that there were a freehold and copyhold estate both liable to the whole mortgage by the contract and act of the testator in his life; that though the specialty creditors could not be wholly paid, unless the mortgage was thrown upon the copyhold estate, to the intent that the freehold might be open to the specialty creditors, yet the copyhold should only bear its proportion; that is, that a value should be set upon each estate; and if that distribution of the two funds left any specialty creditor unpaid, they must abide by the loss. It is quite clear this case is by no means a due application of that principle stated by Mr. Cox. *Both the copyhold and the freehold estates were before subject to the claim;* and the converse of that proposition seems in some degree to follow from making the election of the mortgagee determine how far the specialty creditors shall or shall not be paid.

I have had an opportunity of communicating with Lord *Redesdale* upon this case, and have his Lordship's authority to say, that he can reconcile it with no principle; that it was as great a surprise upon him as it was upon me; and he considers it as a case standing altogether by itself, and not reconcilable to the principles which govern the Court in a great variety of other instances. I have also the full concurrence of Lord *Redesdale's* opinion, that he would not determine according to that authority. In the consideration of this subject, the word "assets" has been very frequently used. But when you come to look at the case of *marshalling*, though that term so frequently occurs, *the operation is upon the principle, that the party has a double fund.* It is said copyhold estate is not assets. Clearly it is not assets for specialty debts, not even for the debts of the Crown. But is freehold estate assets for simple contract debts? It is not, neither in law nor equity (*a*). Upon what ground, then, does the Court say, in given cases, simple contract debts shall be paid out of

Copyhold estate not assets for specialty debts, not even debts to the Crown.

(*a*) Both freehold and copyhold estates

the real estate? Not upon the ground of assets; but upon this, that, not every creditor has a pledge of land, but a specialty creditor has a double fund to resort to. There may be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir. Though he has a pledge of the land, it is not as assets, or as a specialty creditor. But if he has a bond or covenant in the deed, he is a specialty creditor, whose demand after the death of the mortgagor would affect the heir. In that case, then, the Court says, as that specialty creditor, by his specialty contract, can affect the land, he has two funds: the freehold and the personal estate: and he shall not by his election disappoint the natural and moral equity of the creditor by simple contract to be paid out of the single fund, which his debt affects. The simple contract creditor, therefore, has no more in law any claim against the freehold estate than the specialty creditor in *Robinson* v. *Tonge* had upon the copyhold estate. But, in the former case, the Court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor; and how can a due application of that principle be made, if it is not applied where the specialty creditor has a claim against the freehold estate, but not against copyhold estate as any creditor of any sort, but both estates being pledged and made a double fund by the act and deed and contract of the mortgagor?

are now assets for the payment of all debts. See 3 & 4 Will. 4, c. 104.

Suppose another case: two estates mortgaged to A., and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him. This has been carried to a great extent in bankruptcy; for a mortgagee, whose interest in the estate was

Instances of the rule, that a person, having a double fund, shall not, by his option, disappoint another who has only one of them.

affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief; that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect per directum, because the Crown affected those in pledge to him (*a*). Another case may be put: that a man died, having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A., and the freehold estate only was mortgaged to B.; and that B. was not only a mortgagee of the freehold estate, but also a specialty creditor by a covenant or a bond. In that case, as well as in this, it might be said the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt that, being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity should throw the prior incumbancer upon the estate to which the other has no resort (*b*).

(*a*) And see *Sagitary* v. *Hyde*, 1 Vern. 455.

(*b*) See *Gwynne* v. *Edwards*, 2 Russ. 289, n.

Right of legatees to stand in the place of specialty creditors, paid out of the personal estate against estates descended;

The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling: that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets; but with relation to the fact of a double fund. Both are in law liable to the creditors, and therefore by making the option to go against the one, they shall not disappoint another person, who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has, by his own act in his life, made liable to the whole of the debt a copyhold estate, now in law liable,

and who, having also a freehold estate, must be understood to mean, that the freehold estate shall be liable according to law to his specialty debts.

not against specific devisees, unless devised subject to debts, or a mortgage.

The case is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees, for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and as, by that denotation of intention, the creditor has a double fund,—the land devised, and the personal estate,—he shall not disappoint the legatee (*a*). The case is also the same, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator; as in *Lutkins* v. *Leigh* (*b*): there he shall not disappoint the legatee. So the case of *paraphernalia* is very strong for this proposition, that, wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator.

(*a*) See *Paterson* v. *Scott*, 1 De G. Mac. & G. 531.

(*b*) Ca. t. Talb. 54.

The claim to *paraphernalia* not to be disappointed by the effect of the option of a creditor having a double fund.

The conclusion therefore is, that the case of *Robinson* v. *Tonge* is not reconcilable with the general classes of cases; and therefore, if it is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate.

Aldrich v. *Cooper* is generally cited as the leading case upon the doctrine of marshalling, which, although, in consequence of legislative enactments, not so frequently called into exercise as in former years, is still of considerable importance, and forms one of the most useful branches of equitable jurisdiction: *Hanby* v. *Roberts*,

Amb. 127; *Tombs* v. *Roch*, 2 Coll. 497; *Tidd* v. *Lister*, 10 Hare, 157; *Paterson* v. *Scott*, 1 De G. Mac. & G. 531. It depends upon this principle, as laid down by Lord *Eldon* in *Aldrich* v. *Cooper*, that *a person having two funds to satisfy his demands, shall not, by his election, disappoint a party who has only one fund.* If, therefore, a person, having a claim upon two funds, chooses to resort to the only fund upon which another has a claim, that other person shall stand in his place for so much against the fund, to which otherwise he could not have access; the object of the Court being, that every claimant shall be satisfied, as far as, by any arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of such claims. See *Ex parte Kendall*, 17 Ves. 520.

Marshalling will not, unless founded on some equity, be enforced between persons, unless they are creditors of the same person, and have demands against funds the property of the same person. "It was never said," observed Lord *Eldon*, "that if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all the obligations arising out of these complicated relations may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity giving B. the right, for his own sake, to compel me to seek payment from A.:" *Ex parte Kendall*, 17 Ves. 520.

It is, moreover, essential to the application of the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds *belonging* to the *same person* to which he can resort. Thus, it has been held that a legatee in a will of a tenant in tail of land has no right to throw judgment creditors of the testator, whose judgments attach on the land under the statute 3 & 4 Vict. c. 108, s. 22, exclusively on those lands, in exoneration of his general assets. See *Douglas* v. *Cooksey*, 2 I. R. Eq. 311. There a testator seised in fee simple of lands, A., and in tail of lands, B., by his will, left an annuity charged on all his property. A judgment creditor of the testator's, whose judgment was a charge on the estate of which the testator died seised in fee, and also by the statute 3 & 4 Vict. c. 105, s. 22, on those of which he was seised in tail, sold first, estate A., which was insufficient to pay him, and afterwards the lands of B. It was

held by the Master of the Rolls of Ireland (*Walsh*) that the annuitant had no right to marshal as against the remainderman in tail, so as to be recouped out of the produce of the sale of B. the amount paid to the judgment creditor out of the produce of the sale of A. "To authorise marshalling," said his Honor, "it is obviously necessary not only that a claim should exist against a fund, subject in common with another fund to a paramount liability; but also that those interested in that other fund *should not have a right to throw the liability on the fund of the claimant.* A man's own property—on which alone his legatees can claim—must be applicable to his debts in preference to the property of another, against which the statute merely gives a remedy. The case is much clearer than the instance of an estate made assets by the exercise of a power, as in *Fleming* v. *Buchanan*, 2 De G. Mac. & G. 976, or the instance of paraphernalia, to which it was compared in argument." See also *In re International Life Assurance Society*, 2 Ch. D. 476.

The doctrine of marshalling, moreover, is not applicable unless there are two funds already in existence before the question relating to it is raised. *In re Professional Life Assurance Company*, 3 L. R. Eq. 668; *In re State Fire Insurance Company*, 1 H. & M. 457; 1 De G. Jo. & Sm. 634; *In re International Life Assurance Society*, 2 Ch. D. 476.

It may here be mentioned that the Court will marshal, although the right to marshal may not be distinctly raised by the pleadings: *Gibbs* v. *Ougier*, 12 Ves. 413.

The doctrine of marshalling has been enforced, not only by Courts of Equity, but also, as mentioned in the principal case, in Bankruptcy (*Ex parte Stephenson*, 1 De Gex, 586; *Ex parte Alston*, 4 L. R. Ch. App. 168); and in the Court of Admiralty: *The Trident*, Simson, 1 W. Rob. 29, 35, post p. 113.

It is proposed in this note to consider the doctrine of marshalling, 1st, as exercised in the administration of the assets of a deceased person; 2nd as between persons holding securities; and 3rdly, as to marshalling in the Court of Admiralty.

I. *As to marshalling in the administration of assets.*—1st. *Between creditors.*—When under the old law creditors by simple contract had no claim upon real assets, unless charged with, or devised for, the payment of debts, a Court of equity would compel specialty creditors who might resort, in the first instance, to the personal estate, in priority of simple contract creditors, and to the real assets, in exclusion of them, to recover satisfaction, in the first place out of the real assets as far as they went; or, if the specialty

creditors had already exhausted the personal assets in payment of their claims, the simple contract creditors would be put to stand in their place against the real assets, whether devised or descended, as far as the specialty creditors might have exhausted the personal assets (*Sagitary* v. *Hyde*, 1 Vern. 455; *Neave* v. *Alderton*, 1 Eq. Ca. Abr. 144; *Wilson* v. *Fielding*, 2 Vern. 763; *Galton* v. *Hancock*, 2 Atk. 436); so would a voluntary specialty creditor, though liable to be postponed to simple contract creditors: (*Lomas* v. *Wright*, 2 Russ. & My. 769.) And a specialty creditor, to whose debt copyholds (previous to 3 & 4 Will. 3, c. 104) were not liable, might stand in the place of a mortgagee of the copyholds who was paid out of the personal estate: *Gwynne* v. *Edwards*, 2 Russ. 289, n.

But simple contract creditors were not entitled to have a larger fund for payment of their debts than they had originally. Thus, in *Cradock* v. *Piper*, 15 Sim. 301, where specialty creditors had exhausted their debtor's personal estate, a decree was made for marshalling his assets. A considerable time elapsed before the real estate could be made available for the purposes of the decree: it was held, by Sir *L. Shadwell*, V.-C., that the simple contract creditors were not entitled to have the interest which would have accrued on the specialty debts if they had remained unsatisfied, as well as the amount of the personal estate, raised out of the real estate, and applied towards satisfaction of their debts.

Where, however, specialty debts of a deceased person had been paid out of his personal estate, and at the time of such payment the personal estate was sufficient also to pay his simple contract debts, and the executor *subsequently* committed a devastavit, which rendered the personal estate insufficient to pay simple contract creditors, it was held by Lord Chancellor Brady, that they were entitled to be paid out of the real estate of the debtor, to the extent to which the personal estate had been applied in payment of the specialty debts: *Ellard* v. *Cooper*, 1 Ir. Ch. Rep. 376; but see *Kearnan* v. *Fitzsimon*, 3 Ridg. P. C. 16.

The statutes 3 & 4 Will. 4, c. 104, rendering freehold and copyhold estates liable to simple contract debts, and 32 & 33 Vict. c. 46, making the debts by simple contract of persons dying on or after the 1st of Jan. 1872, payable pari passu, with their debts by specialty, have obviated the necessity of the Court resorting to the doctrine of marshalling, for enforcing their payment.

The principles upon which the Courts act in cases of marshalling was departed from in the case of a mortgagee, in the administration of the assets of a deceased mortgagor in Chancery. There, it might have been supposed, that a

mortgagee having two funds, viz., the mortgaged estate and the general assets, would as against the general creditors only have been allowed to prove against the latter fund for so much of the debt as the mortgaged estate was deficient to pay; and this was so decided by Sir *John Leach*, M.R., in *Greenwood* v. *Taylor*, 1 Russ. & My. 185, following the rule of bankruptcy in such cases. It was held, however, by Lord *Cottenham*, in *Mason* v. *Bogg*, 2 My. & Cr. 448, overruling the case of *Greenwood* v. *Taylor*, that in an administration suit a mortgagee might prove his whole debt and afterwards realise his security for the deficiency: see also *Rome* v. *Young*, 3 Y. & C. Exch. Ca. 194; 4 Y. & C. Exch. Ca. 204; *Tipping* v. *Power*, 1 Hare, 410; *King* v. *Smith*, 2 Hare, 239; *Wickenden* v. *Rayson*, 6 De G. Mac. & G. 210; *Armstrong* v. *Storer*, 14 Beav. 535; *Tuckley* v. *Thompson*, 1 J. & Hem. 130; Trower's Prevalence of Equity, 1—6.

The same rule was followed where a company was being wound up under the Companies Act, 1862, and a creditor holding security was entitled to prove for the whole amount that was due to him, and not merely, as in bankruptcy, for the balance remaining due, after realising or valuing his security; and he could prove for the amount due at the time his claim was sent in, without regard to securities which had been realised by him between the sending in his claim and its being adjudicated upon: *Kellock's case*, 3 L. R. Ch. App. 769; *In re Oriental Commercial Bank*, 6 L. R. Eq. 582; *Fottrell* v. *Kavanagh*, 10 I. R. Eq. 256.

Recent legislation has, however, adopted the rule laid down in *Greenwood* v. *Taylor*. See the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, whereby it is enacted "that in the administration by the Court of the assets of any person who may die after the commencement of this Act (1st of November, 1875), and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities, and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who, in any such case, would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the

assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this act."

This section does not apply to any case of a winding-up which had commenced before the act came into operation. *In re Joseph Suche & Co., Limited*, 1 Ch. D. 48.

The demand of a simple contract creditor, as against the real estate of a testator, which would otherwise be barred by the Statute of Limitations, will not, in general, be kept alive so as to preclude the operation of the statute, by the effect of any right which might exist, or might have existed among the parties, to have the assets of the testator marshalled. *Fordham* v. *Wallis*, 10 Hare, 217, 229.

But under special circumstances, a simple contract creditor has been held not to be barred by the statute, so as to prevent the filing of a supplementary bill to bring recently discovered descended estates within the principle of marshalling, where, under the original bill, there was a prayer for the marshalling of assets. See *Vickers* v. *Oliver*, 1 Y. & C. C. C. 211. There upon the death of a testator, who had devised his real estates for payment of his debts, a bill was filed on behalf of his creditors, both by specialty and simple contract, to have his assets administered and his real estate marshalled. In that suit a receiver was, in 1821, appointed of all his estates. It was afterwards discovered that the testator had died seised of an estate which had not passed by his will but had descended to his heiress at law, Mrs. Marsh, upon whose death, in 1822, it descended to the defendant Oliver. In 1840, eighteen years after Mrs. Marsh's death, a supplemental bill was filed against Oliver by one of the plaintiffs in the original suit, being a simple contract creditor of the testator, praying to have the benefit of that suit as against the descended estate. It was held by *Knight Bruce*, V.-C., that the original suit was to be treated as a suit for the administration of all the testator's real estates, and as the plaintiff sought to affect the descended estate by standing in the place of the specialty creditors, he was not barred by the Statute of Limitations, but was entitled to have the descended estate marshalled in his favour. See the remarks in *Fordham* v. *Wallis*, 10 Hare, 229; *Gibbs* v. *Ougier*, 12 Ves. 413; *Busby* v. *Seymour*, 1 J. & L. 527.

2nd. *Between Legatees.*—The principle of marshalling is applicable between legatees; as where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged; if the personal estate

prove insufficient to pay them all, the legacies charged on the real estate shall be paid thereout; or if they have been paid out of the personal estate, the other legacies, as to so much, shall stand in their place as a charge upon the land: *Hanby* v. *Roberts*, Amb. 127; *Masters* v. *Masters*, 1 P. Wms. 421; *Bligh* v. *Earl of Darnley*, 2 P. Wms. 619; *Bonner* v. *Bonner*, 13 Ves. 379; *Scales* v. *Collins*, 9 Hare, 656.

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequent to the death of the testator, as the death of the legatee before the time of payment, the Court will not marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible, whereas, as against the real estate, it would sink by the death of the legatee: *Prowse* v. *Abingdon*, 1 Atk. 482; and see *Pearce* v. *Loman*, 3 Ves. 135; there a legacy charged upon real estate, and payable at a future day, was held by Lord *Rosslyn* to sink as to the real estate by the death of the legatee, before the time of payment; and that the assets could not be marshalled. "There is a singularity," observes his Lordship, "in the doctrine, as it now stands, that, as far as it affects one fund it is good; as far as it affects the other, bad; but it would be still more singular if it shall sink in one case, and not in the other, but the land, making good the personal estate, shall be charged. The point was of very little moment in *Reynish* v. *Martin* (3 Atk. 330; 1 Wils. 130). Therefore I would not follow that case to introduce a new point with regard to marshalling assets against established rules. The assets cannot be marshalled. It would be directly against *Prowse* v. *Abingdon;* the contingency is the same; and *I cannot charge the real estate indirectly.*" And see *Tombs* v. *Roch*, 2 Coll. 504.

3rd. *Between Legatees and Others.*—"One rule of marshalling assets," observes Lord *Hardwicke*, "is clear, if there are debts by specialty and legacies, and no devise of the real estate, but it *descends;* if the creditors exhaust the personal estate, the legatees may stand in their place, and come upon the real estate; this is *against the heir-at-law.*" *Hanby* v. *Roberts*, Amb. 128; *S. C.*, Dick. 105. "For although," as observed by Lord *Eldon*, in the principal case, "in the cases of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor, the mere *bounty* of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees

shall be paid or not." And see *Culpepper* v. *Ashton*, 2 Ch. Ca. 117; *Tipping* v. *Tipping*, 1 P. Wms. 730; *Lucy* v. *Gardener*, Bunb. 137; *Lutkins* v. *Leigh*, Ca. t. Talb. 54; *Bowaman* v. *Reeve*, Prec. Ch. 577.

And it is as clear, "that if one *devises* his real estate, and gives general pecuniary legacies not charged on that real estate, and dies, leaving specialty debts, and the specialty creditors exhaust the personal estate, the legatees shall not stand in their place and come on the realty, *because it was the intention of the testator that the devisee should have the real estate, as well as the legatees be paid;*" (*Hanby* v. *Roberts*, Amb. 128; and see *Clifton* v. *Burt*, 1 P. Wms. 678; *Scott* v. *Scott*, Amb. 383; 1 Eden, 458; *Mirehouse* v. *Scaife*, 2 My. & Cr. 695; *Keeling* v. *Brown*, 5 Ves. 359); nor will a specific legatee be allowed to stand in the place of specialty creditors as against real estate devised (see *Haslewood* v. *Pope*, 3 P. Wms. 324, 5th Resolution); although, since 3 & 4 Will. 4, c. 106, the devisee be the heir; (*Strickland* v. *Strickland*, 10 Sim. 374); and it is now settled that a devisee and a specific legatee shall contribute pro ratâ to satisfy the debts of the testator which his general personal estate is sufficient to pay. See *Long* v. *Short*, 1 P. Wms. 403; *Young* v. *Hassard*, 1 J. & L. 466; *Gervis* v. *Gervis*, 14 Sm. 654; *Tombs* v. *Roch*, 2 Coll. 490; *Dugdale* v. *Dugdale*, 14 L. R. Eq. 234.

It seems that previous to the Wills Act (1 Vict. c. 26), a pecuniary legatee was not entitled to stand in the place of a creditor who had exhausted the personal assets as against a *residuary* devisee, upon the ground that previous to the Wills Act, every residuary devise was in reality specific, as it only comprehended property of which the testator was seised at the time of making his will. See *Spong* v. *Spong*, 1 Y. & J. 300, 311; *Mirehouse* v. *Scaife*, 2 My. & Cr. 695.

It has been held by some learned judges, that inasmuch as a residuary devise, subsequent to the Wills Act, comprehends all the real property of which the testator is seised at his death, such devise is not specific, and that a pecuniary legatee whose fund has been exhausted by creditors, had a right, under the doctrine of marshalling, to stand in their place as against the residuary devisee (*Dady* v. *Hartridge*, 1 Dr. & Sm. 236; *Cogswell* v. *Armstrong*, 2 K. & J. 227; *Dyer* v. *Bessonett*, 4 Ir. Ch. Rep. 382; *Barnwell* v. *Iremonger*, 1 Dr. & Sm. 242; *Rodbourn* v. *Mold*, 13 W. R. (V.-C. K.) 854; 35 L. J. (Ch.) 67; *Rotheram* v. *Rotheram*, 26 Beav. 465; *Bethell* v. *Green*, 34 Beav. 302; *Hensman* v. *Fryer*, 2 L. R. Eq. 627). The opinion has, however, since prevailed that a residuary devise of real estate

remains specific, notwithstanding the 24th section of the Wills Act makes it speak as if it had been executed immediately before the death of the testator, and that a pecuniary legatee has consequently no right to marshal assets as against residuary devisees: *Pearmain* v. *Twiss*, 2 Giff. 130; *Hensman* v. *Fryer*, 3 L. R. Ch. App. 420; *Gibbins* v. *Eyden*, 7 L. R. Eq. 371; *West* v. *Lawday*, 2 I. R. Eq. 517; *Collins* v. *Lewis*, 8 L. R. Eq. 708. *Lancefield* v. *Iggulden*, 10 L. R. Ch. App. 136, reversing the decision of *Bacon*, V.-C., reported 17 L. R. Eq. 556; *Tomkins* v. *Colthurst*, 1 Ch. D. 626.

In *Hensman* v. *Lewis*, 3 L. R. Ch. App. 420, Lord *Chelmsford*, C., although he rightly decided that a residuary devise is none the less specific since the passing of the Wills Act (1 Vict. c. 26), and that consequently pecuniary legatees had no more right to marshal as against residuary devisees than they had before the Act (*Ib.* p. 426), nevertheless, apparently by some mistake, held that residuary devisees were bound to contribute rateably with the pecuniary legatees to pay such debts as the general personal estate was insufficient to satisfy (*Ib.*). But in the subsequent case of *Collins* v. *Lewis*, 8 L. R. Eq. 708, Sir *John Stuart*, V.-C., stating it to be the settled law of the Court that personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary estate can be resorted to, declined to follow *Hensman* v. *Lewis*, as a mistaken decision. See also *Farquharson* v. *Floyer*, 3 Ch. D. 109.

Although, as we have before observed, a legatee is not entitled to stand in the place of a specialty creditor, as against real assets devised, nevertheless, where a *mortgagee* of a devised, as well as of a descended estate, has exhausted the personal assets by resorting to them in the first instance, a legatee may stand in his place, and be satisfied out of the mortgaged premises, to the extent of the personalty applied in their exoneration; for the application of the personal assets in exoneration of the real estate mortgaged, does not take place so as to defeat any legacy. See *Forrester* v. *Lord Leigh*, Amb. 171; *Lutkins* v. *Leigh*, Ca. t. Talb. 53; *Luey* v. *Gardener*, Bunb. 137; *Howell* v. *Price*, 1 P. Wms. 294; *Oneal* v. *Mead*, 1 P. Wms. 693; *Davies* v. *Gardiner*, 2 P. Wms. 190; *Rider* v. *Wager*, 2 P. Wms. 335; *Middleton* v. *Middleton*, 15 Beav. 450; and see *Wythe* v. *Henniker*, 2 My. & K. 635, 644; *Johnson* v. *Child*, 4 Hare, 87.

The doctrine of marshalling as applied in favour of legatees against heirs-at-law taking descended real estates in England is part of the *lex loci* affecting those real estates, but will not be

applicable where persons who have an interest in the personal estate only, endeavour indirectly to establish in their own favour, or for their own relief, a burthen upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask. See *Harrison* v. *Harrison*, 8 L. R. Ch. App. 342, 348.

Where a purchaser of real estate dies intestate as to such estate, but having bequeathed legacies by his will, as the vendor has two funds to resort to, viz., his lien upon the land descended and the general personal estate, the legatees may stand in his place upon the land if he resorts to the personalty in the first instance. *Spoule* v. *Prior*, 8 Sim. 189. And it seems to be settled by the more recent authorities (notwithstanding the case of *Wythe* v. *Henniker*, 2 My. & K. 635) that pecuniary legatees have the same right to stand in the place of the vendor with respect to his lien for unpaid purchase-money on estates *devised* by the purchaser, in case the vendor resorts in the first instance to the personal estate. See *Birds* v. *Askey*, 24 Beav. 618. There a trustee advanced to A. B., one of his cestuis que trustent, a part of the trust funds, to enable him to purchase a real estate. A. B. died without having repaid the money, having devised the estate, and his personal estate was insufficient to pay his debts and legacies. It was held by Sir *John Romilly*, M.R., first, that there was a lien on the estate for the trust funds; and, secondly, that the pecuniary legatees had, as against the devisees, a right of marshalling so as to have the lien satisfied primarily out of the purchased estate. See also *Lord Lilford* v. *Powys Keck*, 1 L. R. Eq. 347.

As to the right of creditors to marshal in respect of a vendor's lien, see note to *Mackreth* v. *Symmons*, vol. i., p. 356.

So, if land be *devised for*, or *made subject to*, the *payment of debts*, assets will be marshalled in favour of legatees, or annuitants, who will stand in the place of the creditors who may have been satisfied out of the personal assets: *Foster* v. *Cook*, 3 Bro. C. C. 347; *Bradford* v. *Foley*, 3 Bro. C. C. 351, n.; *Webster* v. *Alsop*, 3 Bro. C. C. 352, n.; *Arnold* v. *Chapman*, 1 Ves. 110; *Norman* v. *Morrell*, 4 Ves. 769; *Paterson* v. *Scott*, 1 De G. Mac. & G. 531; *Surtees* v. *Parkin*, 19 Beav. 406; *Rickard* v. *Barrett*, 3 K. & J. 289.

As simple contract creditors have now, under 3 & 4 Will. 4, c. 104, a right to demand payment of their debts out of the real estate of the deceased debtor, and have therefore a double fund out of which they may receive satisfaction, it follows on principle, that if they exhaust the personal assets, the legatees may stand in

their place, as to the real estate descended. In a case, however, before *Knight Bruce*, V.-C., it was argued that the stats. 3 Will. & M. c. 14, and 3 & 4 Will. 4, c. 104, were intended for the relief of creditors, and not of legatees, but his Honor was clearly in favour of marshalling for the legatees, in such a case. "The equity of marshalling," he observes, "arises from a creditor's power to resort, not from the mode in which he acquired the power of resorting, to each or either of two funds belonging to the debtor, whose rights, subject to the debt, have become divided; and though I do not forget the passages found in the reports of *Galton* v. *Hancock* (2 Atk. 424, and *Forrester* v. *Lord Leigh* (Amb. 171), it seems to me impossible, consistently with the principles of decisions of the highest authority, or consistently with any legal principle, to take the view of the effect and consequences of a liability to creditors, created merely by statute, that the devisees take in this case. Certainly, the liability, in general, of personal estate in the first instance to the debts of a deceased debtor, the intent of the Statute of Fraudulent Devises, and the intent of the statute of 1833, do not, in my judgment, establish this proposition. I have dwelt the more upon this argument, grounded on the nature and effect of statutory liability to debts, because, if it is well founded, it seems in substance not to stop short of asserting that, inasmuch as it is by statute that copyholds are assets for creditors, and freeholds for simple contract creditors, therefore there cannot be marshalling for legatees against descended copyholds, or in respect of simple contract debts against descended freeholds; it will surprise me exceedingly to hear of such a doctrine having met, or meeting, with support, or acceptance:" *Tombs* v. *Roch*, 2 Coll. 499.

4th. Paraphernalia.] — Although, with the exception of necessary wearing apparel (2 Ves. 7), a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled, therefore, to marshal assets in all those cases in which a general legatee would be entitled to do so; for instance, as against real assets descended (*Tipping* v. *Tipping*, 1 P. Wms. 730; *Probert* v. *Clifford*, 1 Atk. 440; Amb. 6; 2 P. Wms. 544, note by Cox); or real assets devised, if subjected by will to the payment of debts (*Incledon* v. *Northcote*, 3 Atk. 438; *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576; 1 Cox, 106); and if a devised estate be subject to a mortgage or other specific incumbrance, she will be entitled to marshal the assets as against the devisee, by throwing the charge upon the estate, as the legatee would have that right

(*Oneal* v. *Mead*, 1 P. Wms. 693; *Lutkins* v. *Leigh*, Ca. t. Talb. 53); but not, it seems, if the estate devised be neither subjected by will to payment of debts, nor subject to a mortgage or specific incumbrance: *Ridout* v. *Plymouth*, 2 Atk. 104; *Probert* v. *Clifford*, 2 P. Wms. 545, n.; *Forrester* v. *Leigh*, Amb. 171. But the same claims on the part of the widow would, it appears, prevail against specific legatees: *Graham* v. *Londonderry*, 3 Atk. 395; 1 P. Wms. 731; 2 Atk. 78; 3 Atk. 369; sed vide contra, *Burton* v. *Pierpoint*, 2 P. Wms. 79.

As to Paraphernalia, see ante, vol. i. p. 589.

5th. Assets not marshalled for a charity.]—An exception occurs to the equitable doctrine of marshalling, with respect to charities: for it may be stated, as a general rule, that assets are never marshalled in favour of legacies given to charities, upon the ground, as stated by Lord *Hardwicke*, in *Mogg* v. *Hodges*, 2 Ves. 53, that a Court of equity is not warranted in setting up a rule of equity contrary to the common rules of the Court, merely to support a bequest which is contrary to law. Thus, if a testator gave his real estate and personal estate, consisting of personalty savouring of realty, as leaseholds and mortgage securities, and also pure personalty, to trustees, upon trust to sell, and pay his debts and legacies, and bequeathed the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of the realty, in order to leave the pure personalty for the charity: *Mogg* v. *Hodges*, 2 Ves. 52; *Attorney-General* v. *Tyndal*, 2 Eden, 207; *S. C.*, Amb. 614; *Foster* v. *Blagden*, Amb. 704; *Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Attorney-General* v. *Earl of Winchelsea*, 3 Bro. C. C. 373; *Makeham* v. *Hooper*, 4 Bro. C. C. 153; *Crosbie* v. *Mayor of Liverpool*, 1 Russ. & My. 761, n.; *Fowdrin* v. *Gowdey*, 3 My. & K. 397; *Johnson* v. *Woods*, 2 Beav. 409.

There has, however, been a question whether there could not be a marshalling of assets where a particular legacy was given to a charity; and Lord *Hardwicke*, in several cases, was of opinion that it ought to be done: (*Attorney-General* v. *Lord Weymouth*, Amb. 25; *Attorney-General* v. *Graves*, Id. 155; *Attorney-General* v. *Tomkins*, Id. 216); but it has now been decided beyond all doubt, that if a simple pecuniary legacy is given out of two sorts of personalty, there must be an abatement in the proportion of the mixed to the pure personalty (*Ridges* v. *Morrison*, 1 Cox, 180; *Walker* v. *Childs*, Amb. 524; *Attorney-General* v. *Tyndal*, Id. 614; *S. C.*, 2 Eden, 207; *Foster* v. *Blagden*, Amb. 704; *Makeham* v.

Hooper, 4 Bro. C. C. 153; *Hobson* v. *Blackburn*, 1 Kee. 273; see also *Williams* v. *Kershaw*, 1 Kee. 274, n.; *Philanthropic Society* v. *Kemp*, 4 Beav. 581); or as Lord *Cottenham* has expressed himself, "The rule of the Court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies; then holding so much of the charity legacies to fail as would, in that way, be to be paid out of the prohibited fund:" (*Williams* v. *Kershaw*, 1 Kee. 275, n.; see also *Waite* v. *Webb*, 6 Madd. 71; *Johnson* v. *Lord Harrowby*, Johns. 425; *Jauncey* v. *The Attorney-General*, 3 Giff. 308; *Scott* v. *Forristall*, 10 W. R. (V.-C. S.) 37;) and this apportionment should be made according to the respective values of the pure and impure personalty at the testator's death: *Calvert* v. *Armitage*, 2 N. R. (V.-C. W.) 60, overruling on this point *Robinson* v. *The Governors of London Hospital*, 10 Hare, 19.

In a singular case, where executors were directed to purchase a presentation to Christ's Hospital, the result of the rule against marshalling assets for a charity was, that the bequest failed altogether, there not being sufficient money from the pure personalty alone to effect the purchase: *Cherry* v. *Mott*, 1 My. & Cr. 123.

Although a Court of equity will not marshal assets for charitable legacies, a testator may in effect himself marshal or arrange his assets, by directing his charitable legacies to be paid exclusively out of his pure personalty, and the Court will, as it is not illegal, give effect to his intention: (*Robinson* v. *Geldard*, 3 Mac. & G. 735; *Sturge* v. *Dimsdale*, 6 Beav. 462. See, however, *The Philanthropic Society* v. *Kemp*, 4 Beav. 581; 1 N. R. Ho. Lo. 452; *Nickisson* v. *Cockill*, 32 L. J. (N. S.) Ch. 753; 3 De G. J. & S. 622; *Wigg* v. *Nicholl*, 14 L. R. Eq. 92; *Wills* v. *Bourne*, 16 L. R. Eq. 487; *Miles* v. *Harrison*, 9 L. R. Ch. App. 316; and see *Gaskin* v. *Rogers*, 2 L. R. Eq. 284); and a bequest of a residue of personal estate (which included impure personalty) to trustees upon trust to divide the same among such charities in England as they should think proper, was held equivalent to a direction to the trustees in effect to marshal the residue by applying the impure personalty to some charities exempt from the Mortmain Act, and the pure personalty to other charities. *Lewis* v. *Allenby*, 10 L. R. Eq. 668.

And it seems that where a testator has charged his real estate with payment of his debts, and has directed his charity legacies to be paid out of his pure personalty, the charity legatees will have a right to stand in the place of creditors who may have exhausted the pure personalty, inasmuch as it is not the Court, but

the testator who in such cases marshals the assets: *Attorney-General* v. *Lord Mountmorris*, 1 Dick. 379.

Although the testator may have directed his charitable legacies to be paid out of his pure personalty in priority of other legacies, if he has given no direction as to the funds out of which his debts and funeral and testamentary expenses are to be paid, the pure personal estate must contribute with the other personal estate to their payment, before it can be applied in satisfaction of the charitable legacies. See *Tempest* v. *Tempest*, 7 De G. Mac. & G. 470, where Lord *Cranworth*, C., reversed the decision of Sir *W. Page Wood*, V.-C., reported 2 K. & J. 635; *Beaumont* v. *Oliveira*, 4 L. R. Ch. App. 309.

It seems that the rule of the Courts of equity in England, which will not allow marshalling in favour of legacies given to charities, is not applicable to Scotland: *Macdonald* v. *Macdonald*, 14 L. R. Eq. 60.

II. *Marshalling securities.*] — The doctrine of *marshalling* is not confined to the administration of assets; but it is applied to other cases, where the parties are living. Thus, it has been laid down, that "if a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons:" per Lord *Hardwicke*, C., in *Lanoy* v. *Duke of Athol*, 2 Atk. 446. This seems to be a correct exposition of the law, with this exception, that it seems to be immaterial whether the second mortgagee has notice of the first mortgage or not: see also *Baldwin* v. *Belcher*, 3 D. & War. 176; *Hughes* v. *Williams*, 3 Mac. & G. 690; *In re Cornwall*, 2 C. & L. 131; 3 D. & War. 173; *Tidd* v. *Lister*, 10 Hare, 157; 3 De G. Mac. & G. 857; *In re Fox*, 5 Ir. Ch. Rep. 541; *Gibson* v. *Seagrim*, 20 Beav. 614; and see and consider *In re Jones, a Minor*, 2 Ir. Ch. Rep. 544; *Heyman* v. *Dubois*, 13 L. R. Eq. 158.

And if one of two estates in mortgage is subject to a portion, the person entitled to the portion may, if it be necessary, compel the mortgagee to resort to the other estate, so that the payment of the portion as well as the mortgage may be worked out: *Lord Rancliffe* v. *Parkyns*, 6 Dow, 216.

And estates comprised in one mortgage will be marshalled in favour of a voluntary settlement, so as to throw the debt on the un-

settled estates. Thus, in *Hales* v. *Cox*, 32 Beav. 118, A. B. executed a voluntary settlement of real estate to uses in favour of his four children, and he covenanted that the estate should remain to those uses and for quiet enjoyment. A. B. afterwards mortgaged the *settled estate with his own unsettled estates*, and died. It was held by Sir *John Romilly*, M.R., that the children were entitled to throw the mortgages on the unsettled estate, and as against the legatees to prove under the covenants against the settlor's assets for the damage they had sustained by the mortgage. "It is clear," said his Honor, "that the persons who take under the voluntary settlement would, as regards the subsequent mortgages, not only take the property subject to those mortgages, but the mortgages ought, by marshalling, to be thrown as much as possible on the unsettled property, so as to liberate the settled property from the mortgage. If, by these means, the settled property will not be altogether freed from the mortgages, then I think that the persons who are entitled to the benefit of the covenants for quiet enjoyment contained in the settlement have a right to prove against the assets of the settlor for the amount to which they have been damaged, by reason of his subsequently mortgaging the settled property; that is, after providing for the testator's debts, they are entitled to priority over the legatees." See the remarks on this case, by *Christian*, L. J., in *Ker* v. *Ker*, 4 I. R. Eq. 15, reversing *S. C.*, 3 I. R. Eq. 489.

It may however be laid down as a general rule, subject to some exceptions, that the doctrine of marshalling will not be enforced to the prejudice of a third party. Thus, in *Barnes* v. *Racster*, 1 Y. & C. C. C. 401, Racster being seised of Foxhall Coppice, and a piece of land marked in a plan of the estate No. 32, mortgaged, in 1792, Foxhall to Barnes; in 1795, Foxhall to Hartwright; in 1800, Foxhall and No. 32 to Barnes; and in 1804, Foxhall and No. 32 to Williams; the subsequent incumbrancers took with notice. It was held, by Sir *J. L. Knight-Bruce*, V.-C., that the Court ought not, as against Williams, to marshal the securities. His Honor said, that, circumstanced as the case was, Hartwright and Williams stood, with regard to the matter in dispute, on an equal footing; that Barnes ought to be paid out of the respective proceeds of No. 32, and Foxhall, pari passu and rateably, according to their amounts; that the residue of the proceeds of Foxhall ought to be applied towards paying Hartwright, and that the residue of the produce of No. 32 ought to be applied towards paying Williams: a conclusion, as he considered, entirely in accordance

with the principles on which *Lanoy* v. *Duchess of Athol*, *Aldrich* v. *Cooper*, and *Averall* v. *Wade*, were decided. See also *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377; *Gibson* v. *Seagrim*, 20 Beav. 618; *Stronge* v. *Hawkes*, 4 De G. & Jo. 632; *In re Lawder's Estate*, 11 I. Ch. R. 346; *In re Rorke's Estate*, 15 Ir. Ch. Rep. 316; *Dolphin* v. *Aylward*, 4 L. R. Ho. Lo. 486.

In other words, if a mortgagor is entitled to two properties, A. and B., and makes three mortgages of them, the first including A. and B., the second A. only, and the third both A. and B., the Courts of equity would not marshal in favour of the second against the third mortgagee, but would direct that the first mortgagee should be paid rateably out of estates A. and B., so that the second mortgagee should be satisfied out of A., and thus leaving what remained of A. and B. for the third mortgagee.

But if the third mortgagee, by his mortgage, takes expressly, *subject to and after payment of the first two mortgages*, the second mortgagee will be entitled to marshal as against the third. See *In re Mower's Trusts*, 8 L. R. Eq. 110. There a mortgagor being entitled in reversion to funds A. and B., made three mortgages. The first mortgage included A. and B., the second mortgage included B. only, and the third mortgage included A. and B., but was made subject to, and after payment of the two former mortgages. Fund A. was absorbed in payment of the first mortgage. It was held by Lord *Romilly*, M.R., that the second mortgagee was entitled to marshal as against the third by standing in the place of the first mortgagee as against fund B.

Where, moreover, there are judgments affecting estates, and some of the estates are settled for valuable consideration, and there has been either a mere concealment of the judgments and, à fortiori, if there is a declaration or covenant in the settlement that the estate is free from incumbrances, the trustees entitled to the settled estates, will be entitled to the benefit of the doctrine of marshalling, by having the judgments thrown upon the unsettled estates, not only as against the settlor himself but also as against judgment creditors of the settlor subsequent to the settlement, who do not stand in any better position than the settlor himself. See *Averall* v. *Wade*, L. & G. t. Sugd. 252, where a person, being seised of several estates, and indebted by judgments, settled one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, it was contended, by the subsequent judgment creditors, that, as they only affected the unsettled estates, on the principle in *Aldrich* v. *Cooper*, as they had only one

fund, they had a right to compel the prior judgment creditors, who had two funds,—the settled and unsettled estates,—to resort to the settled estates; or, at any rate, that the settled estates ought to contribute to the payment of the prior judgments. Lord Chancellor *Sugden*, however, held that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates: on the contrary, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute. See also *Going* v. *Farrell*, Beat. 472.

So where there was a mortgage upon two estates, and a judgment mortgage upon one of them in Ireland, followed by a judgment mortgage upon both of the estates, it was held that the first judgment mortgage creditor had a right to marshal as against a second judgment mortgage creditor. See *In re Lynch's Estate*, 1 I. R. Eq. 396; in this case there was first a mortgage by deed, of lands A. and B.; secondly, in 1856, two judgments registered as mortgages under the Judgment Mortgage Act, 1850, against the A. lands; and thirdly, in 1857, a judgment registered as a mortgage against the entirety of the lands A. and B. The mortgagees having sold and applied in payment of their debt the whole of lands A., it was held by *Dobbs*, J., that the two judgment creditors of 1856 had a right to marshal as against the judgment creditor of 1857. "The judgment mortgage creditors of 1856," said his Lordship, "stand, with regard to the judgment mortgage creditor of 1857, in the same position as if they were mortgagees under a deed, whereas the latter is, as to them, in the position of an old judgment creditor, and in no better position. Suppose there were, first, a charge affecting the whole of certain lands; next, a mortgage of a portion; next, a judgment affecting the whole; would the mortgagee have a right to marshal as against the judgment creditor? I consider it a settled principle that he would, and that the judgment creditor has no equity which he could set up to prevent him from doing so. I rule that these judgment creditors have a right to be paid in priority to the judgment mortgage creditor of 1857."

Where the creditor has two funds to which he can resort the surety is entitled to marshal not only as against the principal debtor, but also as against all persons claiming under him. See *In re Westzinthus*, 5 B. & Ad. 817. There Westzinthus shipped oil to Lapage & Co., who, on its arrival, endorsed the bill of lading and deposited it with Hardman & Co., brokers, who advanced money on it. Hardman & Co. had pre-

viously advanced money upon other goods of Lapage & Co. deposited with them by way of security. Lapage & Co. having become bankrupt, the oil not having been paid for, the agents of Westzinthus claimed the oil from the master, who however, delivered it to Hardman & Co. It was held first that the transfer of the goods to Hardman & Co. would in equity be treated as a pledge or mortgage only, and that Westzinthus, therefore, by his attempted stoppage in transitu, acquired a right to such goods in equity against the assignees of Lapage & Co., subject to the lien of Hardman & Co. for the sum they had advanced upon them. Secondly, that Westzinthus, by means of his goods, had become surety to Hardman & Co. for Lapage's debt, and had a clear equity to oblige Hardman & Co. to pay his debt out of Lapage's own goods deposited with him in ease of his surety, and all the goods of Westzinthus and Lapage & Co. having been sold, Westzinthus might insist on the proceeds of Lapage & Co.'s goods being appropriated to the payment of the debt, and therefore that Westzinthus was entitled to have all the proceeds of the oil paid over to him. See also *Spalding* v. *Ruding*, 6 Beav. 376. See also *Heyman* v. *Dubois*, 13 L. R. Eq. 158. There A., having effected policies upon his own life with an assurance office, mortgaged them to the office for successive loans. In one of these mortgages B. became surety for repayment of the amount borrowed. A. subsequently became bankrupt, and B. was compelled, as surety, to pay part of the debt. Upon A.'s death it was held as against A.'s assignee in bankruptcy, that B. was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay.

The right however, of a subsequent mortgagee of one fund to compel a former mortgagee of the same fund and another to resort, in the first instance, to that fund which will leave his own either wholly or partially free, cannot be interfered with by a surety for the debt of the first mortgagee, who has paid off the debt and taken an assignment of his security. Thus, in *South* v. *Bloxam*, 2 Hem. & Mill. 457, there was a mortgage of two funds to A. with a covenant by a surety. This was followed by a second mortgage of one of the funds to B. B.'s fund having been exhausted in part payment of A.'s debt, and A.'s mortgage having been transferred to the surety on payment by him of the balance, it was held by Sir W. *Page Wood*, V.-C., that B. had a right to marshal the securities against the surety.

If an agent, as for instance a factor or consignee, pledge the

goods of his principal and also goods of his own to secure a debt, the pledgee may be compelled by the principal to resort first to the agent's goods. In *Ex parte Alston*, 4 L. R. Ch. App. 168, a firm in Ceylon employed a firm in England as their agents and factors, and the course of the business was that the Ceylon firm consigned cargoes of coffee to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee (which belonged to the Ceylon firm), together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent, and executed a creditors' deed under the Bankruptcy Act, 1861; and then T. sold the coffee (which produced more than sufficient to cover the bills drawn against it), and enough of the other securities to satisfy his debt, and still held securities of the English firm in his hands. It was held by the Court of Appeal in Chancery that the Ceylon firm were entitled, as against the creditors of the English firm, to have the securities marshalled, so as to have a lien on the securities of the English firm remaining in the hands of T., for the balance due to them in respect of the consignments of coffee. See also *In re Westzinthus*, 5 B. & Ad. 817; *Broadbent* v. *Barlow*, 3 De G. F. & Jo. 570.

The principle of marshalling has been applied to cases between a landlord and a mortgagee of chattels of a tenant, where the landlord has distrained not only the chattels comprised in the security, but also other chattels of the tenant. See *Ex parte Stephenson*, De Gex, 589. There a tenant mortgaged some personal chattels, and being in possession of those and also other personal chattels, the landlord distrained for rent upon both sets of chattels. The person in possession under the distress was requested by the mortgagee, and consented, to hold possession of the goods, or at least of the mortgaged goods, for him as well as the landlord, without prejudice to the landlord's rights. The tenant then became bankrupt, and after the bankruptcy the landlord's demand was satisfied by means of a sale of goods, some if not all of which were subjected to the mortgagee's security, whilst some or all of the goods to which the security did not extend remained unsold. It was held by Sir *J. L. Knight-Bruce*, V.-C., that the mortgagee was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress which were not com-

prised in his security. "The disputed point," said his Honor, is upon the mortgagee's claim to apply against the assignees the doctrine of marshalling: he asserting, and they denying, that, as between him and them, such of the goods seized as were not included in his security were the portion of them first applicable to pay the landlord's demand; and that, consequently, the mortgagee is entitled, against the assignees, to be placed substantially in the same situation as if the landlord had regulated his proceedings in conformity with that title. I have considered the point, and my doubt has been removed. The doctrine and rules recognised by Lord *Eldon* in *Aldrich* v. *Cooper* seem to me to reach this case, which, if new in specie is not so, I think, generally. Fraud and reputed ownership being out of the question, the assignees and the bankrupt are here one, so that no fourth persons have right to intervene; and the ordinary course, where the first creditor has two funds of a debtor whose second creditor has but one, seems the right course on this occasion.

"The simple case of a person having lent or entrusted goods to a man whose landlord distrains for rent, both on those goods and also on the proper goods of the tenant, may be thought to exhibit, possibly, more strikingly than the present, a necessity in point of reason and justice for judicial interference, but does not, I suppose, in substance differ from it. The mortgagee being, I think, right in this contention, I must direct the principle of marshalling to be applied between him and the assignees accordingly." See also *Broadbent* v. *Barlow*, 30 L. J. (N. S.) Ch. 569; 3 De G. F. & Jo. 570.

Marshalling takes place where the Crown has two funds to which it can resort under an extent, viz., an estate comprised within a mortgage — and other property of the mortgagor; "for" in such a case, as observed by Lord *Eldon*, in the principal case, "a mortgagee whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief, that he was held entitled to stand in the place of the Crown, as to those securities which he could not affect per directum, because the Crown affected those in pledge to him." See *Aldrich* v. *Cooper*, 8 Ves. 382, ante, p. 91, 92. So when creditors were not entitled to be paid out of real estate, "there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets." *Sagitary* v. *Hyde*, 1 Vern. 455. So if a mortgagee chooses to take the paraphernalia of a widow in satisfaction of his debt, by bond or

covenant, a Court of Equity will ascertain the value, and make her a creditor for that upon the mortgaged estate: *Tipping* v. *Tipping*, 1 P. Wms. 729.

Where an estate is subject to debts, legacies, or other charges, and the owner mortgages a part of such estate, the mortgagee will, as against the mortgagor, or a purchaser from him, have a right to throw such charges upon that part of the estate which is not comprised within his security. *Haynes* v. *Forshaw*, 11 Hare, 93; *Finch* v. *Shaw*, 19 Beav. 500; 5 Ho. Lo. Ca. 905, 3 Jur. N. S. 25.

In applying the doctrine of marshalling to mortgagees and creditors, the Court will not interfere with the first mortgagee's right to take his debt out of that part of his security which becomes first available upon the ground that other funds are comprised in his security (*Wallis* v. *Woodyear*, 2 Jur. N. S. 179), nor will a mortgagee who is executor and legatee of the mortgagor be compelled to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands (*Binns* v. *Nichols*, 2 L. R. Eq. 256); but if the mortgagee having a double fund has exercised his option in such a way as to disappoint a creditor by taking the only fund to which he could resort (*Aldrich* v. *Cooper*, *ante*, p. 85); or even if such only fund had been applied for convenience by the order of the Court (*Gwynne* v. *Edwards*, 2 Russ. 289, note); such exercise of option or order will not have the effect of disappointing the creditor with one fund only, who will therefore be entitled to stand pro tanto in the place of the former: *Trimmer* v. *Bayne*, 9 Ves. 209.

The doctrine, however, of marshalling is not applicable where no question can be raised as to the insufficiency of the single fund. Where for instance the person having the double fund offered to redeem the owner of the single fund, as that could only be done by paying him off, the doctrine of marshalling is inapplicable: *Gregg* v. *Arrott*, Ll. & Goo. t. Sugd. 246.

III. *Marshalling by the Court of Admiralty.*]—The equitable doctrine of marshalling is put in force by the Court of Admiralty. Thus, in a case where there are several bonds, and one is secured on the ship and freight, and another upon the ship, freight, and *cargo*, the bond-holders who have a charge on the cargo, will not be allowed to disappoint the other bond-holders who have none thereon, but will be compelled to resort to the security against their ship and freight: *The Trident*, *Simson*, 1 W. Rob. 29, 35; *La Constancia*, 2 W. Rob. 404, 406; *The Arab*, 5 Jur. N. S. 417.

Upon the same principle, where bottomry bond-holders have two

funds out of which they may be satisfied, the first being ship and freight, and the second the cargo, and the master can only resort to to the first fund for payment of his claim for wages and disbursements, the funds will be marshalled by the Court so as to allow the master to be paid out of the proceeds of the ship and freight: *The Edward Oliver*, 1 L. R. Ad. & Ecc. 379; *The Eugénie*, 4 L. R. Ad. & Ecc. 123. *Sed vide The Priscilla*, Lush. 1.

So if there be a bottomry bond *on the ship only*, and the ship being afterwards arrested for wages, is insufficient in value to meet both claims, if the bond be not held by implication of law to extend to the *freight*, payment of wages will be decreed therefrom, leaving the whole proceeds of the ship available in satisfaction of the claim of the bond-holder: *The Mary Ann*, 9 Jur. 95.

But where the master has by the terms of the bottomry bond bound himself as well as ship and freight for the payment of the bond, marshalling will not take place to the prejudice of the bond-holder; in other words, if the proceeds of the cargo were insufficient to satisfy the claims of the bond-holder, he would as to the amount remaining payable to him have a prior claim to the proceeds of the ship and freight: *The Edward Oliver*, 1 L. R. Ad. & Ecc. 383.

SCOTT *v.* TYLER (*a*).

(*a*) In this edition, so much of the statements, arguments, and judgments as relate to the power of an executor to pledge property has been omitted.

Easter and Trinity Term, 1787; *Dec. 20th*, 1788.

[REPORTED 2 BRO. C. C. 431: 2 DICK. 712.]

CONDITIONS IN RESTRAINT OF MARRIAGE. — PUBLIC POLICY.]—*Legacy to a daughter, one moiety of which was to be paid to her at twenty-one, if then unmarried, and the other moiety at twenty-five, if then unmarried; but in case she married before twenty-one, with the consent of her mother, to be settled upon her as mentioned in the will. The daughter married under twenty-one, without the consent of her mother:—Held, that the legacy did not vest in the daughter upon the marriage, and that she never came under the description to which the gift of the legacy was attached.*

RICHARD KEE (*b*), the putative father of the plaintiff Margaret Christiana Scott, by his will devised as follows:—"I will that my executors, hereinafter named, do, with all convenient speed after my decease, purchase the sum of 5000*l.* South Sea Annuities, 1751, in their names, upon trust that they, or the survivors or survivor of them, do stand possessed thereof, and receive the dividends from time to time as the same shall grow due, and thereout pay and apply the sum of 60*l.* yearly, and every year, in and towards the maintenance and education of my grandson, Richard Dryer, till he shall arrive at the age of fifteen years; and if my said grandson should then choose to go to the university, from thenceforth to pay and apply 120*l.* per annum in and towards his said maintenance and education at the university; but if my said grandson shall not go to the university, I will that, out of the sum of 5000*l.* and the dividends and savings arising thereon then made, a sum not exceeding 400*l.* be applied in placing

(*b*) The statement of the case and arguments are taken from 2 Bro. C. C. 431; the judgment from 2 Dick. 712.

out my said grandson to any trade, profession, or employment he may, with the approbation of my executors, choose. And my will and meaning is, that the surplus dividends, if any, over and beside such allowances as aforesaid, from time to time be invested in the like South Sea Annuities, and that the said *capital sum, with such surplus dividends, be transferred to my said grandson at his age of twenty-one years,* if he shall be living, but *if he shall die before that age,* I give the said annuities between Mrs. Elizabeth Tyler, who now lives with me, and *my god-daughter, Margaret Christiana Tyler, equally to be divided between them, share and share alike,* but the share of my god-daughter not to be transferred to her till twenty-one. And if she shall die before her arrival at that age, I give her share to the said Elizabeth Tyler, for her own use and benefit; also, I will that my executors hereinafter named, do, with all convenient speed after my decease, purchase the sum of 10,000*l.* South Sea Annuities, 1751, in their names, upon the trusts after mentioned, that is to say, upon trust that they and the survivor and survivors of them do stand possessed thereof, and out of the dividends pay or permit the said Elizabeth Tyler to take or receive yearly, and every year, as the same shall become payable, the sum of 100*l.* for the maintenance and education of my said god-daughter, Margaret Christiana Tyler, until her age of twenty-one years, which will be on the 18th day of June, 1785, and add the surplus of such dividends from time to time to the said capital stock; and at her said *age of twenty-one years,* I will that *one moiety of the said capital stock of* 10,000*l.* and the savings thereof, be *paid and transferred to my said god-daughter, in case she shall be then unmarried;* and that, at *her age of twenty-five years, if she shall be then unmarried, I will that the other moiety* of the said 10,000*l. be* then *transferred to her* for her own use and benefit; but *in case my said god-daughter shall marry before her said age of twenty-one years, with the consent of her said mother, Elizabeth Tyler,* I will that *one moiety* of the said 10,000*l.*, with the savings made, *be settled* on my said god-daughter, for *her sepa-*

rate use, and her issue, in such manner as her said mother, Elizabeth Tyler, shall think proper, and the *other moiety thereof,* with the surplus dividends, disposed of, *as she, my said god-daughter, shall think fit;* but *in case* my said god-daughter shall *depart this life before her arrival at the age of twenty-five years, unmarried,* then, and in such case, I give the said 10,000*l.* *to her said mother, Elizabeth Tyler, for her own use and benefit.* I give, devise, and bequeath to my executors, and to their heirs, all my freehold messuages or tenements, with the appurtenances, in Denmark-court in the Strand, being Nos. 2, 3, 4, and 5, in trust that they and the survivors of them, and the heirs and assigns of such survivor, do from time to time receive the rents and profits thereof, and lay out the same in government securities, to the use of my aforesaid god-daughter, Margaret Christiana Tyler, till her age of twenty-one years; and from and after her attaining that age, I give the said messuages, and the rents, issues, and profits received by my said executors in the mean time, to my said god-daughter, her heirs, executors, administrators, and assigns, for ever; but if my said god-daughter shall depart this life before she shall attain the age of twenty-one years, I give and devise the said messuages, or tenements and premises, to my said grandson, Richard Dyer, if living, his heirs and assigns; but if dead, I give and devise the same to the said Elizabeth Tyler, her heirs and assigns for ever." He then gave several other legacies, and appointed as follows:—"All *my freehold* estate in Whitechapel, in the county of Middlesex, and all bond debts, and other debts, owing to me by any person or persons whomsoever (particularly a sum of 2300*l.* and interest, due to me from Maurice Dryer and his wife, on mortgage of their estate), and effects as well real as personal, whatsoever and wheresoever, and of what nature or kind soever, *I give and bequeath* the same to the aforesaid Elizabeth Tyler, her heirs, executors, *administrators and assigns,* for ever, for her great care in looking after me in my several illnesses, and whom I look upon as my wife in every respect, which I would have made her, had it not

been for a foolish promise I made to my late wife in her lifetime; and constitute and *appoint the aforesaid Elizabeth Tyler, George Shakespear* the elder, *Charles Mahew*, and *Philip Nind, executors and trustees* of this my last will and testament."

In 1774, James Cockburn left to the plaintiff Margaret Christiana Tyler a legacy of 100*l.*, and made the defendant Tyler executrix, and Richard Kee died in September, 1776, without revoking his will. The plaintiff Samuel Scott, about the latter end of 1782, paid his addresses to the other plaintiff, Margaret Christiana, and by her consent made proposals to the defendant Elizabeth Tyler relative to a marriage with her daughter, offering to settle her whole fortune, together with a reasonable part of his own, upon the marriage, which proposal was rejected by the defendant; but on the 17th of May, 1783, he married the other plaintiff, Margaret Christiana, *without her mother's consent*.

In 1786, Elizabeth Tyler became a bankrupt.

The original and supplemental bill prayed (amongst other things) that the right of Margaret Christiana to the 10,000*l.* South Sea Stock might be declared, and the same settled on the marriage.

The defendant Elizabeth Tyler by her answer denied that the marriage of the plaintiff was by her consent, and insisted, that, for want of performance of that condition, the plaintiff Margaret Christiana had forfeited her legacy of 10,000*l.* South Sea Annuities, which had fallen into the residuary estate of the testator.

The case was argued on three days in Easter and three in Trinity Term, 1787.

Mr. *Mansfield*, for the plaintiffs.—First, we say, that Margaret Christiana Tyler, having married under her age of twenty-one, is entitled to the legacy of 10,000*l.* If she married under that age, a moiety was to be settled on the marriage, the other to be paid as she should direct. She, having married, is therefore become entitled to it. But it is objected, on the other side, that she is not en-

titled, because her marriage with the other plaintiff was not with the consent of her mother, whose consent was made necessary by the testator's will. The doctrine of our law is, that wherever there is a personal legacy or a portion payable out of money only, and not out of land, and a condition is annexed of not marrying without consent, the clause restraining marriage is construed to be *in terrorem* only, and void; and it is immaterial whether the condition be precedent or subsequent. In this point our law follows the civil law, as far as personal property is concerned. If this were a new case, and to be argued on principle, it would perhaps be a matter of more difficulty; but the law seems to be so fully settled, that it scarcely seems to be necessary to do more than mention a few of the leading cases: *Hervey* v. *Aston*, Ca. t. Talb. 212, 1 Atk. 361, and Comyn's Rep. 726; *Reynish* v. *Martin*, 3 Atk. 330; *Elton* v. *Elton*, 1 Wils. 159. According to which cases, the plaintiff would be entitled to this legacy; and the condition requiring Mrs. Tyler's consent would be pro tanto void, even if it be taken as a condition precedent. But, in truth, this is a condition subsequent; the plaintiff was entitled absolutely to this legacy although she did not marry. Marriage is not necessary to give her the legacy; the condition would therefore operate to divest a gift which would otherwise have effect. The testator meant her to have the legacy in all events, at a certain period; and the clause respecting her marriage with Mrs. Tyler's consent was only meant to accelerate the payment.

Mr. *Scott* (*a*), on the same side.—Independently of the clause containing the condition of marrying with consent, it may be argued, that the testator intended the legatee to have the 10,000*l.* in every event except one; namely, that of her dying unmarried under the age of twenty-five years, which, by her marriage, is now become impossible. That is the only event in which he has given the legacy over; for it is settled that the bequest of a residue is never considered as having the effect of a bequest over, of a particular legacy. But, on the authorities, it is clear, that

(*a*) Afterwards Earl of Eldon.

this being a personal legacy, the condition, as far as it requires the consent of Mrs. Tyler, is *in terrorem* only, and therefore void in law; and that, in fact, the condition, as far as it is legal, is complied with by the marriage. The case of *Long* v. *Dennis*, 4 Burr. 2052, shows how averse the Courts always are from conditions in restraint of marriage, by requiring consent even in the case where the legacy issues out of land. However, in the case of personalty, the rule is fully established, from *Hervey* v. *Aston*, that in this case our Courts follow the rules of the civil law, and that by that law two strict maxims are laid down. 1st, That marriage ought to be free. 2nd, That a testament shall not be inofficious. With reference to these two maxims, they held a condition requiring consent to marriage to be void; whereby, 1st, They encouraged matrimony upon sound principles of policy. 2nd, They prevented heirs from being defeated of their inheritance, by conditions requiring them to obtain consent from particular persons, which was a mode invented to evade the laws respecting inofficious testaments, by requiring a consent which the testator knew to be impossible to obtain. On this subject the civil law was very strict, and it was immaterial whether the condition was precedent or subsequent, or whether there was any gift over or not; nor did it signify what relation the legatee bore to the testator. The condition was absolutely void: Godolph. Orphan's Leg. b. 1, c. 15. This shows that the only effect of the condition was, that it made it necessary for the party to marry, and the other part of the condition, requiring consent, is unlawful and void. Marriage alone, therefore, is a compliance with the condition. Godolph. b. 3, c. 17. And the subject is more fully considered in Swinburne, b. 4, c. 12, p. 266. That these rules have been adopted by our law, is clear from many cases, particularly *Wheeler* v. *Bingham*, 1 Wils. 135; *Elton* v. *Elton*, 1 Wils. 159; *Piggott* v. *Morris*, Sel. Ch. Ca. 26; and in 2 Eq. Ca. Ab. 214. This last case may seem at first to be against us, but it was decided on the double times of payment. Then *Underwood* v. *Morris*, 2 Atk. 184, adopts the rule: *Semphill* v. *Baly*, Prec. Ch.

562. *Garbut* v. *Hilton*, 1 Atk. 381, is a negative authority for us on this point, and shows that, if a marriage had been had, the condition would have been void, as far as it required assent: *Bellasis* v. *Ermine*, 1 Ch. Ca. 22. Another head of cases is where there has been a provision made on the alternative of not marrying with consent, and there the Court has not relieved against the condition; but this is a distinct ground, and does not apply to this case. *Gillet* v. *Wray*, 1 P. Wms. 284, is a case of this nature. *Hemmings* v. *Munkley*, 1 Bro. C. C. 304, does certainly in some measure contradict *Underwood* v. *Morris*; but whether that case be wrong or right, is at present immaterial, as here is no devise over. [Lord Chancellor *Thurlow*.—The civil law seems to have determined it to be illegal to give one person a general control over another in respect to marriage: but I always apprehend this to be restrained (*a*) to a general control, and not to the preventing a rash or precipitate match. Here it is confined to marrying with consent under twenty-one years of age; and the question is, whether there is anything in sound reason to make a restraint to this extent illegal. Confining it to years of immaturity is a very different thing from a general restraint of marriage.] The second question in this case is, in respect to the deposit of the bonds by Mrs. Tyler, in the hands of Messrs. Hankey, the bankers, whether they can retain them against the specific legatee for the private debt of the executrix. No assignment was ever made of them; it was merely a deposit of part of the testator's property, and made for a purpose that had no reference whatever to the purposes of the will. *Mead* v. *Lord Orrery*, 3 Atk. 235, lays down the rule, to be sure, pretty broadly, that executors may assign or pledge the testator's estate for any purpose whatsoever: but that case has been much shaken since, by *Bonney* v. *Ridgard* (*b*), before the Master of the Rolls, December 3rd, 1784, where his Honor was of opinion, that the rule was carried too far in *Mead* v. *Lord Orrery*: for though it is clear that an executor may dispose of assets, and anybody purchasing of him is not bound to see to the application

(*a*) See *Stackpole* v. *Beaumont*, 3 Ves. 89.

(*b*) 4 Bro. C. C. 130; 1 Cox, 145.

of the money, yet this shall never protect anybody who purchases from an executor with a full knowledge that the money was to be misapplied; and that mortgaging a leasehold property of the testator did not seem to be the natural way of dealing with assets, and was in itself a very suspicious circumstance. *Nugent* v. *Gifford*, 1 Atk. 463, is also a strong case for the defendants, but is inconsistent with that of *Bonney* v. *Ridgard*. Now, this is a case where the defendants must know that the purpose for which these bonds were pledged could be no part of the purposes to which they were applicable by the will, for it was a deposit made in the course of a private transaction between them and Mrs. Tyler.

Mr. *Graham*, on the same side.—It seems a very fair inference, from the words of the will, that the plaintiff, Mrs. Scott, became entitled to her legacy at twenty-one, in all events; though in some cases not to be paid then, yet it vested. The clause is oddly worded, and there are several events which are not provided for expressly, such as her marrying with consent after twenty-one. It is given over only in one particular event, that of her dying unmarried under twenty-five; which seems to imply that her interest was absolute in all other events. But, on the point of the illegality of these conditions, the cases are positive. *Bellasis* v. *Ermine* is a case of great authority, for it had the assistance of the judges. So *Fry* v. *Porter*, 1 Ch. Ca. 138. The distinction is between a legacy issuing out of land and a mere personalty: for, as to real property, it must follow the rules of the common law on the subject of conditions: *Reynish* v. *Martin* (*a*), *Hervey* v. *Aston*. The Digest lays down those conditions as void, in the most unqualified terms possible: Dig. lib. 35, tit. 1; Laws, 62, 63, and 64.

(*a*) 3 Atk. 330.

Mr. *Alexander*, on the same side.—I contend that Mrs. Scott is become entitled in respect of her marriage. The rule of this Court is, that wherever a personal legacy is given to any one, upon condition of marrying with the consent of a third person, and no express provision is made in the case of the legatee's marrying without such

consent, the part of the condition restraining the marriage to being with consent, is held to be *in terrorem* only, and the legacy vests on the marriage; and this is so, whether the condition be precedent or subsequent; whether it be a portion or a legacy; whether the restraint be temporary or perpetual; and notwithstanding there is a general devise of the residue. But they will object, on the other side, first, that this rule does not apply where the condition is precedent. The doctrine is adopted from the civil law, and it would be almost unnecessary to argue that this distinction does not apply, had not Lord Chief Baron *Comyns*, in his argument in *Hervey* v. *Aston* (*a*), taken great pains to prove that there was a distinction in the civil law between conditions precedent and subsequent. I admit the civil law had such a distinction, but it did not apply to this sort of condition. The rule was, that where the condition was impossible, against good morals or positive law, there was no distinction whether it was precedent or subsequent: the legatee took the legacy, discharged of the condition. The Lord Chief Baron himself states the rule so in p. 788. Now this sort of condition was prohibited by the *Lex Julia*, and therefore falls within the rule. This the Lord Chief Baron admits in p. 736, but he cites Dig. 35, tit. 1, l. 64, which relates to restraint of another kind, and omits to cite Dig. 35, tit. 1, l. 72, § 4, *Si arbitratu Titii Seia nupserit, hæres meus ei fundum dato etiam sine arbitrio Titii, eam nubentem, legatum accipere respondendum est; eamque legis sententiam videri, ne quid omnino nuptiis impedimentum inferatur.* Then, if it was contrary to law, it is the same as if it had not been written, and no distinction whether it was precedent or subsequent. With respect to the modern practice of our Ecclesiastical Courts, we are informed it is consonant to the rule of the Digest. The cases in our law are principally *Bellasis* v. *Ermine*, 1 Ch. Ca. 22; *Semphill* v. *Bayly*, Prec. Ch. 562; *Pulling* v. *Reddy*, 1 Wils. 21; *Reynish* v. *Martin*, 3 Atk. 330; which last was a condition precedent. The cases where the condition is subsequent, prove the same thing. Those where the reso-

(*a*) Com. Rep. 726.

lution is in favour of the forfeiture, proceed on different circumstances. *Sutton* v. *Jewke*, 2 Ch. Rep. 95; *Jarvis* v. *Duke*, 1 Vern. 19, are on the devise over; *Stratton* v. *Grymes*, 2 Vern. 357; *Aston* v. *Aston*, 2 Vern. 452, on the same circumstance; *Gillet* v. *Wray*, 1 P. Wms. 284; *Creagh* v. *Wilson*, 2 Vern. 572; on the alternative provision; *Piggot* v. *Morris*, Sel. Ch. Ca. 26; *Hervey* v. *Aston*, Comyns, 726, was a case of land; *Chauncey* v. *Graydon*, 2 Atk. 616, there was a devise over; *Hemmings* v. *Munkley*, 1 Bro. Ch. Ca. 304, which seems to have been a hasty determination, but there is a devise over; from all which cases taken together, it seems that no distinction has been taken on this subject between conditions precedent and subsequent. The next objection that will be made, will be, that though this rule holds good of a portion, it does not extend to a legacy. This will be supported by an argument drawn from the civil law, and which is stated by Lord Chief Baron *Comyns* in his argument, fol. 735, and a conclusion will be drawn, that it applies only to portions. But this proceeds only on a mistake of the *Lex Julia*, the policy of which was to compel persons to marry, by all the means that could be devised. It is not, therefore, probable that such a law should be confined to portions, and indeed the words of the law equally comprehend legacies. So, in *Reynish* v. *Martin*, which was the case of a legacy, not of a portion, for the party was entitled to a large provision besides. The third object is, that though the rule may obtain where the restraint is perpetual, it is otherwise where it is temporary, and, in this case, to cease at twenty-one or twenty-five years of age. If the question were to turn upon the policy of the thing, I admit this might be a very wise distinction, but it appears from all the cases, that there is no ground to argue it on policy. The objection proceeds on the supposition that the determination turns on the illegality of the restraint; in the civil law, it is true, it is so, but this Court has adopted the rule of civil law in part only; and as a rule of construction of the testator's intent, that the condition should

be *in terrorem* only; and the question with us is only, whether the condition was meant *in terrorem*. Upon this ground it is, that in those cases where there are devises over, the condition has had its effect; but if the condition was considered as being in itself illegal, there being a devise over could make no difference; but the cases in our law say, that where there is a devise over, the testator having made an express provision in the event of the condition not being complied with, shows sufficiently that he did not mean it *in terrorem* only; and this reconciles these cases with the others, which would be unintelligible if they proceeded on the illegality of the restraint. The same observations arise upon another class of cases: those where there is a provision made for the legatee in the alternative; if the condition were illegal, it would be equally so in that case with any other. In the Roman law it was immaterial whether there was a devise over or not; for this reason it is that in our law the constant language is, that the condition is *in terrorem;* but there is no such language in the Roman law, in ours not a word of the condition being absolutely illegal and void, except in the case of *Long* v. *Dennis*, where the language attributed to Lord *Mansfield* by the reporter is so extraordinary as to leave room to doubt the accuracy of the report in other respects. From hence we may gather, that though our law has adopted the Roman law in part, it has not done so on the whole, and whatever the distinction in that law might be between temporary and perpetual restraints, our law has not followed them; no such distinction is to be found in any of the cases. If it be possible for a man to impose such a restraint till twenty-one, he has not done it here. Where he meant to give the property over, he has done it. In the bequest to his grandson, he has devised it over. Consider the policy of construing it so here. The residuary legatee had the custody of the infant; it was her consent, if any, that was to be had to the marriage. How easy it would be to her to encourage a match without being proved to have consented to it; and she would herself be the per-

son to take advantage of its being without consent, and obtain the forfeiture. If the point, therefore, turned on any ground of policy, there is strong reason why, in this case, the restraint should not hold. The last point they will contend is, that the devise of the residue is equal to a devise over; and this will be founded on the case of *Amos* v. *Horner*, 1 Eq. Ca. Ab. 112; but there is no principle of good sense upon which it should be so. And the authority of *Amos* v. *Horner* has been expressly denied in *Herrey* v. *Aston*, *Garret* v. *Pretty*, and *Wheeler* v. *Bingham*, 1 Wils. 135.

Mr. *Hardinge*, for the defendant Elizabeth Tyler and her assignees.—(1.) One of the four alternative contingencies upon which the daughter's interest is to depend, and that which alone can found her claim to the limitation of this entire sum for her benefit, is not accomplished. She has not "married before the age of twenty-one with her mother's consent." The alternative, respecting this marriage with consent, is not merely formal, nor is it by way of substitution for other alternatives, and with an equal benefit annexed, but substantially different, and with additional benefit. She is to attain the age of twenty-one, —a mere contingency of time,—or she is to attain it unmarried; or she is to attain the age of twenty-five before marriage; or she is to marry with her mother's consent under the age of twenty-one. Upon every one of these alternatives after the first, her state is improved. In the first event, she is to have certain freehold houses. In the second, she is to have an immediate 5000*l.* In the third, she is to have an additional 5000*l.* In the fourth, she is to have 10,000*l.* before the age of twenty-one; but 5000*l.* is to be settled upon the marriage. The fourth contingency, interposing its earlier effects, saves the legatee from the restraint of the other stipulations, and by an act very much in her own power. The will does not compel her to be unmarried, or to wait for the age of twenty-five, or even that of twenty-one before her marriage; for she is only to marry with her mother's consent before twenty-one, and the 10,000*l.* is from that instant her own.

(2.) There is no condition respecting marriage after the age of twenty-five; and there is no condition requiring consent after the age of twenty-one. The contingency of time is definite; but, coupled with a condition essential to its benefit, or indefinite, except as falling within a certain period, but so as to admit of being defined by the performance of a condition,—the marriage with consent. The will may be construed as if the words had been "when she has attained the age of twenty-five unmarried, or when she has married before twenty-one, with her mother's consent."

(3) There is no direct legacy to the daughter. The gift is to executors; and they are to pay at the several periods for her benefit.

(4.) She has a sure provision if she arrives at the age of twenty-one, married or unmarried, and married with or without consent.

(5.) Upon failure of the other events described, there is a marked and clear limitation over to the mother. But it is argued, that, upon the failure of this event (i. e. of the marriage before twenty-one, with consent), no limitation over to the mother appears in the will; and it is true, that, in terms, no such limitation is to be found. But there is a limitation over of the whole 10,000*l.* directly to the mother, in the very next clause to this, upon the event of the daughter's death before twenty-five unmarried; and she, the mother, is residuary legatee.

The assignees of the mother argue thus in their claim to the 10,000*l.*:—

1st. The intention of the testator is clear to make the condition peremptory, and limit over the interest.

2ndly. The condition which he has imposed is unexceptionable if it stood alone, and is indispensable to any benefit under the will; or,

3rdly. At least it would be unexceptionable here, as put by way of alternative, and enabling a better provision.

4thly. It would avail here as a limitation of time; or,

5thly. As being followed by a limitation over.

1st. As to the intention. The will has clearly meant

that her marriage without consent before twenty-one should put her in the same condition respecting her fortune as if she died before she attained the age of twenty-five unmarried.

It has been argued, that a right in the whole 10,000*l.* vested in the daughter at the age of twenty-one, which this clause respecting the limitation over, if it operates at all, is to divest, and that a right cannot be divested by implication; but that argument overlooks the word "unmarried."

Another of the counsel has more plausibly reasoned, that inasmuch as the limitation over is expressly upon another event, it can only operate, in case of that event, as a limitation over; so that, in this respect, if the mother has any interest at all, it must be in her character of residuary legatee; but that she cannot, in that character, take this interest; because the testator has implied that she is only to have it in a certain event, which has failed; but why cannot she be excluded in one view from this interest, and admitted in another which is *in alio jure*, and which, by a devolution of law upon a partial intestacy falls into the residuum?

The counsel adds, that if the mother is excluded, the daughter alone can take this interest. But that is not a correct inference; for, if the residue given to the mother must be formed after a deduction of this interest, the part which is deducted will be a residue undisposed of.

2nd. The condition is good—even if it were the case of a direct legacy to the daughter, upon condition of a marriage with consent of the mother before twenty-one.

It is a good condition by the civil law, and good in this court, which has not implicitly followed the rule of the civil law as to legacies, nor with an accurate reference either to the reason of that rule or to the distinction upon it.

By the civil law, the condition of remaining unmarried is void, and so is the condition which requires any consent, though it be that of the parent. This too, with or without a limitation over superadded. And if the general

rule which dispenses with a parent's consent be just, the extent of it thus far has very good sense in it.

The reason, however, of the rule, as given in Swinburne, is perfectly ridiculous. It stands thus: "A restraint upon marriage in general is void. This rule is peremptory and universal. A requisition of consent, which the testator knows will never be given, would baffle the rule; every testator may be guilty of this evasion; every nominal trustee may be an accomplice in it; a testator who is a parent may act in this point against his own child; therefore, says the civil law, we must cut the knot,—'*Rescindi debet quod fraudandæ legis gratia ascriptum est.*'"

But even the civil law, with all its enmity against the condition, lets in the effect of it in another shape; for if a marriage with consent is to mark the time at which the legacy will be due, the Ecclesiastical Courts will not anticipate the event or act upon it by halves. In the case of *Hervey* v. *Aston*, Com. Rep. 735, the words of the Lord Chief Baron *Comyns* are these—"If a legacy be given upon a preceding fact, that may or may not be done, or be to be paid at such a time as may or may not come; if the fact be not performed, or if the time should never come, the legacy would be lost by the civil law;" and in p. 744, "When the legacy is given to be paid at a certain time, or upon a certain act which is to be performed, nothing is due till the time incurred, or the act performed, by the civil law." He cites for this Dig. l. 36, tit. 2, c. 21, 22. In p. 756, he puts the very case of money given to be paid upon marriage with consent, and holds, that, in that case, the legacy would be suspended by the civil law.

He seems to consider the marriage and the consent as two events that are indispensable marks of the time at which the gift shall begin to speak.

This rule, however, of the civil law, as it respects the mere condition, is not implicitly adopted here, and the reason of it never. For here, the condition of a parent's consent is good and meritorious. Lords *Hale* and *Kelynge*, in *Fry* v. *Porter*, approve it in very emphatical terms.

Lord Chief Baron *Comyns* does the same in *Hervey* v. *Aston*, Com. Rep. 748.

The idea of a condition *in terrorem*, as it is called, is perfectly ridiculous. What is a terror which is never to intimidate? Would a man of sense impose it? Would any but an idiot act upon it?

The intention of the restraint is to guard against an improvident marriage, and punish it if it shall have taken place. In this view, which has the soundest policy, the restraint is here *stricti juris* to a certain extent; and though it is difficult, perhaps, to ascertain the limits with accurate precision, they are marked enough to bear directly upon the case before us.

According to Lord Chief Baron *Comyns*, in *Hervey* v. *Aston*, p. 729, "If money be directly given to A., in consideration that the legatee shall not marry without consent, and there is no devise over, the condition is ineffectual even here;" that is, in other words, if an absolute gift is qualified by that condition imposed upon it.

But it seems agreed, that if it be a devise of real estate, or of a sum charged upon real estate, the condition would be effectual, though without a devise over.

These distinctions are not very becoming; and they offend one the more, when the degree in which the rule taken from the civil law is adopted here, has been justified by a view to the uniformity of the two Courts, though uniformity in the same Court is thus overlooked. Suppose portions to A. and B., two daughters, of the same value, and qualified by the same condition, what can be more irrational or incongruous than to repel the condition as to one of the daughters, and adopt it as to the other, because the fund happens to be different?

The reason of rejecting the rule where there is a limitation over is explained by Chief Baron *Comyns* to be this: he says the intention is better marked by that circumstance; and he contends that if a similar intention can be collected *aliunde*, it should have the same effect. Lord *Hardwicke*, indeed, says, the intention is considered as favouring the devisee over, and as vesting

a right in him; that it is a condition, therefore, in that view, taken more as beneficial to him than as prejudicial to the legatee restrained.

But if money be given to be paid at twenty-one, or marriage with consent, both Courts are agreed that it is a good restraint, and that no money will be due till one or other of those events has taken place, and *à fortiori*, if the money be not given to the legatee, to be paid at those periods, but given to another in trust for that payment. The distinction is taken in *Hervey* v. *Aston*, Com. Rep. 752; and the point itself decided by an obvious implication resulting from the actual judgment in that case.

The 2000*l.* given by that will was personal estate; but it had the same condition imposed upon it, which had also fettered a real devise in the same will, and that condition was, "a marriage with consent;" yet, if the condition of requiring assent is void in a personal gift, the marriage without the consent would have entitled the legatee.

But the argument of Lord Chief Baron *Comyns* is more direct. Page 751, he construes the will as if expressed thus: "When she marries with consent, I give her 2000*l.* more." He first argues from a general intention, covering both funds, and pointing at the time when the gift shall take place; but if the condition were necessarily bad in a personal gift, the time could not be so qualified.

He then reasons from its being a personal gift, in augmentation of the real devise preceding it, and he lays particular stress upon the want of a gift immediately to the child. He says, that if she were to die before the first portions could be paid, she would have neither of the gifts, and he comes, p. 753, to the very point, asserting the intent of the will to be, that the 2000*l.* shall be due to her upon her marriage with consent, and puts it as if so expressed. He affirms the condition to be lawful, as a condition precedent, and states, that, in every other personal gift, conditions precedent must be performed, that even the civil law holds that rule, and that we have

no instance the other way, either at common law or in this Court.

He distinguishes conditions precedent and subsequent with particular care, so as to refuse what had been too inaccurately called precedent conditions, and which he considers in the light of subsequent.

The distinction taken by him is between some event preceding the payment of the legacy (whether coupled with a condition, or importing a condition itself), and a condition put by way of restraint upon a gift actually made complete by the will, before the restraint is imposed.

3rd. But the condition here would be good, as enabling a better provision by way of alternative.

If a condition of marriage with consent, is by way of proviso to amplify a gift, there is no case where this condition, remaining unperformed, the additional benefit can be received. "You shall either have 20*l.*, or, if you marry with consent, you shall have 30*l.*" Shall the legatee marry without consent and have 30*l.*? *Creagh* v. *Wilson*, 2 Vern. 572, appears to be directly in point. Stress is laid upon this principle, too, in *Hervey* v. *Aston*, Com. Rep. 750. The testator, in the case before us, gives 10,000*l.*, at twenty-five, to his daughter unmarried; but if she marries with consent before twenty-one, he accelerates the payment, and relaxes the condition of unmarried.

No case can be found in which a new and ulterior benefit being the reason for a conditional gift, it can operate in defiance of the terms imposed.

4th. If the condition here were in itself absolutely void, either taken as precedent or subsequent, yet it would be good as a mark of the time when the legacy should be payable—this, too, even by the civil law.

In other words, if a personal legacy to a daughter is made payable upon an event marked in the time of it, by this condition upon her marriage, the legacy is not payable till the time so described and qualified is come. Lord Chief Baron *Comyns*, in *Hervey* v. *Aston*, is express to this point: Com. Rep. 737, 744, and 756.

Swinburne, p. 269, states it as no condition, if put as an

adverb of time "*quamdiu*" or "*dum sola fuerit*," &c. Lord Chief Baron *Comyns* treats it as a limitation of time, and in that view adduces the civil law as being agreed with him. This way of considering it parries the inconvenience of refusing the condition, as annexed to a personal gift, and adopting it as a gift of real estate. He distinguishes between a legacy "if," &c., and the same condition preceding the legacy, as the mark of its time.

5th. The condition here is good, as accompanied with a devise over.

The whole 10,000*l.* is given over to the mother, if the daughter should die unmarried.

If the testator had said, "unmarried before twenty-one," it would have been more clear; but, even as it is, it is clear that the testator meant "unmarried before twenty-one with consent," not adverting to any marriage after twenty-one and before twenty-five.

In every other case of the event failing, upon which the particular legacy is given, the mother takes by limitation over, nor can a reason be assigned why it should be omitted here, where such peculiar anxiety is marked for the effectual performance of the condition.

The local position of the limitation over of the whole 10,000*l.* is not immaterial. It comes immediately after the gift of the 10,000*l.* upon a marriage with consent before twenty-one.

If this were not the key to it, the absurdity would be extreme; for the testator would then say, "If you should marry before twenty-one without consent, and die before twenty-five, having so married, it is not to be given over, though, in failure of all the other events, it is."

In *Hervey* v. *Aston*, a marriage with consent having preceded in the same will, subsequent words referring generally to marriage, are bound as referring to a marriage with consent. Thus, it appears, that in the case before us, the intention is clear from a conditional gift, the condition too is good in itself,—good as a limitation of time, —good as annexed to a better provision,—and good as accompanied with a limitation ove.

(*a*) See Harg. Jur. Arg. vol. i. p. 22.

Mr. *Hargreare* (*a*), for the assignees of Mr. Tyler.—Two questions occur in this cause: the one as to the bonds deposited with Messrs. Hankey, with respect to which I am not instructed to interpose; the other, concerning the 10,000*l.* claimed by Mr. and Mrs. Scott, which is a question of great importance, as it involves the general doctrine of the Court as to gifts on condition of marriage being merely *in terrorem*.

Four times has this Court called in the assistance of the judges of the Courts of law upon different branches of this doctrine. Lord *Clarendon*, in the case of *Bellasis* v. *Ermine* (15 Car. 2), was assisted by Lord Chief Justice *Hyde* and Lord Chief Baron *Hale*. Lord Keeper *Bridgman*, in the case of *Fry* v. *Porter* (21 Car. 2), had the three chiefs as assessors. A few years after the Revolution, in *Bertie* v. *Lord Falkland*, Lord *Somers* called in the aid of the Chief Justices *Holt* and *Treby;* and early in the last reign, *Hervey* v. *Aston* was heard before the *Lord Chancellor*, assisted by the Chief Justices *Lee* and *Willes*, with Mr. Justice *Comyns*. But notwithstanding this, and that new cases occurred in the latter part of Lord *Hardwicke's* time, yet, during the time that the Great Seal was in commission, the case of *Mansell* v. *Mansell*, on a power of jointuring given to a testator for life, on condition of his marrying with consent, came on, and underwent great discussion. In the interval between that case and the present time, two cases only seem to have occurred, *Randall* v. *Payne* (1 Bro. C. C. 55) and *Hemmings* v. *Munkley* (1 Bro. C. C. 304), neither of which appears to have been much debated.

The present case induces a necessity of re-examining the principles and authorities of the doctrine in question; I shall, therefore, examine the present case as far as relates to the condition of marriage with consent, annexed to the legacy given by Mr. Kee.

Under the will in question, Mr. and Mrs. Scott claim, in Mrs. Scott's right, the legacy of 10,000*l.* South Sea Annuities, and found their claim thus:—That Mrs. Scott having married under twenty-one years of age, the mate-

rial part of the contingency in Mr. Kee's will respecting the legacy has taken effect, and, therefore, that she is entitled to the Stock, with the accumulation of interest. Against this the assignees contend that she is not so entitled, because she has married without the consent of her mother. The bill states a kind of consent to have been obtained, but this is totally contradicted by the mother's answer, and there is not a syllable of proof of such consent, so that the fact must be taken to be that she has married under twenty-one, and without the consent of her mother.

The case has been argued on behalf of the plaintiffs in two ways:—First, that Mrs. Scott's title has accrued within the contingencies under the will. Secondly and principally, that the condition in the will, as far as it requires marriage with consent of the mother, is a condition *in terrorem* only, and, as such, null and inoperative.

With respect to the first point, it is not much relied upon; the true answer to it will be to state the contingencies. The first contingency is, that upon her attaining her age of twenty-one, a moiety of the Stock shall be transferred to her, in case she should be then unmarried; the event is, that at twenty-one she was, and still is, married to Mr. Scott: this contingency, therefore, has not happened. The next contingency is her attaining twenty-five, and being then unmarried, when the remaining moiety is to be transferred; but to this there is a double answer,—she has not yet attained twenty-five, and she is married. The third contingency is, her marrying under twenty-one with the consent of her mother; but this contingency neither has happened nor ever can happen; for she married under twenty-one without consent, and has continued married till after her age of twenty-one. These are the only contingencies in the will, and are so framed that no one of them is complied with. It has, however, been attempted to raise an argument in favour of Mrs. Scott, from the devise over to Mrs. Tyler, which gives the 10,000*l.* to her only in the event of Mrs. Scott's dying before twenty-five unmarried.

But this is inconclusive, because the real question is as to Mrs. Scott's right, not Mrs. Tyler's; because it vests Mrs. Tyler's right on the devise over, which really depends on the residuary clause, because the title on which each rests depends on the contingencies, and because the implication that Mrs. Scott is entitled to whatever Mrs. Tyler is not, is too violent.

I therefore proceed to the second and great point in the cause. The position maintained by the plaintiffs is, that it is the rule of the Court, in case of legacies of personal property, to consider conditions in restraint of marriage as merely *in terrorem*, unless where, upon the breach of the condition, the legacy is expressly devised over to a third person. That such a rule should ever have existed appears wonderful; and if the authorities were out of the case, the rule could not be supported.

There is no policy in our law which objects to reasonable restraints on marriage, although it will not admit of an absolute prohibition. On the contrary, it prohibits marriage under twenty-one, without consent of parents or guardians. A legacy, therefore, upon those terms, instead of being against law, coincides with and enforces it; the legality of such a legacy has been recognised in several instances, notwithstanding the condition has met with much opposition. It was once contended, that, in a devise of land, on condition of marrying with consent, the condition was null; but that point was settled in favour of the condition, in *Fry* v. *Porter*, 1 Ch. Ca. 138; 1 Mod. 300; and in *Bertie* v. *Lord Falkland*, 3 Ch. Ca. 129. So in the case of a portion to be raised out of land, in *Herrey* v. *Aston*, which also settled that the condition is effectual on a legacy having reference to a portion to be raised out of land; all agree that it is so of a legacy in money with a devise over. In *Mansell* v. *Mansell*, the condition was held effectual, on a power of jointuring with land, by the unanimous opinion of the Lords Commissioners. A question arose before Lord *Hardwicke*, whether the condition was effectual with respect to money to be laid out in land. This was in 1743, in the case of

Ready v. *Colson*, a note of which is among Mr. Joddrell's MSS., but the point went off, the determination of it being unnecessary.

Is there any latent intent of the testator which the rule seeks to establish? The rule seems to imply this: construing it to be *in terrorem* seems as if the intention was to deter the legatee; but what terror can arise from a condition known to be a nullity? It is impossible that the testator can mean to impose a void condition. Is there then, any rule of equity which interferes? There can be only one to have recourse to; and that is, that this Court will relieve against penalties. It will so; but then it is part of the rule to exact compensation; and where that cannot be given, the rule does not apply; but in these cases there can be no measure of compensation but the penalty, so that the rule is completely inapplicable. Where, then, is the foundation of the rule of considering restraints on marriage as only *in terrorem* to be traced? The answer given is, that the Roman law (*a*) rejected such conditions as invalid; that our Ecclesiastical Courts followed the rule of the Roman law, and that when the Courts of equity assumed a concurrent jurisdiction over legacies, they held themselves bound to adopt the same rules.

(*a*) "Common law" in the report is evidently a mistake.

With respect to the Roman law, it certainly was unfavourable to conditions in restraint of marriage; many of its constitutions tend to promote matrimony, and discourage celibacy; the most celebrated provisions are those contained in the law commonly called the *Lex Julia*, but which is properly the *Lex Papia Poppæa*, the *Lex Julia* being a much earlier law. Among the provisions in the *Lex Papia Poppæa*, for encouraging matrimony, is one aimed against legacies on condition of celibacy. It is in the 29th chapter of the Remnants of the Law, as collected by Heineccius (*b*): the words are, "*Si quis celibatus aut viduitatis conditionem hæredi legatariove injunxerit: hæres legatariusve ea conditione liberi sunto, neque eo minus delatam hæreditatem legatumve, ex hâc lege, consequuntur;*" the terms of the law, therefore, only nullify condi-

(*b*) Heineccius in legem Papiam Poppæam 4to, 1726, p. 94. And see an amplo commentary on this chapter

of the law in the same book, p. 298.

tions wholly forbidding marriage, but do not make invalid all restraints upon it. The frauds upon the law, indeed, induced a large interpretation, extending to conditions, on account of their tendency to celibacy; as when a legacy was given on condition of marrying a particular person, who was so inferior as to make the marriage disreputable, it was deemed equivalent to a condition of celibacy, and brought within the construction of the law. So, if a legacy was given with a condition of marriage *ex arbitrio alterius*, it was null, under the idea that it was an evasion of the law, by naming a person who would not consent to any marriage. But it is impossible to argue from these provisions to our law, which will endure conditions not to marry without consent, where they do not amount to making marriage impracticable. In arguing upon the law of England, it cannot apply in argument that the law of Rome was otherwise. The Court cannot adopt the *Lex Julia*, or the *Lex Papia Poppæa*, where our law is contrarient. Besides, it is far from clear that the Roman law did reject conditions in restraint of marriage to the extent supposed. In the case taken from that law the restraint is perpetual, and is given to a stranger,—not, as in the present case, restrained to a limited time, and the consent required that of the parent, a restraint imposed by the law itself. There is no authority to show that such a restraint would have been rejected by the Roman law. With respect to the Ecclesiastical Courts, it is probably a mistake that they carried the rule to the extent in which the Court of Chancery is understood to have received it. What authority is there to show that there was any such rule? Since the Courts of equity have assumed a concurrent jurisdiction over legacies, the Ecclesiastical Courts have little cognisance of them; and when they are called upon, instead of giving the rule to the Court of Chancery, they regulate their proceedings by our equity reports. Swinburne and Godolphin are almost the only books which have been produced by the ecclesiastic lawyers; but Swinburne is wholly occupied by the Roman law upon his subject; and Godolphin, where

he does not follow him, takes his materials from the reports of decisions in the temporal Courts. The only reference by name to a legacy cause, decided in the spiritual Court, is in Moore's Rep. 857, where Judge *Winch* cites *Pigot's case*, in which the legacy was held good, notwithstanding the breach of a condition not to marry without consent. From this case alone the Courts of equity are said to have borrowed this rule from the Ecclesiastical Court, and are said to have adopted it, not from conviction of its rectitude, but merely for the sake of conformity between the concurrent jurisdictions, which in general is certainly highly laudable, but has its proper bounds. But in the present case there is a seeming inconsistency, as we are immediately told that the Courts of equity reject a very material part of the rule adopted by the Ecclesiastical Court. With them a devise over will be no guard to the condition; but it is confessed, that, in the Courts of equity, it will render the condition inviolable,—a deviation which greatly detracts from the conformity of the jurisdictions.

The doctrine appears, from this view of it, to rest on erroneous opinions with respect to the Roman law, and the practice of the Ecclesiastical Court; but it has become so entrenched by authorities, and supported by great names, especially those of *Hale*, *Nottingham*, and *Hardwicke*, that it cannot be wholly denied to be the law of the Court; it can only now be pressed, that the Court will not carry it an iota beyond its limits, and resist its application to such a case as the present. For this purpose, I shall contend,—

1st, That the doctrine is inapplicable where the condition of marriage is precedent;

2ndly, That the residuary devise in the present case is a sufficient devise over;

3rdly, That the doctrine ought to be confined to immediate and direct legacies, and not to include a trust engrafted upon them; under which latter denomination the legacy in question must be admitted to be.

If I succeed in either of these points, it will negative the claim of the plaintiffs to this legacy of 10,000*l.*

1st, As to the first of the three points. I acknowledge that the authorities in support of the *in terrorem* doctrine are, to a certain extent, so strong and so uniform, that they extort submission ; but, in so saying, I look to the distinction between precedent and subsequent conditions. Where the condition is subsequent the authorities are peremptory. I entertained a doubt whether it was not the same as to conditions precedent, being aware that Lord *Hardwicke* had refused to draw the distinction between them where restraint of marriage was concerned ; but upon serious investigation, I found ample room for exempting conditions precedent, both upon the principle on which equity affords relief, and upon the authorities ; and with respect to the principle on which the Court relieves, it does not extend to conditions precedent. The only principle to which it can be referred, is that by which the Court relieves against penalties and forfeitures. The rule with respect to marriage conditions, when adopted by the Courts of equity, therefore, became arranged under that head, and not being permitted to have any further effect than to alarm the parties, they obtained the names of conditions *in terrorem*. Unfortunately that principle required compensation to be made, which will not hold as to these conditions ; but this only shows that the principle has been misapplied, not that the relief has not been administered under colour of that principle. If this be allowed to be the principle, let us examine whether, on that account, conditions precedent are not entitled to be exempted from the interference. The old distinction between conditions precedent and conditions subsequent, to which Lord *Coke* calls the attention as of the first importance, is this : that where an estate is given on a condition subsequent, the estate vests till the condition or contingency takes place, and then it operates by devesting or destroying the estate. It is resorted to in order to enforce the object of the donor by the terror of a penalty, and as it operates by the destruction of estates

it is considered as odious, and *stricti juris*. In a MS. common-place book of Judge Dodderidge's it is said, "Conditions that go in defeazance shall be taken strictly, for they are odious." To the same effect is Co. Litt. 218 a; *Fraunces's case*, 8 Co. 90; title "Condition," in Fulbeck's Par. and Shep. Touch. One effect of this disfavour is, that if the condition is, or by the act of God becomes, impossible, the estate is absolute, as if there had been no condition: Co. Litt. 206 a. So, where the condition subsequent is unlawful: Fulbeck's Par. part 2, 66 b, citing Perkins, sect. 139, and 4 Hen. 7, 4, and 2 Hen. 4, 9. Another effect of the odium under which they lie, is, that they are construed strictly: *Fraunces's Case*, 8 Co. 90 b, and 1 Leon. 305. Thus, it appears, that, in respect to the penal nature of these conditions, the phrase of *in terrorem* is peculiarly applicable to them.

The condition precedent is of quite an opposite nature; there the estate cannot commence until the condition is performed, or the contingency has happened. It has, therefore, been observed upon it that "*Adimpleri debet, prius quam sequatur effectus.*" A passage in Plowden conveys an idea of the dependent nature of the estate on such a condition. Judge *Brown* says, Plowd. 272, "If I grant to you, that if you will do such a thing, you shall have a lease in such particular land of mine; there the condition precedes the lease, as the needle precedes the thread, and as the needle draws the thread after it, does the condition the lease." The condition, therefore, is beneficial, not penal, and is favoured and benignantly interpreted, according to the intention of the words, Co. Litt. 218 a, 219 b. The phrase of *in terrorem* is therefore from its nature inapplicable to them; actual performance is essential to them, notwithstanding their favourable interpretation; therefore, though the condition be impossible or illegal, no estate can arise, and it is the same as if none had been given; Co. Litt. 206 a. and b., 217 b, 218 a; Ful. Par. part 2, 67 a. The result is, that though penal conditions to destroy estates may be

dispensed with, beneficial conditions to raise estates must always be complied with.

If this doctrine is important at law, it essentially affects the jurisdiction of equity. From the penal nature of conditions subsequent, they in general fall within that lenient principle by which Courts of equity relieve against penalties; but there is no connexion between this and a condition precedent, which operates by giving an estate and conferring a benefit. Upon such a condition equity cannot interpose; equity cannot raise an estate which the donor has not given. If such power was to be assumed over one subject, it might soon extend over others, and overleap all boundaries. If the principle on which this argument proceeds be just, is there a reason to be alleged why marriage conditions precedent, when conformable to law, should not be strictly complied with? Nor is the distinction of penalty or no penalty new in this Court: there are cases where the form alone will make the difference, as in the case where four or four and a half per cent. interest is reserved in a mortgage, with a condition of increasing the interest, in default of punctual payment, to five per cent.: the Court will relieve, because it is in substance and in form a penalty; but if the reservation be five per cent., with condition of reducing the interest to four, on punctual payment, equity cannot interpose, because, though they are substantially the same, there is not in this case the form of a penalty. This is a stronger case than that between estate and conditions; because, with respect to the payment of interests, the difference is only formal; but the difference between conditions precedent and subsequent is substantial.

If I have established the doctrine with respect to the difference between conditions precedent and subsequent, I may proceed to argue, that the circumstances of the present case furnish less reason for considering it as a penalty than cases upon marriage conditions in general. This is not the case of a child left with a portion, wholly dependent on a marriage conditioned to be with consent;

it is the case of an additional portion; besides the present portion, she has four freehold houses, with the intermediate rents, together with the money due on the New River bonds, with the accuring interest upon them, the principal sum of which is 1000*l.*; she has also a contingent interest on the death of the grandson. The present is therefore a conditional addition to a provision unclogged by conditions: and there is not so much to affect the feelings of the Court, and impress the idea of penalty, as a person, looking only to this provision, might suppose.

I come now to the authorities on the distinction between conditions precedent and subsequent. However nice the discrimination for which I have argued may be, I cannot expect it will be recognised, if the current of authorities should be against me. I shall endeavour to evince, that, however authorities on conditions subsequent are against me, there is an ample stock, with respect to conditions precedent, of respectable authorities, that these provisions need not be disappointed.

The gentlemen on the other side have rested their argument on the authorities; they have declined arguing it on principle, and have referred the Court to cases of great weight, principally those in the time of Lord *Hardwicke*. The chief authorities they have relied upon are these:—*Daley* v. *Desbouverie*, 2 Atk. 261. The declaration of Lord *Hardwicke* certainly blends conditions precedent and subsequent: but he only says, that the Court puts the most favourable construction on both, to prevent forfeiture: and the judgment was given on evidence of a kind of consent to the marriage; on which account his Lordship cites *Farmer* v. *Compton*, 1 Ch. Rep. 1; *Wiseman* v. *Forster*, 2 Ch. Rep. 23, both of which are cases turning on consent: *Underwood* v. *Morris*, 2 Atk. 185: the report of this case has not a word on the distinction of the two conditions. I agree, however, that the condition should be taken as precedent: *Pulling* v. *Reddy*, 1 Wils. 21. It is not clear that the condition in this case was not subsequent: *Reynish* v. *Martin*, 3 Atk. 330; 1

Wils. 130. This is an unambiguous decision, that a condition precedent is equally *in terrorem* with a subsequent one; and that the real estates being charged with the legacy will not exempt it from the rule: *Wheeler* v. *Bingham*, 3 Atk. 364; 1 Wils. 135; and in Mr. Joddrell's MS. Reports. In this Lord *Hardwicke* repeats his opinion against distinguishing conditions precedent; but the case was on a condition subsequent, and Lord *Hardwicke* treats it as such. The earliest of these cases is not further back than Lord *Hardwicke's* accession to the Great Seal. The cases are only five in number, and only two of them can be considered as decisions against the effect of conditions precedent, viz., *Underwood* v. *Morris* and *Reynish* v. *Martin*. Only one of them is pointed in distinct terms against precedent conditions; and Lord *Hardwicke* in the other does not name the authorities on which he relied; so that at last they seem to compress themselves into one fully pointed decision, and the opinion of one single judge of equity.

I do not mean to question that Lord *Hardwicke's* opinion on the subject was gradually and deliberately formed. Whether he had made up his mind against exempting conditions precedent from the rule, at the time when he determined *Hervey* v. *Aston*, does not clearly appear; but he certainly was afterwards satisfied upon the point, which gives great weight to his opinion.

Sir *Joseph Jekyll* was also clearly of the same opinion, as appears by his judgment in *Hervey* v. *Aston*, as reported by Mr. Forrester, Ca. t. Talb. 212. And some appearance of authority may be gathered for the same position from the cases before the Revolution: but, according to my idea, those cases were decided upon as conditions subsequent.

The first case in favour of conditions precedent is that of *Popham* v. *Bamfield*, 1 Vern. 83, where Lord *Nottingham* says, "Precedent conditions must be literally performed, and this Court will never vest an estate where, by reason of a condition precedent, it will not vest in law."

In *Bertie* v. *Lord Falkland*, 3 Ch. Ca. 129; Freem. Ch. Rep. 220, and 2 Vern. 333, all the Court (Lord *Somers*,

assisted by the Chief Justices *Holt* and *Treby*) held, 1st, that the condition being precedent, the estate never vested; 2ndly, that the case was beyond the relief of equity. The words of the two Lord Chief Justices, that the condition of marriage was precedent, are very strong. Lord Chief Justice *Treby's* words, according to Vernon, were these :—"The condition, which is precedent, not having been performed, it is plain that the estate, by the letter of the will, is gone over to Lord Falkland." He afterwards said, "They run upon a plain mistake in saying that they come to be relieved against a forfeiture." In another part he says, "It is not a case in compensation; it is not capable of an equivalent to answer the will of the testator." Lord *Holt's* words, according to Ch. Ca. 130, were these :—"The estate was given on a condition precedent; and such is the nature of a condition precedent in point of law, that no action interposing can be a ground to relieve upon, if it be not performed; so that, being a condition precedent, though the Lord Guildford had died within the three years, and the condition had become impossible by the act of God, it could not have helped the lady. It will not be easy in a Court of equity to shew any precedent of relief in case of conditions precedent, as often happens in cases of conditions subsequent." Lord *Somers* also laid great stress on the condition being precedent. The case is of great strength—1st, It is a decision against a devisee, who was also heir-at-law; 2nd, The condition was a hard one; 3rd, The lady had shewn a willingness to do all the delicacy of her sex would permit towards the performing of it; 4th, It was a legacy of personal estate as well as a devise of land, and no attempt at a distinction was taken between them; 5th, The great ground of determination was, its being a condition precedent, not the devise over; for it appears by Freeman's Reports, that the Lord Chancellor did not hold a devise over essential on a condition precedent. Another authority with me is *Creagh* v. *Wilson*, 2 Vern. 572, where Lord *Cowper* founded himself on the greater legacies being substantially on a condition precedent. The case is, therefore, a direct authority,

that if the condition of marriage be precedent, it wants not a devise over to make it effectual. The next is *King* v. *Withers*, Prec. Ch. 348; Gilb. Ch. Rep. 26. The case shews Lord *Harcourt's* opinion, that where the condition was precedent, and had not happened, he did not think the want of a devise over material; and although the devise was of a portion out of land, no distinction was made in that respect. In *Gillet* v. *Wray*, 1 P. Wms. 284, Lord Chancellor *Cowper* held the condition not to be *in terrorem*—1st, Because the provision was alternative. 2ndly, Because the condition was precedent. In *Clark* v. *Lucy*, 3 Geo. 1, Lord *Cowper* is said (5 Vin. 87, in the side note) to have expressed himself thus:—"When the party cannot be compensated in damages, it is against conscience to relieve; and in *Fry* and *Porter's* case, the condition could not be compensated in damages, being a marriage without consent. Precedent conditions must be literally performed, and a Court of equity will never vest an estate when, by means of a condition precedent, it will not vest at law. But as conditions subsequent are to devest an estate, there it is otherwise, where there can be a compensation made in damages as above; but in any other case, even in a case of condition subsequent, it is not so." *Holmes* v. *Lysaght*, 2 Bro. P. C. 103, Toml. ed., arose on the additional legacy given on a condition of marriage with consent; it is a direct authority for supporting a condition of marriage precedent, without a devise over, and in the case of personalty, for the legacy was primarily chargeable on the personal estate. The next authority is the great case of *Hervey* v. *Aston*, decided in 1737 or 1738, and first heard by Sir *Joseph Jekyll*, whose judgment is reported by Mr. Forrester (Ca. t. Talb. 212). He decided that the condition, which was precedent, was only *in terrorem*, both as to the portion out of land and the money legacy. The case was brought by appeal before Lord *Hardwicke*, who called in the assistance of the Lord Chief Justices *Lee* and *Willes* and Mr. Justice *Comyns*. There is a full report of the argument in 1 Atk. 361. Lord Chief Baron *Comyns'* argument is reported by himself;

Mr. Joddrell's MS. contains the completest account of Lord *Hardwicke's* argument; and far the best account of the Chief Justice's, is a MS. report which I have been favoured with by Mr. Serjeant *Hill*. Sir *Joseph Jekyll's* argument is against the effect of conditions precedent; nor will Lord *Hardwicke's* reversal make for me, as he decided on the distinction between land and money, and held the money legacy to be governed by a reference to the portion. But all his Lordship's assessors were of opinion with me. Lord Chief Baron *Comyns* thought the condition effectual as to the money legacy, and relied on the case of *Creagh* v. *Wilson;* and his short note of the case in the margin makes the point determined a general one as to money legacies as well as portions out of land. The Chief Justices concurred in thinking the precedent condition effectual with respect to the money legacy, independently of its being mixed with the portion out of land. In *Mansell* v. *Mansell*, the Lords Commissioners held a precedent condition annexed to a power of jointuring to be effectual, and laid great stress on the general doctrine as to conditions precedent. An expression of Lord *Mansfield*, in *Ambrose* v. *Ashby*, 4 Bur. 1929; 1 W. Bl. Rep. 607, upon *Hervey* v. *Aston* being cited, his Lordship said, "That was a condition precedent, and, therefore, the estate never vested; and, in Chancery, it is held, that subsequent conditions of forfeiture, in restraint of marriage, are only *in terrorem*, unless there is a devise over." This amounts to an opinion, that where the condition is precedent, it is effectual without a devise over. Another authority remains, from what fell from Lord *Loughborough*, in *Hemmings* v. *Munkley*, 1 Bro. C. C. 304. The words are few but import an opinion, that the condition, being precedent, was sufficient to make it effectual. I do not rest much upon it, because in fact there was a devise over before the Court, and it is not quite certain that the Court meant to decide independently of that circumstance. These are the authorities which oppose the doctrine of Lord *Hardwicke*, Sir *Joseph Jekyll*, and Lord Chief Baron *Parker*, and though they were few, might justify your

Lordship in overruling this determination. The balance is vastly in favour of the proposition, that where the condition of marriage is precedent, it is effectual in case of a money legacy without a devise over. Upon the whole, I cannot but suspect that Lord *Hardwicke* fell into a mistake on the subject, by supposing many of the cases to have been on conditions precedent, which really turned on conditions subsequent. Those cases are many in number. I will only refer to them in the order of time: *Yelverton* v. *Newport*, Tothill, 226, is the oldest case in Chancery on a marriage condition; *Pigot's case*, cited by *Winch*, Moore, 857, as a sentence of the Ecclesiastical Court; *Norwood* v. *Norwood*, 1 Ch. Rep. 121; *Vintner* v. *Pix*, 1 Ch. Rep. 121; Toth. 227; *Bellasis* v. *Ermine*, 1 Ch. Ca. 22; Freem. Ch. Rep. 171; *Fleming* v. *Walgrave*, 1 Ch. Ca. 58; *Anon.*, 1 Freem. 302; *Rightson* v. *Overton*, Freem. Ch. Rep. 20; *Hicks* v. *Pendarvis*, Freem. Ch. Rep. 41; a case put by Lord *Nottingham*, in *Jervois* v. *Duke*, 1 Ven. 19; *Lord Salisbury's case*, 2 Vent. 365; 2 Vern. 223; Skin. 285; *Garrett* v. *Pretty*, 2 Vern. 293; *Semphill* v. *Baily*, Prec. Ch. 562. In all these cases, although at first sight the conditions appear to have been precedent, yet on a closer view they were all considered as conditions subsequent. This will particularly appear by considering the case of *Bellasis* v. *Ermine*, which is considered as the leading case, for requiring a devise over, on a condition precedent; yet, according to the authorities as they stood in the time of Lord *Hardwicke*, and to the strict language of the bequest, the condition is subsequent, there being an immediate legacy by the first words, and the condition following afterwards. This construction was given to a legacy of the same kind by Sir *Joseph Jekyll*, *Peyton* v. *Bury*, 2 P. Wms. 626. It is true, in *Elton* v. *Elton*, 1 Ves. 4 (reported also in Mr. Joddrell's MS.), Lord *Hardwicke* would not allow legacies so expressed to be vested, though the legatee was a grandchild; but it is sufficient if the current of old cases considered them as vested, for if so, I believe it will be found, that the cases on which Lord *Hardwicke* formed his opinion, that the doctrine of *in ter-*

rorem governs conditions precedent as well as subsequent, will be found to be cases of condition subsequent, and if so, it will leave Sir *Joseph Jekyll's* opinion alone in favour of the plaintiff.

2nd. The second ground upon which I argue, that the present condition is effectual, is that the general residuary devise over is a sufficient devise for that purpose.

I admit that the authorities of Sir *Joseph Jekyll* and Lord *Hardwicke* are against me upon this point. The former, in *Paget* v. *Haywood*, cited 1 Atk. 378, denied to a general devise of the residue the effect of a devise over. In *Hervey* v. *Aston*, Lord *Hardwicke* seems to have avoided deciding this point; but, in *Wheeler* v. *Bingham*, he appears to have been of opinion that it must be a special bequest, on failure of the event. There are also some earlier authorities the same way, as *Garrett* v. *Pretty*, 2 Vern. 293; and *Semphill* v. *Baily*, Prec. Ch. 562. Yet there are very strong authorities on the other side; the first of these is *Lady Kilmore's case*, cited by Lord *Nottingham*, in *Parker* v. *Parker*, Freem. Ch. Rep. 59, a legacy of 1000*l.* each to daughters, if they married with consent of a person named; and if they married without, they were to have only 500*l.* each, and the residue was given to the son. The daughters being thirty years of age, sued in Chancery for their legacies, but the Court would not decree them without security given to refund on marrying without consent. But this, I confess, is not a clear case, as to its being residue, and not a devise over, though it should seem the former. The next, *Amos* v. *Horner*, 1 Eq. Ca. Ab. 112, is a complete decision upon a general residuary bequest. A legacy to a daughter of 100*l.*, payable on marriage with consent, or at twenty-five; and if she married without consent, 50*l.*, and no more, the residue to the defendant; the daughter marrying without consent, under twenty-one, Sir *John Trevor* held the devise of the surplus of the estate to be a devise over of the 50*l.* This case was refused as an authority, by Sir *Joseph Jekyll*, because no decree was to be found in the Registrar's book; but Lord Chief Justice *Willes*, in

Hervey v. *Aston*, said it appeared by the calendar that a decree was made; and it appears that he was of opinion that the residuary bequest was a sufficient devise over. Upon this contrariety of authorities, your Lordship will be justified in deciding this point according to the reason of the thing and the real intention of the testator.

The nature of a residuary bequest is to vest in the legatee all the property of the testator not otherwise disposed of; therefore it is that lapsed legacies of personalty fall into the residuum, which seem once not to have been allowed: *Sprigg* v. *Sprigg*, 2 Vern. 394; at least, if the legatee was dead at the time of making the will. But the doctrine is now settled in favour of residuary legatees: *Wright* v. *Hall*, Fortescue, 182. Therefore, in *Durour* v. *Motteux*, 1 Ves. 320, Lord *Hardwicke* decided in favour of the residuary legatee on a legacy void by the Statute of Mortmain. The residuary bequest, in the present case, is in the fullest and completest terms possible; it extends both to the real and personal estate, and gives a particular reason for making her the hæres factus and universal legatory of his estate, subject to the former devises of his will. If the condition annexed to Mrs. Scott's legacy had been any other than marriage with consent, there could not have been a doubt on its failure, of Mrs. Tyler's title, the intent being sufficiently clear; and if so, why should any stronger evidence of intent be required on a condition of marrying with consent, than of living to a particular age, or any other contingency? But it may be said, that a special devise over effectuates a marriage condition, not by being an expression of intention, but by creating an interest in a third person; and this is Lord *Hardwicke's* method of accounting for it in *Wheeler* v. *Bingham*, 3 Atk. 367; but the residuary legatee is equally interested with any special devisee over. In both cases, the interest of the third person is equally at stake; the only difference is, that the interest of the one is created by general words, the other by a special limitation.

3rd. The third point I made was, that this is not the

case of a direct legacy, but of a trust. The Court will consider whether, being such, it is at all within the sphere of the ecclesiastical jurisdiction. If it is not, the foundation on which the doctrine of *in terrorem* stands is wanting, and it becomes the subject of quite a different rule, under which land, portions out of land, powers over land, and money legacies, having a reference to a devise of land, are exempted from the doctrine. There was a case before Lord *Hardwicke*, of *Reddy* v. *Colson*, which I have referred to before, which went off; but Lord *Hardwicke*, expressed a doubt in respect to its being a trust, whether it was not exempted from the rule.

Upon the whole, Mr. and Mrs. Scott fail in making out their title to any part of the legacy of 10,000*l.*, Mrs. Scott having married under twenty-one, without the consent of her mother, which was made essential by Mr. Kee's will. The only ground for avoiding the contingency is, that it is a condition in restraint of marriage, and therefore only *in terrorem*. In answer to this, I have endeavoured to show that the doctrine is mistaken, or at most, does not apply to conditions precedent; that if a devise over is necessary to defend a condition precedent, as well as a condition subsequent, the residuary bequest amounts to such a devise over.

Lastly, I have submitted, whether a trust is not exempted from this supposed rule of the ecclesiastical jurisdiction; I have only to add, that the present case is favourable to the validity of the condition, as it comes from a father to a child; is exacted only whilst the legatee is under twenty-one; as the power is vested in the parent; that the power has not been abused, and it is not a case where the child loses her whole provision, there being a considerable portion for her, which is not affected by the condition.

Mr. *Stainsby* (as amicus curiæ) referred the Court to the case in Dyer, 189 b (*Butler* v. *Lady Bray*), which he said was cited in *Mansell* v. *Mansell*, by Sir *John Skynner*, then the junior counsel in the cause, and was thought so

important by the Court, that the cause was ordered to stand over till the next day, in order that Mr. *Henley*, the Attorney-General, might answer it.

Mr. *Plumer*, on the same side.—The question in this cause brings two points under discussion. 1st. The intention of the testator, independent of the authorities on the subject. 2nd. The construction of the will upon the ground of the authorities.

The only question now is as to Mrs. Scott's claim under the will. She stands in the light of a particular legatee taking this legacy out of the general fund; to do this, she must show the intention of the testator in her favour, either by express words or by implication. In the present case, it is not claimed as given in express terms; and it does not appear by implication that she was to have it in the event, which has happened, of her being married under twenty-one without her mother's consent. The legacy is given to an infant twelve years of age. The testator had a son-in-law and a grandson; and he gives to the present plaintiff other provisions, without any conditions, except attaining twenty-one years of age, by which she is amply provided for—a real estate of 150*l.* a-year, and a contingent interest in 5000*l.* given by the testator to Dryer, the grandson, on his dying under age, which is a very ample provision for a child under the circumstances of the plaintiff. The testator had not affixed any condition or restriction as to marriage, to the gift of the 5000*l.* to his grandson Dryer; but, when he was giving this 10,000*l.* to an infant, in augmentation of the fortune already provided for her, he might think it very reasonable to give it her with a restriction respecting marriage; it might be very detrimental to the daughter herself not to be restrained in a matter of so much importance. The testator knew how to qualify his gift in the one case, and to leave it unqualified in another, where he thought it unnecessary. In respect of this child, he makes no disposition till she attains twenty-one years of age; then, in order to entitle herself to the legacy, she must do one of two things: she must either

postpone her marriage till twenty-five, or, if she marries under twenty-one, she must do so with her mother's consent. This is a reasonable restraint, such as the law itself imposed upon her, and such as many celebrated writers think imposed upon her by nature. The whole devise is in one sentence; one moiety is to be paid to her at twenty-one, if unmarried, the other at twenty-five, if then unmarried. If the testator had made no further disposition, it would be clear that the legacy was not given absolutely, for she is not to take it unless she is unmarried. But he then says (going upon the ground of the former prohibition), that, in case she should marry under twenty-one, it must be with the consent of her mother. The condition he looked forward to was marriage; the first part of his will contains a prohibition of marriage till twenty-five; the latter lessens that restraint to twenty-one, with consent. By marrying under twenty-one, without consent, she has departed from the lesser restraint, and disqualified herself from the additional bounty to which she had no title but upon the performance of the condition. The only way the case can be argued in her favour is, that this restriction was not a condition, but a recommendation, because the legacy is not given over; and although it is given over in case of her dying unmarried under twenty-five years of age, that it is not so in any other event; the construction that it was recommendatory is not maintained by the will; it might as well be contended that marriage itself was not necessary, as that it was not to be with consent. The principal intent as to marriage was to postpone it till twenty-five; your Lordship will not, therefore, admit that conjecture into the construction of the will. The assertion, that it is not given over on marriage without consent, is a mere fallacy, founded on a supposition that whatever is not given away is given to the plaintiff, who is only a particular legatee; for, in truth, whatever is not given away goes to the residuary legatee. But they argue, that being given to her in one event it is not so in any other; which is a mistake, as Mrs. Tyler does not claim as a

particular legatee, but as general legatee; therefore, if anything is not disposed of from her, it is given to her. It is by no means incompatible that it should be given to Mrs. Tyler in case of the plaintiff dying unmarried, and also in case she should marry without consent; but to give it to Mrs. Scott, if she marries without consent, is inconsistent with giving it to her on condition of marrying with consent, and would destroy a principal object of the testator's intention. Mrs. Scott is therefore not entitled to take on the ground of the testator's intention.

When I call this condition a restraint, I am probably wrong, for I may as well call it a condition in encouragement of marriage; if the condition had stopped in its first part, it would have been a restraint, for the plaintiff in that case could not have married until twenty-five; then permitting her to marry under that age is an encouragement to marriage; but to say because it is a condition in encouragement of marriage, it shall be construed as an absolute gift immediately upon marriage, is not arguing justly. The condition annexed has nothing in it to engage a wish to set it aside. The intention of the testator is legal; imposes nothing but what the law itself imposes; it ought therefore to prevail; and if it does, the plaintiff does not make out the proposition, that there is, in the event that has happened, an intent, either expressed or implied, that she shall take the additional legacy of 10,000*l.* given in the will.

Secondly. Suppose the intent to be clear, that, in the events which have happened, the plaintiff is not entitled to take the legacy, the authorities ought to be very strong to induce the Court to contradict that intent.

All the authorities upon the subject are bottomed on the civil law.

In cases not within the ecclesiastical jurisdiction, the civil law has not been adopted as the rule, as in the cases of settlements of land, or of money to be raised out of land; in these the condition has been held good; from

whence it follows that the condition in its own nature is just and legal, otherwise it must fail universally. Neither is the rule adopted in the case of pecuniary legacies, where there is a limitation over, or in the case where there is an alternative provision where it only notifies the testator's intention. It follows, therefore, that where the intention is clear to the contrary, the rule does not apply. Another proposition also arises, from the cases; the only ones which apply are those of money legacies upon conditions precedent. If the doctrine laid down by Lord Chief Baron *Comyns* and the Chief Justices in their argument in *Hervey* v. *Aston* is right, those even do not apply if the intention appear to the contrary, although there is neither a remainder over, nor an alternative provision; this is expressly laid down by Chief Baron *Comyns*.

In adopting the rule of the civil law, your Lordship will inquire what that rule is; and it appears that it is not a deduction from principles, but merely a part of the *Lex Scripta*, the *Lex Papia-poppæa*. This rule makes the condition unlawful, and counteracts two principles adopted by our law: it makes the condition unlawful which by our law is legal, and it gives the legacy; whereas our law annuls the legacy given on an unlawful condition. Will this Court adopt a part of the *Lex Scripta* of Rome, made under the particular circumstances of the times, against the clear principles of our own law? It was a part of this law, that a man who had but one child should take but half of a legacy. Will the Court adopt a part of the law, and reject the other? Where is the propriety of making a positive law of Rome, a rule of construction of a will here? How can it constitute a rule for discovering a testator's intention? Perhaps, however, after the determinations which have passed, it would be presumptuous to say the Court should not at all refer to it. But if the Court feels itself obliged to consider it as a subsisting rule as to those cases which fall within it, I trust your Lordship will not extend it farther than it has hitherto prevailed; if the case before you could not, from its nature,

be of ecclesiastical cognisance, or enter under that jurisdiction, the rule does not apply.

The present case is not a bill for the payment of a legacy; it is a bill filed for carrying into execution a trust; the legal fund is vested in the trustees; the Ecclesiastical Court cannot compel the execution of the trust, it can only give the legacy to the nominal trustee. The trust, then, is the subject of the appropriate jurisdiction of this Court; the bill is to compel the mother to dictate the words of the settlement, as to a moiety of the legacy, which the Ecclesiastical Court could not do: if they had attempted it, this Court would have restrained them by injunction. This appears from *Anon.*, 1 Atk. 491, where it is laid down by Lord *Hardwicke*, that notwithstanding the original jurisdiction of the Ecclesiastical Court in legacies, yet, if there be a trust, this Court will grant an injunction, *trusts being only proper for the cognisance of this Court* (*a*).

(*a*) But see now the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), and the note to the Earl of Oxford's case, *post*.

The Court, therefore, in a matter of trust, is not bound by the rule of the civil law. This is the first case on the subject of a trust fund. In the case of land, or portions charged upon land, the rule has been held not to apply; so also it has been held in personal legacies under certain circumstances. Will your Lordship then conform to the general rule of this Court, agreeable to the law of England; or adopt the rule of the civil law made under partial circumstances, when the question is which of these rules shall be applied to a new set of cases upon which there is hitherto no determination? But even admitting that the rule of the civil law is to prevail, the rule of that law would in this case not be to avoid, but to give effect to the restraint. The case here is that of a parent. The case in the Roman law is the consent of a stranger; so it was also in the case of *Underwood* v. *Morris*, and in *Reynish* v. *Martin*. The civil law requires the consent of the parents in all marriages: Dig. l. 23, tit. 2, l. 2,—*nuptiæ consistere non possunt nisi consentiant omnes; id est, qui coëunt quorumque in potestate sunt.* And it appears by Dig. l. 22, tit. 2, l. 62, that the father might

delegate this authority to the mother; and if she unjustly withdrew her consent, the prætor might compel her to give it: Dig. l. 23, tit. 2, l. 19. The restraint imposed here is therefore only of the same kind with that which the civil law recognised. It is limited to twenty-one, which is acknowledged by Swinburne, 153, to be good; "Albeit all these conditions are generally disliked; where they are part restrained, as that the daughter shall not marry under twenty, the condition is not void." The case there put is stronger than the present: there the restraint is absolute,—here only to restrain without consent. The civil law would therefore give effect to, not control the present restraint. The cases do not militate with this doctrine; many of them turn upon the special manner in which they are penned; several of them are upon conditions subsequent. In *Underwood* v. *Morris*, and *Reynish* v. *Martin*, the restraint is unlimited, and given to strangers; the former of them is directly contradicted by *Hemmings* v. *Munkley;* and there is no one of the cases which, if all the facts are taken into consideration, contradicts the doctrine now laid down.

Mr. *Stratford*, on the same side.—This case has been argued on the part of the plaintiff, on the ground of two principles, both drawn from the civil, and, as it is alleged, adopted by our law:—

1st, That all conditions in restraint of marriage are void.

2nd, That conditions annexed to legacies of marrying with consent are, where the legacies are not specifically given over, to be held *in terrorem* only, and not necessary to be performed.

With respect to the first of these principles, it is not to be maintained, taking it in a general, universal, and unqualified sense, but only when it is taken *sub modo;* and therefore in the same book in which it is said, "that all conditions against the liberty of marriage are unlawful," it is also added, "but if the conditions are only such as whereby a marriage is not absolutely prohibited, but only

in part restrained, as in respect of time, place, or person, then such conditions are not utterly to be rejected." Godol. Orph. Leg. 45, c. 15, s. 1. The reason of which seems to be, because none of these conditions impose celibacy upon the party altogether and at all events; for, though the marriage may not be had at this particular time or place, or with this particular person, yet it may at some other, &c.

The question, therefore, in all these cases must be, whether the restraint imposed be reasonable or not.

In the present case, if the restraint be unreasonable, it must be so either as applied to the person to whom the power of restraining is given, or to the length of time for which such power is given. As to the person, the power is given to the mother of the legatee; and as to the time it can in no event continue longer than till the legatee attains the age of twenty-five years.

It were needless to state particularly the power which the Roman law gave to the parent over the child in cases of marriage. Many passages have been cited from the civil lawyers, and many more might be, to show that no marriage could stand without the previous consent of the parent (where there was one), and the child was not emancipated. Among others, it is said in the Digest—*In tantum* (speaking of marriage), *jussus parentis præcedere debet.* But it is said that this authority resided in the father only, and not in the mother, and that it was part of the *patria potestas.* In answer to this it is to be observed, that the civil law, as it appears to be adopted in our ecclesiastical law respecting marriages, gives an equal power of consenting to the mother as to the father. Thus it is expressly decided by the Canons of 1603, that no children under the age of twenty-one complete, should contract themselves or marry without the consent of their parents (in the plural number), or guardian and governors, if their parents be deceased. These are the words of the Hundredth Canon, and by the Act of the 26th of Geo. 2, c. 33, it is expressly enacted, that the consent of the mother shall be as

necessary as that of the father was, if the father be dead and there be no guardian.

The length of time during which the restraint may in this *individual* case last, does not much exceed the time given to parents by the Marriage Act (26 of Geo. 2, c. 33) (*a*), universally. And though the testator has in this case by his will mentioned a time, viz., the age of twenty-five, to the extent of which the marriage of the legatee might by possibility have been restrained, yet he has by the same will held out inducements to an earlier marriage, provided it be a marriage with consent; and he has not impeded any marriage whatever after the age of twenty-five years.

(*a*) Repealed by 4 Geo. 4, c. 76, s. 1, which is repealed in part by 11 Geo. 4 & 1 Will. 4, c. 66, s. 31; 6 & 7 Will. 4, c. 86, s. 1. Stat. Law Rev. Act, 1873.

There is no case to be found in which it has been said what should be a reasonable restraint in regard to the time it is to continue; but from what is said in *Aston* v. *Aston*, 2 Vern. 452, it should seem, that, though no time be limited, the restraint is not reasonable—that is, so as to avoid the condition.

If the legacy in this case had been given to the legatee at the age of twenty-five years, *if she was then sole and unmarried*, it would at least have been questionable whether by such a bequest a certain character and description of person was not imposed upon the legatee, which it would be necessary for her to sustain at that age, and without which she could not be entitled; and yet in such a case marriage would be as much impeded as in the present. In this view of the case another ground of argument arises on the part of the defendant. In the common case of a legacy of personal estate, given to a person of twenty-one, it was expressly said by the Court, in pronouncing judgment in *Dawson* v. *Killett*, 1 Bro. C. C. 123, it makes such a description of the person, that, if the person does not sustain the character at the time, the legacy will fail. I do not cite this case as being in point to the present (though that was a case upon a personal legacy, whether vested or not), but merely for the passage alluded to in the judgment which was pronounced on consideration.

If it be true, then, that the words of the bequest do in this case describe the qualification and character of a person under which the legatee is to take, a condition arises which, according to what is said by Lord *Cowper* in the case of *Creagh* v. *Wilson*, 2 Vern. 572, is in the nature of a condition precedent, and must be performed before the legatee can be entitled. To what is said by Lord *Cowper* in the case of *Creagh* v. *Wilson*, may be added what is said by the Lords Commissioners *Willes* and *Wilmot*, in the case of *Mansell* v. *Mansell* (*a*) (24th February, 1757, which case seems much in point with the present one, as to the principle at least upon which the question now to be stated was determined. The case was this:—

(*a*) Wilm. 36.

Sir Edward Vaughan Mansell being seised in fee of lands, &c., by his will devised as follows:—

"I give and devise all my estates, lands, tenements, and hereditaments to my wife Mary Mansell for ever, and will that she shall be directed and governed by John Vaughan, Esq., and Morgan Davis, gent., and their heirs, in the management of her concerns, whom I appoint and institute trustees of this my will, to act for her and my children's interest as hereinafter mentioned; and after my wife's decease, I give and devise all my lands, &c., to my son Edward Mansell for the term of his natural life; and I will that he shall be capable, *with the consent of the said trustees, to settle a jointure on the woman they agree to in writing he should marry;* and from and after his decease to his first and other sons," &c.

There was also in the will the like limitation to Rawleigh Mansell, the testator's second son, with remainder to his first and other sons, &c., and the same power of jointuring.

The testator died in 1720, leaving his eldest son Edward thirty years of age and married: and the trustees were sixty years old and upwards.

In the year 1740, the lady of Sir Edward Vaughan Mansell, the devisee for life, being dead, and the trustees

also being both dead, Davis being the survivor, and leaving a son and heir-at-law, Edward Mansell, then Sir Edward Mansell, and who was at that time a widower, married Lady Mansell (the plaintiff in the cause), and by deed settled the whole estate devised to him by his father's will upon her, by way of jointure, without any consent obtained of the heir of the surviving trustee.

Sir Edward Mansell, the plaintiff's husband, died afterwards without issue; and upon his death the defendant in the cause, who was the eldest son of Rawleigh Mansell, was the remainderman in tail of the estates in question, but the plaintiff entered upon the estates under her jointure; and the bill was brought by her for confirmation of her jointure, and for delivery of some deeds. And one of the questions made, and much agitated in the cause, was, whether the want of consent of the heir of the surviving trustee to the marriage and jointure was matter of circumstance only, and the Court should aid the execution of the powers as being defective or not.

Lord Commissioner Willes said, "I observed the counsel on both sides have considered this consent as a condition. By the defendant's counsel it has been argued as a condition precedent: by the plaintiff's as a condition subsequent. I think, if it is to be taken as a condition, it must be a precedent one; and, not being performed, no estate could arise. The trustees were not only to consent to the marriage, but to the *quantum* of the estate; and, therefore, there are two conditions, and both precedent."

Lord Commissioner Wilmot.—"Such an act as attends this power, must be in the nature of a condition precedent. I have no idea of a condition annexed to a power being subsequent: the condition must be performed before the power can take effect. All powers arise out of the original freehold; and the person who takes under a power takes from the original grantor in the power; but such taker must bring himself within the description to enable him to take. And it is plain, without cases, that

when a person claims by *designatio personæ*, he must verify the description."

Mr. *Mansfield* puts this as the case of a vested legacy. If it had been given to the legatee, without the intervention of trustees, he might, perhaps, have argued, that it did come within the cases of legacies vested, though to be paid in future. But here, nothing is given immediately to the legatee, but to the trustees; and they are directed "to pay and transfer," as it seems to me, to one of two persons, at a certain time, and on certain events, viz., when the legatee shall attain the age of twenty-five years, to her, if unmarried, or if married with consent; but if not married with consent, to her mother.

With respect to the second of the principles mentioned, viz., that conditions annexed to legacies of marrying with consent, where the legacies are not specifically devised over, are to be held *in terrorem*, and not necessary to be performed, I consider the circumstance of there being, or not being, a devise over, as a ground of presumption only of the intent of the testator, and not a necessary and invariable rule of itself. And this will appear to be so, by considering the rule, as far as it may be called one, and the principles on which it has been adopted. The rule is laid down in the case of *Stratton* v. *Grymes*, 2 Vern. 357, where it is said, that a devisee over being named, he must be looked upon as a person whom the testator considered and had in his thoughts, as to what provision he was to have by his will; but where there is no devise over, the condition shall be held *in terrorem* only; because, as it is said by Sir *Joseph Jekyll* in the case of *Hervey* v. *Aston*, though a daughter marries without her father's consent, yet it is not to be supposed that his severity, if living, would carry him so far as to leave her quite destitute.

As to the rule itself, as laid down in *Stratton* v. *Grymes*, Lord *Harcourt*, in observing upon it in the case of *King* v. *Withers*, Prec. Ch. 350, says it is too wide. And as to the reason given by Sir *Joseph Jekyll*, if it be the true

one, it does not apply to the present case; for, in this case, the daughter is not only not left destitute, but is provided for otherwise: and where that is the case, the rule has been held not to apply: *Gillet* v. *Wray*, 1 P. Wms. 284. Upon authority, therefore, as well as principle, if the legatee be otherwise provided for, though there be no devise over, the legatee must fulfil the condition or forfeit the legacy.

But it is said, that there must not only be a devise, but a specific devise over, in order to disappoint the legatee, and that a devise of a residue will not do. It is possible that the precise meaning of the word *specific*, as applied to a devise over, is not sufficiently attended to; but it should seem, that where the devise over, though of a residue only, be to a particular person, that, in such a case, the word *specific* applies at least as much to the person to take as to the thing given; indeed, otherwise the rule, as laid down and reasoned upon in *Stratton* v. *Grymes*, is hard to be understood.

In this case the residue is expressly given to Mrs. Tyler nominatim, accompanied with strong words of regard. It might have been different had Mrs. Tyler been appointed executrix, and the residue had fallen to her as such. But here Mrs. Tyler seems to be the person whom the testator considered, and had it in his thoughts to provide for *specifically* next after his daughter, and in case his daughter should not comply with the terms of marrying with the consent of her mother, if she thought proper to marry at all before she was twenty-five years of age, or continuing unmarried till that time.

Mr. *Mansfield*, in reply.—I shall endeavour to take notice of the several heads of argument under which the gentlemen of the other side have arranged the questions in the cause. The question is that made on the will, whether this gift to the plaintiff Mrs. Scott is, or is not, a simple gift of the money in one of two events, or whether she was, at all events, to have the money in case she married. The first gift in the will is that to Dryer, of 5000*l.*, payable when he should attain the age of twenty-

one; if he should die under that age, it was to be divided between the defendant Elizabeth and the plaintiff Margaret Christiana, and if the latter died under twenty-one, it was to go wholly to the defendant Elizabeth. Then comes the bequest upon which the question arises: he directs his executors to purchase 10,000*l.* South Sea Annuities, and gives a direct order that the interest (except the 100*l.* a year maintenance) should accumulate until the plaintiff should attain her age of twenty-one years, then the accumulation was to stop, and half of the stock, and all the savings, were to be paid to her, and at twenty-five the other moiety was to be paid. Then comes the provision for her marrying under twenty-one, and the gift of the stock over to the mother, in case she should die under twenty-five, unmarried. He then proceeds to give her the houses at twenty-one, and if she dies under that age he gives them to Dryer, and then to the River Lee Bonds, which he gives to the plaintiff at twenty-one, and if she dies under that age he gives them to the mother, the defendant Elizabeth. He afterwards gives several legacies, and gives the residue to the defendant Elizabeth Tyler. It is a mere blunder by which the legacy is made to vest at twenty-five; he understands and means that she shall have it at twenty-one, if married; but if married before twenty-one, with consent, he meant to accelerate it, and that she should not, in that case, wait till she attained twenty-one. The provisions as to twenty-one and twenty-five, are a restraint of the precedent gift of the moiety and savings at twenty-one, at which age he gives her everything else—the houses, the River Lee Bonds, and the contingency in Dryer's legacy of 5000*l.*

If this be the fair construction, there is no pretence to say the legacy is forfeited by the marriage. The gentlemen on the other side have fancied them different provisions at different times; but this is wrong, for by their construction, if the plaintiff married at seventeen, and died under twenty-one, even leaving children, she would transmit nothing to them. There is no arguing against the words of the will. The 10,000*l.* is the only thing given

as a portion: out of that alone her maintenance is to arise, out of the other funds she is to derive nothing till twenty-one; this is the reason, that, in disposing of them, no reference is made to her marriage. They have studiously avoided taking any notice of the remainder over, which is simply in the event of her dying unmarried. This is a ground for deciding against them: the only shift they have been able to find, is to construe it "*so unmarried*," which will be to contend, that dying married without consent, is dying "*unmarried*." The clause of dying unmarried is at twenty-five. It will be a new construction, that this signifies the same thing as unmarried under twenty-one: it shows they are sensible of the efficacy of that clause. All the argument from the bequest over, is therefore in full force. He could not mean what he has expressed; for, as half was to vest at twenty-one, the whole could not go over if she died between that age and twenty-five. He could not mean her situation to be worse if she married between twenty-one and twenty-five, than she was at her arrival at that age: but it is contended, she is only to take in the events pointed out. But the restraint being confined to twenty-one, he could not mean her provision should be less upon marrying without consent, between twenty-one and twenty-five, than if she married without consent under twenty-one. The mistake is obvious: it arises from the insertion of twenty-five, instead of twenty-one. If twenty-one had been inserted, it would have been clear she was to have her whole fortune upon marriage after twenty-one, or upon marriage before twenty-one with consent.

In the present case there are no negative words; it is, in that respect, not like *Reynish* v. *Martin;* there the gift was upon marriage with consent, *and not otherwise;* but here there are no words, nor a title to show an intent to deprive her of the legacy. On the fair construction, therefore, of the will, according to the true intent of the testator, if she was married she was to have the whole at twenty-one, and the provision in restraint of marriage is as such *in terrorem* only.

If, however, the testator has expressed himself so imperfectly, that she is obliged to get rid of the objections which have been raised to the legacy, we must consider what has been said on the several points.

1st. I have always understood the point to be established, that there is no distinction between conditions precedent and conditions subsequent, except with respect to lands, or where there was a devise over; and that in all other cases a condition in restraint of marriage was void. It is not very pleasant to find that this is a mere distinction of authority, not of reasoning; and that children are not, in all reasonable cases, bound by the authority of parents and guardians. In reasoning, subsequent conditions ought just to prevail as much as precedent ones: but the doctrine is established, and it is too late to correct it, at least with respect to subsequent conditions. But it is said, on the other side, that though this be the case with subsequent, it is not so with precedent conditions. And with a reference to some of the cases, the intention of the testator has been talked of; and Mr. *Plumer* has argued, that wherever the intent of the testator appears, that shall be the rule; but in the same breath he says, a subsequent condition shall not prevail, although there can be no doubt but a subsequent condition speaks the intention of the testator as strongly as a precedent one can do. It is contended, however, that the authorities are different as to precedent conditions; but the authorities put precedent conditions out of the way as much as subsequent ones. The doctrine is adopted from the civil law. They contend the civil law has been misunderstood, and that we are now to give it a new construction. But if there is any error in the manner in which the civil law has been construed, the time for correcting that error is past; the doctrine is now established too strongly to be moved; it has become the law of the Court, and the question only can arise, how it has been understood and adopted. It is of no avail to understand it better than those who adopted and established the rule have done. But, in fact, the civil law does not admit the

distinction between precedent and subsequent conditions. What is the difference taken on the other side between these conditions? That precedent conditions are favoured and must prevail; that subsequent ones must be rigorously construed as to their validity, and may be dispensed with where compensation can be made. At law there is no distinction between conditions precedent or subsequent, if the subsequent condition is broken. If a legacy be given to A. if he marry with consent of B. there is no distinction whether in point of form it be a condition precedent or subsequent; and equity has nothing to do with the condition. There can be no compensation, and therefore there is no distinction between them, as applied to this subject. If it is so applied, it is arbitrarily to create a law for the purpose. But it is admitted on the other side, that a subsequent condition is void. There is no argument for a subsequent condition being void, that will not equally apply to a precedent condition being void also. A great many cases have been cited, as to the distinction, which I shall not go through: *Creagh* v. *Wilson* and *Amos* v. *Horner* were clear cases of alternative provisions, and in each of them there was a remainder over. There is not one of the cases where a precedent condition prevailed. *Hervey* v. *Aston* is that which has been the most relied upon, as favouring what has been contended for on the other side. It is not easy, from Lord Chief Baron *Comyn's* argument, to determine what his opinion was; but I think it may be gathered, that he thought both the precedent and the subsequent condition void. But what was the decision, and the ground of it, in that case? That it was the case of land, and therefore the gift could not take place till the condition was completed. I never yet knew any other conclusion drawn from that case, but that it was so distinguished from the case of personal property. But how came Sir *Joseph Jekyll* to decide in that very case that the condition was void? How came Lord *Hardwicke* or Lord *Somers*, to doubt whether such a legacy was to take place, when the condition was not complied with? They must have under-

stood that a condition in restraint of marriage was, in general, void; but doubted, when it was to arise out of land, whether the distinction was to prevail, or was to yield to the ecclesiastical rules. These are the principal authorities referred to by the other side; for I shall not dwell on the opinions of commentators on the civil law, which is a lamentable way of collecting what the law is.

On the other side we have very express authorities: from Godolph. Orph. Leg. c. 15, p. 45, it appears that such a condition, though precedent, is void; and this is confirmed by the passage from the Digest, cited there. In the cases of *Reynish* v. *Martin*, *Underwood* v. *Morris*, and *Elton* v. *Elton*, the point is treated as perfectly settled, that there is no such distinction. In *Amos* v. *Horner*, the decision proceeded on the remainder over; not on the condition being precedent. I may add *Gillet* v. *Wray*, where the condition was held good; but that was on account of the alternate provision. *Bellasis* v. *Ermine* was clearly a condition precedent; and the Court was of opinion that it was only *in terrorem*. In *Holmes* v. *Lysaght*, 2 Bro. P. C. 261, Toml. edit., the counsel in their reasons expressly state, that in a legacy of personalty there is no distinction between conditions precedent and subsequent. *Underwood* v. *Morris* is said to be impeached by *Hemmings* v. *Munkley*, but the point determined in the latter did not apply to that case. Lord *Hardwicke's* authority on this subject has every circumstance possible to give it weight; *Reynish* v. *Martin* was late in his time, and was determined upon great consideration. He had the strongest aversion to inconsiderate marriages; and after again and again considering the subject, he decided that point in that case as an established rule in this Court. If the cases are such as I have stated them, it is now too late to discuss any thing but what the cases are.

2nd. It has been endeavoured, on the other side, to bring in the devise over; and they have argued, that, being given to the plaintiff in three events, that in all others the legacy goes to Mrs. Tyler. A devise over

exists only where there is a gift to one, if he marry or do any other act; with a gift, if he does not, to another person. A residuary bequest does not amount to a devise over. There is no devise over here, but what there is in every case where there is not an intestacy. The case of *Stratton* v. *Grymes*, 2 Vern. 357, shows that a devise over is only a gift to A., in one event, in another to B., where B. has as good a claim in the latter event as A. has in the former. As to a residuary legacy being a devise over, it cannot be in such a case as this, where it is given over only in one certain event, that of the daughter dying unmarried under twenty-five. And the legacy being expressly given over to Mrs. Tyler in that event, it is absurd to say it is given over to her in another event, and in a different character. A general residuary legatee has never been considered as a devisee over of a particular legacy.

They then contended, that here is an alternative provision. But the testator has said no such thing. The other gifts are without any reference to this lagacy of 10,000*l.*: if the plaintiff had died under twenty-one, she would, according to their argument, have had nothing, for none of the other gifts vested before that time. There is not the least ground to say that here is an alternative within the meaning of *Gillet* v. *Wray*, where one thing is given in one event and another in another event.

Another ground of argument has been that the restraint is only till twenty-one, though there is a passage in Swinburne, where a restraint to twenty is said to be good; it is only given as his opinion; and although the point might have occurred in two or three of the cases —as *Amos* v. *Horner* and *Creagh* v. *Wilson*, where the restraints were only temporary,—yet it was not insisted upon in those cases: and although the restraint in *Underwood* v. *Morris* was only till twenty-one, yet the condition was held void, and not a hint given that the circumstance of its being confined in point of time would make any difference.

Another circumstance introduced to vary this case was that here the restraint was given to a parent. In the civil law, the mother could not be considered as a parent. Is there any possible distinction to be taken between a parent and a guardian? The law makes no such distinction, and reason and common sense agree in this with the law. In *Herrey* v. *Aston* the consent first required was that of the mother; but no distinction was made on that ground.

The objection that this is a trust is also perfectly new. If there is any ground for this distinction, another case must be added to the exceptions upon this subject, that a condition in restraint of marriage annexed to a legacy given in trust for the legatee, will be good, though if the legacy be given immediately to the legatee, it will be void. And this is a distinction expected to be adopted in a Court which says, that trust estates follow the nature of legal estates. Although the Ecclesiastical Court has not in general a jurisdiction over trusts, it is by no means clear that that Court may not compel the executor to pay the legacy to the party actually entitled; and where the executor is himself the trustee, that Court may undoubtedly compel him to pay it, as he in that case only is what he is in all cases—a trustee for the legatee. Upon the true construction of this will, I therefore contend Mrs. Tyler was not to have this legacy if Mrs. Scott married.

(*a*) 20th December, 1788.

The cause stood over till this day (*a*), when it came on for judgment.

This judgment is from 2 Dick. 712. Mr. Dickens states in a note, that Lord *Thurlow* having read his judgment, which was written, gave it to him, and that the following was correctly copied from it.

Lord Chancellor Thurlow.—This is a bill filed by Samuel Scott and Margaret Christiana his wife, against Elizabeth Tyler, the residuary legatee and executrix of Richard Kee, George Shakespeare, Charles Mahew, and Philip Nind, executors and trustees named in the will of the same Richard Kee, and Richard Dryer, his heir-at-law.

The bill prays that the plaintiff Margaret Christiana's right may be established in a trust fund of 10,000*l.* South Sea Annuities, and that proper accounts may be directed accordingly.

For this purpose the bill states the will of Richard Kee, made on the 16th day of December, 1776, whereby he directs his executors to purchase 5000*l.* South Sea Annuities, of the year 1751, in their own names, but in trust to pay 60*l.* per annum for the maintenance of Richard Dryer till his age of fifteen, and from thenceforward 120*l.* per annum, with liberty to raise 400*l.* to put him out in some trade or profession, the surplus profits to be invested in the like Annuities, and the whole to be transferred to him at twenty-one; but if he dies in the meantime, the whole is to be thereupon divided between the defendant Elizabeth Tyler and the plaintiff Margaret Christiana, the share of Margaret Christiana not to be transferred to her till her age of twenty-one, and if she dies sooner, her share is to go over to Elizabeth.

He also directs his executors to purchase the sum of 10,000*l.* in the like Annuities, in their own names, in trust to pay Elizabeth Tyler 100*l.* per annum for the maintenance of Margaret Christiana till her age of twenty-one, the surplus to be laid out in the meantime in the like Annuities; at her age of twenty-one, if then unmarried, one moiety is to be transferred to Margaret Christiana, for her own use and benefit; and at her age of twenty-five, if then unmarried, the remainder to be transferred in like manner.

If she marries with the consent of Elizabeth, before twenty-one, a moiety of the whole sum is to be settled to her separate use, and for her issue, according to the discretion of Elizabeth; the other moiety to be disposed of as Margaret Christiana shall think fit; if she dies unmarried, before her age of twenty-five, the whole is to go over to Elizabeth.

He also gives to the same trustees certain freeholds in Denmark-court, in trust to lay up the rents till Margaret Christiana shall attain twenty-one, whereupon he gives both the estates and their produce to her absolutely; or if she dies sooner, to Richard Dryer, or if he be then dead, to Elizabeth Tyler.

He gives divers other legacies. All the rest of his

estate, real and personal, he gives to Elizabeth Tyler, absolutely, whom he looks upon as a wife.

He died on the 3rd of November, 1776, leaving Elizabeth surviving, and Margaret Christiana, his natural daughter by her.

On the 17th of May, 1783, the plaintiff Samuel Scott clandestinely and against the will of Elizabeth, married Margaret Christiana, then an infant of eighteen years. Elizabeth objected to it as an improvident match, by reason of his inferior circumstances, his advanced age, and the family which he had by one of his former wives, and warned her daughter of the consequence.

And, as the plaintiff Samuel Scott states, by a deed of 13th of May, 1783, he has covenanted to settle Margaret Christiana's fortune on her and her children, after his own death, if she or they should survive him.

The bill further states the will of James Cockburn, who died in October, 1774, leaving Elizabeth Tyler his executrix, and Margaret Christiana a legatee of 100*l.*

All the executors proved Richard Kee's will; Elizabeth Tyler alone acted.

Elizabeth Tyler forthwith transferred 5000*l.* South Sea Annuities into the names of the trustees, which have been since transferred to Dryer, together with the accumulations, and that legacy has been duly discharged.

In August, 1777, she transferred 10,000*l.* South Sea Annuities into the names of herself and co-trustees, together with the further sum of 1000*l.* of like Annuities, whereof she has constantly received the produce; she received, in like manner, the rents of the freehold houses and the interest of the securities on the River Lee.

She admits the legacy of 100*l.* to remain due, and that she had assets, but claims a debt of 900*l.* against the plaintiff Samuel Scott.

In March, 1786, Elizabeth Tyler became a bankrupt; a commission issued, and Sir Edward Vernon, Thomas Hankey, John Marr, and Malcolm Cockburn, were chosen assignees.

Upon this matter questions arise, whether, as the case

stands, the plaintiffs have any and what interest in the 10,000*l.* South Sea Annuities.

The testator makes four several bequests to his daughter: a contingent interest in the 5000*l.* South Sea Annuities originally given to Dryer, the 10,000*l.* South Sea Annuities in question, the freehold tenements, and the Lee Bonds, all upon the event of her living till the age of twenty-one, married or unmarried. If she dies before twenty-one, the first, third, and fourth bequests take no place, and yet the interest of the fourth is to be paid to her separate use, notwithstanding her coverture during her infancy; but there is an event upon which the second bequest may take place before twenty-one, namely, *if she marries before that age with the consent of her mother.*

It is impossible not to suspect that the testator has failed of expressing his full intention concerning this bequest of the 10,000*l.* He gave it to the daughter on a double contingency,—her age, and being then unmarried; he seems to have meant it for the mother on the contrary event; but he has given it over also to her on a double contingency,—the death of the daughter before her age, and unmarried. This leaves a middle case,—the premature marriage of the daughter,—in which neither can claim under the form of this bequest. Again, he has provided for the anticipation of the daughter's title, by another double contingency; namely, *marriage before twenty-one, and with consent of the mother;* but, in case of a marriage between twenty-one and twenty-five, with or without consent, half the legacy would remain undisposed of; which it can hardly be imagined he meant.

Some endeavours were used to infer, from the terms in which it was given to the mother, that, in all other events, it was meant for the daughter; it is more probable, that, in the case of the daughter's not becoming entitled, it was meant for the mother; but neither conjecture is sufficiently collected from the actual expression, by any admissible rules of interpretation.

The main argument for the plaintiff turned on this proposition, that one branch of the contingency upon which

the legacy was given (or rather anticipated), implied a condition in restraint of marriage, which is merely void, and consequently the legacy became absolute.

In support of this position, innumerable decisions of this Court were quoted; but the cases are so short, and the dicta so general, as to afford me no distinct view of the principle upon which the rule is laid down, or, consequently, of the extent of the rule, or of the nature of the exceptions to which its own principle makes it liable.

The earlier cases refer in general terms to the canon law, as the rule by which all legacies are to be governed. By that law undoubtedly all conditions which fell within the scope of this objection,—the restraint of marriage,—are reputed void, and, as they speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection.

Towards the latter end of the last and beginning of the present century, the matter is more loosely handled. The canon law is not referred to (professedly at least) as affording a distinct and positive rule for annulling the obnoxious conditions; on the contrary, they are treated as partaking of the force allowed them by the law of England. But in respect of their importing a restraint of marriage, they are *treated at the same time as unfavourable, and contrary to the common weal and good order of society*. It is reasoned that parental duty and affection are violated when a child is stripped of its just expectations; that such an intention is improbably imputed to a parent, particularly in those instances where there was no misalliance, as in marriage with the houses of *Bellasis* (*a*), *Bertie* (*b*), *Cecil*, and *Semphill* (*c*), which the parent, had he been alive, would probably have approved. These ideas apply indifferently to bequests of lands and of money, and were, in fact, so applied in one very remarkable case; nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent, and every mode of artificial reasoning was adopted to relax their rigour. This was thought more practicable by calling them con-

(*a*) *Bellasis* v. *Ermine*, 1 Ch. Ca. 22.

(*b*) *Bertie* v. *Lord Falkland*, 3 Ch. Ca. 129.

(*c*) *Semphill* v. *Bayly*, Prec. Ch. 562.

ditions subsequent, although, if that had made such difference, they were, and indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest. At length it became a common phrase, that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen; but the Court disposed of such conditions so as to make them amount to no more.

On the other hand, some provision against improvident matches, especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent (*a*). The Court of Chancery is in the constant habit of restraining and punishing such marriages; and the legislature (*b*) has at length adopted the same idea, as far as it was thought general regulation could in sound policy go.

(*a*) *Foden* v. *Howlett*, 1 Vern. 354.

(*b*) 26 Geo. 2, c. 33.

In this situation the matter was found about the middle of the present century, when doubts occurred which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or rather the arguments, on which they proceeded. The better opinion, or, at least, that which prevailed, was, that devises of land, with which the canon law never had any concern, should follow the rule of the common law; and that legacies of money, being of that sort, should follow the rule of the canon law.

Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved), follow the rule of the common law, and such trusts are to be executed by analogy to it.

Mere money legacies follow the rule of the canon law; and all trusts of that nature are to be executed with analogy to that.

But still, if I am not mistaken, the question remains

unresolved, What is the nature and extent of that rule, as applied to conditions in restraint of marriage?

The canon law prevails in this country only so far as it hath been actually received, with such amplifications and limitations as time and occasion have introduced, and subject at all times to the municipal law. It is founded on the civil law; consequently, the tenets of that law also may serve to illustrate the received rules of the canon law.

By the civil law, the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment, insomuch that a will was regarded as inofficious, which did not in some sort satisfy it.

By the positive institutions of that law, it was also provided, *si quis cælibatus, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariusve é conditione liberi sunto; neque eo minus delatam hæreditatem, legatumve, ex hac lege, consequantur* (*a*).

(*a*) Heineccius ad legum Papiam Poppæam, 1776, p. 294. And see the Commentary, p. 298.

In amplification of this law, it seems to have been well settled in all times, that if, instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void.

Upon the same principle, in further amplification of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law, if a slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent; for that also is a lawful condition; and, for the rest, the condition not being lawful, is holden *pro non adjectâ*.

On the other hand, the ancient rule of the civil law has suffered much limitation in descending to us.

The case of widowhood is altogether excepted by the

Novels (*a*); and injunctions to keep that state are made lawful conditions.

(*a*) Novell. 22, c. 44.

So is every condition which does not, directly or indirectly, import an absolute injunction to celibacy.

Therefore, an injunction to ask the consent (*b*), as I have said before, is a lawful condition, as not restraining marriage generally.

(*b*) *Sutton* v. *Jewke*, 2 Ch. Rep. 9; *Creagh* v. *Wilson*, 2 Vern. 572; *Ashton* v. *Ashton*, Prec. Ch. 226; *Chauney* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munkley*, 1 Bro. C. C. 304; *Dashwood* v. *Bulkeley*, 10 Ves. 230.

A condition not to marry a widow is no unlawful injunction, for the reason given before.

So, of an annuity to a widow during her widowhood (*c*).

A condition to marry, or not to marry, Titus or Mævia, is good, for this reason, that it implies no general restraint; besides, in the first case it seems to have a bounty to Titus or Mævia in view (*d*).

(*c*) *Jordon* v *Holkam*, Amb. 209; *Barton* v. *Barton*, 2 Vern. 308.

In like manner, the injunction which prescribes the due ceremonies, and the place of marriage, is a lawful condition, and is not understood as operating the general prohibition of marriage.

(*d*) *Jervoise* v. *Duke*, 1 Vern. 19; *Randal* v. *Payne*, 1 Bro. C. C. 55.

Still more is a condition good, which only limits the time to twenty-one (*e*), or any other reasonable age, provided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies the same restraint.

(*e*) *Stackpole* v. *Beaumont*, 3 Ves. 89.

Nay, according to Godolphin, the use of a thing may be given during celibacy; for the purpose of intermediate maintenance will not be interpreted maliciously, to a charge of restraining marriage (*f*).

(*f*) See *Webb* v. *Grace*, 2 Ph. 701, reversing *S. C.* 15 Sim. 384; *Morley* v. *Rennoldson*, 2 Hare, 570, 580.

It seems also agreed on all hands, that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage (*g*).

(*g*) Swinb. Part 4, sects. 12, 14.

As we receive the canon law, a bequest over, to any purpose, or person, shall be interpreted in the same manner, and make a conditional limitation.

It was made a question, formerly, what a legatee should take on her marriage, under a bequest of 200*l.* if she married, or 100*l.* if she did not. Some thought 300*l.*, some 200*l.*, some 100*l.* In our books we find it

determined formerly, in the case of a greater legacy given upon marriage with consent, or after a certain age, and a less in the other events, that the greater legacy was not forfeited by marrying against the condition (*a*); but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition; but Lord *Cowper* determined otherwise, on alternative bequests (*b*).

(*a*) *Hicks* v. *Pendarvis*, Freem. Ch. Rep. 41; 2 Eq. Ca. Ab. 212; *Bellasis* v. *Ermine*, 1 Ch. Ca. 22.

(*b*) *Creagh* v. *Wilson*, 2 Vern. 572; *Gillet* v. *Wray*, 1 P. Wms. 284.

It is true that the foregoing limitations, which are detailed in Swinburne and Godolphin, are not found in our reports so expressly stated; but the cases did not call for such particularity, except those few alluded to before, which turned upon the looser doctrine of favourable interpretation, and that, which is not to be supported, of *Underwood* v. *Morris* (*c*), and which was determined by Mr. Justice *Parker*, sitting for the Lord Chancellor. It does not appear by any report that I have seen to have been closely considered; it is contrary to the canon and civil law, and apparently unreasonable, the restraint having been imposed only till twenty-one, and the marriage contracted improvidently at sixteen. I therefore agree with the late Lords Commissioners (*d*) in denying the authority.

(*c*) 2 Atk. 184.

(*d*) See *Hemmings* v. *Munkley*, 1 Bro. C. C. 304; and see *Stackpole* v. *Beaumont*, 3 Ves. 89; *Knight* v. *Cameron*, 14 Ves. 389; *Clifford* v. *Beaumont*, 4 Russ. 325.

Sir *Dudley Rider*, in arguing the case of *Hervey* v. *Aston*, expressly founds his argument on the perpetuation of the restraint; and Dr. *Strahan*, who argued on the same side, admits the qualification of time, place, and person, as given before.

The will before us contains a residuary bequest; but that has been repeatedly, and well enough determined, to leave the conditional legacy *in statu quo* (*e*); it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law to the executor or next of kin.

(*e*) *Semphill* v. *Bayly*, Prec. Ch. 562; *Paget* v. *Haywood*, cited 1 Atk. 378, overruling *Amos* v. *Horner*, 1 Eq. Ca. Ab. 112, pl. 9, but where there is an express direction that

But the great vice of the argument in favour of the daughter lies here. It was not contended against the rules above mentioned, if the bequest had been to her at twenty-one or twenty-five, in case she were then un-

married, without more, that she could have claimed the legacy at any other time, or in any other case. But, because the mother was empowered to accelerate the gift by her consent to a proper marriage, and a proper settlement, it was thence argued, that it was indirectly putting an illegal constraint upon marriage. Now, if the first branch of the gift did not impose a direct restraint, in contradiction of law, the relaxation of that condition certainly would not operate as an indirect restraint of the same nature.

the forfeited legacy shall fall into the residue. See *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108, overruling dictum in *Reeves* v. *Herne*, 5 Vin. Ab. 343, pl. 41; and see *Ellis* v. *Ellis*, 1 S. & L. 1.

I am therefore of opinion, that the daughter, having married at eighteen improvidently, so far as appears, and against the anxious prohibition of the mother, never came under the description to which the gift of the 10,000*l.* was attached.

It was therefore void, and a part of the residue; consequently, it belongs to the assignees of the mother, the defendants; and the bill must be dismissed, so far as it seeks to have that trust executed.

Upon principles of public policy, conditions annexed to legacies, devises, or contracts, operating unduly in restraint of marriage, as well as contracts entered into for the purpose of promoting marriage for reward, or in fraud of one of the parties to the marriage or their friends, are, by the laws of England, which have in many respects been influenced by the Roman law, utterly null and void. It is proposed in this note to consider how such conditions and contracts have been dealt with in Courts of equity.

As to testamentary gifts prohibiting or tending to a prohibition of marriage.]—Both by the common law of England, as well as by the civil law, all conditions annexed to gifts *generally* prohibiting marriage, are void, as being against public policy, or, as Lord *Thurlow* expresses it in the principal case, "contrary to the common weal and good order of society:" *Keily* v. *Monck*, 3 Ridg. P. C. 205, 244, 247, 261; *Hervey* v. *Aston*, Com. Rep. 726, 729; *S. C.*, 1 Atk. 361; 1 Eq. Ca. Ab. 110, pl. 2, n. a.; *Rishton* v. *Cobb*, 9 Sim. 615, 619; *Morley* v. *Rennoldson*, 2 Hare, 570; *Connelly* v. *Connelly*, 7 Moore, P. C. C. 438.

And not only conditions actually prohibiting, but also such as lead to a *probable* prohibition of marriage are void. Thus, where

a legacy was given by a testator to his daughter, payable on her marriage or age of twenty-one, upon condition "that she shall not marry without consent, or shall not marry a man who shall not be seised of an estate in fee simple, or of freehold property of the clear yearly value of 500*l.*," the condition was held void: *Keily* v. *Monck*, 3 Ridg. P. C. 205. And see *Long* v. *Dennis*, 4 Burr, 2052. For the Roman law, see Dig. xxxv., tit. 1, l. 22, 64, 72; s. 4, 78; s. 4, 100.

But a condition to marry or not to marry particular persons, or at a particular place, was by the Roman law good, as not operating in general restraint of marriage, unless, in the case of a condition to marry a particular person, it appeared that the match was derogatory; or, in the case of the condition to marry at a particular place, it appeared that marriage would not be likely to take place elsewhere; for, in these cases, the condition would be void, as a fraud upon the law: Dig. xxxv., tit., 1, l. 63, 64.

Upon the same principle, according to our law, and to a greater extent than by the Roman law, all conditions which do not, directly or indirectly, import an absolute injunction to celibacy are valid. Thus, a condition to marry or not to marry any particular person (*Jervois* v. *Duke*, 1 Vern. 19; *Randal* v. *Payne*, 1 Bro. C. C. 55); or a native of any particular country (*Perrin* v. *Lyon*, 9 East, 170); or a person belonging to a particular religious sect, as a papist (*Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295; 1 Eq. Ca. Ab. 110, pl. 2, n. a); or a condition which prescribes the ceremonies of marriage, although differing from those of the established church, as those of the Quakers (*Haughton* v. *Haughton*, 1 Moll. 611); or which prohibits marriage before twenty-one, or other reasonable age (*Stackpole* v. *Beaumont*, 3 Ves. 89), even before twenty-eight (*Younge* v. *Furse*, 8 De G. Mac. & G. 756), is not illegal.

It is said, however, that a condition not to marry a man of a particular profession or calling, whether there be a limitation over or not, is legal (1 Eq. Ca. Ab. 110, pl. 2, n. a), upon the ground, it is presumed, that it leads to a probable prohibition of marriage: *Keily* v. *Monck*, 3 Ridg. P. C. 205, 265.

It has been recently laid down that there is neither principle nor authority for saying that a parent may not make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. The condition is *conditio rei licitæ*, and so the rules derived from conditions in restraint of marriage or otherwise against the liberty of the law, are inapplicable: *Dickson's Trusts*, 1 Sim. N. S. 37, 46; and see *Clavering* v.

Ellison, 8 De G. Mac. & G. 662; 7 Ho. Lo. Ca. 707.

According to the Roman law, when a legacy was given to a widow, if she did not marry away from her children, the condition would be void; but if the legacy were "*si a liberis impuberibus ne nupserit*," the condition would be good; and the reason given was, "*quia magis cura liberorum, quam viduitas injungeretur:*" Dig. Lib. xxxv., tit. 1, 62, s. 2, and tit. 1, 72. Widows, as observed by Lord *Thurlow*, in the principal case, were excepted from the Novels; and it is clear, that, according to our law, a gift during widowhood is good: *Barton* v. *Barton*, 2 Vern. 308; *Jordan* v. *Holkam*, Amb. 209; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255, 263.

By the Roman law, however, all conditions requiring *consent* to marriage seem to have been void, and the gifts dependent upon them to have been good upon a marriage taking place without consent (Dig. xxxv., tit. 1, l. 72, s. 4); as would also be the case if the person whose consent was required died in the lifetime of the testator: Dig. xxxv., tit. 1, l. 28.

By the law of England, conditions restraining marriage under the age of twenty-one or other reasonable age, unless with the *consent* of parents, guardians, or executors (*Sutton* v. *Jewke*, 2 Ch. Rep. 9; *Creagh* v. *Wilson*, 2 Vern. 573; *Aston* v. *Aston*, Prec. Ch. 226; *Chauncy* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munkley*, 1 Bro. C. C. 304; *Dashwood* v. *Bulkeley*, 10 Ves. 230), are valid.

But although such restraint may be valid, the efficiency of the condition imposed will depend, in a great measure, upon the nature of the property, and of the condition itself.

The principal case, so thoroughly argued before Lord *Thurlow*, by the ablest counsel of the day, is generally cited as the leading authority whenever the question arises, whether a condition in restraint of marriage annexed to a gift is or is not valid. And in determining this question, the nature of the property is material; for, as is laid down in the principal case, in construing conditions in restraint of marriage, annexed to a devise of lands, charges upon it, powers to be exercised over it, money legacies referring to such charges, and money to be laid out in land, a Court of equity will follow the rule of the common law. If they are annexed to a mere personal legacy, it will follow the rules of the Ecclesiastical Court, derived from the civil law, except so far as they have been modified or departed from by its own decisions. Unless for the purpose of maintaining uniformity with the decisions of common law as to land, and of the Ecclesiastical Court as to legacies, there exists no reason for the distinction: the construction ought to be precisely the same as to both; but it is

now too strongly established to be overthrown by anything short of the interference of the legislature. It was strongly disapproved of by Lord *Rosslyn*, who thus accounts for its origin :—"In deciding questions," said his Lordship, "that arise upon legacies out of land, the Court very properly followed the rule (that the common law prescribes and common sense supports), to hold the condition binding where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty, upon the supposition that the Ecclesiastical Court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction, (it is not right to call it so,) in the resort to this Court instead of the Ecclesiastical Court, upon legatory questions, which after the Restoration was very frequent, and in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for but upon this circumstance—that, in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a Christian country, they should have adopted the rule of the Roman law with regard to conditions as to marriage. First, where there is an absolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. Next, the favour to marriage, and the objection to the restraint of it, was a mere political regulation applicable to the circumstances of the Roman empire at that time, and inapplicable to other countries. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the time of Augustus, the Julian law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy, (it is an odd expression,) and for the encouragement of all persons who would contract marriage, it necessarily followed, that no person could act contrary to it, by imposing restraints directly contrary to the law. Therefore it became a rule of construction that these conditions were null. It is diffi-

cult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage their children or objects of bounty may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine, not to lay conditions to restrain marriage under the age of twenty-one to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the consent of the parent: " per Lord *Rosslyn*, in *Stackpole* v. *Beaumont*, 3 Ves. 96. And see *Pearce* v. *Loman*, 3 Ves. 139.

In our law, however, there is a marked distinction between conditions precedent and conditions subsequent; for where a condition is precedent, as the estate cannot commence until the condition is performed, the condition is beneficial, as creating an estate, and ought to be construed favourably. Where, however, a condition is subsequent, as it operates by way of destruction of an estate already in existence, and being of a penal nature, it ought to be construed strictly. In consequence of this distinction it will be better to consider conditions precedent and subsequent, as applicable to the subject now under consideration, separately.

Conditions precedent with respect to marriage.]—With regard to a devise of land (*Fry* v. *Porter*, 1 Ch. Ca. 138; 1 Mod. 300; *Bertie* v. *Lord Falkland*, 3 Ch. Ca. 129); or of a portion to be raised out of land, or a legacy having reference, and given as an augmentation, to a portion to be raised from land (*Reves* v. *Herne*, 5 Vin. Abr. 343, pl. 41; *Hervey* v. *Aston*, 1 Atk. 361; *Reynish* v. *Martin*, 3 Atk. 330), on condition of marrying with consent, it is clear that it will not take effect unless the condition be complied with, even although there be no gift over; for such condition is valid at common law, and must be complied with.

And although, from the leaning towards the civil law, it seems at one time to have been supposed, that where a personal legacy was bequeathed to a person upon marriage under twenty-one, or other reasonable period, *with the consent* of persons designated by the testator, the condition was only *in terrorem*, and that the legacy would vest upon marriage, it is now, it is submitted, settled by the principal case, that such legacy will not vest unless the consent be first obtained; for the condition is precedent; and, as it imposes no other restraint upon the liberty of marriage than is imposed or allowed by the law and policy of the land, it is good, whether there be a limitation over or not (*Hemmings* v. *Munkley*, 1 Bro. C. C. 304; 1 Cox, 38; overruling *Underwood* v. *Morris*, 2

Atk. 184); for although there is a limitation over in the principal case, it is not dependent upon a marriage without consent, but upon dying under a particular period, without marriage ever having taken place,—a limitation which was disappointed by the marriage of the legatee, though without consent.

This subject was much discussed in the important case of *Stackpole* v. *Beaumont*, 3 Ves. 89. There the testator devised his real estates in remainder to the use of L. W., or such person, if any, with whom she should first intermarry, "if before twenty-one, then with the consent of his trustees, or the survivor of them," for their joint lives, and the life of the survivor, &c. Towards the end of his will, he gave to L. W. 10,000*l.*, "payable and to be paid to her as follows:—5000*l.* upon her marriage with such consent as aforesaid, and 5000*l.* within two years next afterwards." L. W., while an infant, and a ward of the Court, eloped, and was married in Scotland, without the consent of the trustees. Lord *Rosslyn* held, that she was not entitled to the legacy. "Confined to cases," said his Lordship, "where the restraint operates only up to the age, till which, by the law and policy of the country, consent is necessary, I have no difficulty to say there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. In *Scott* v. *Tyler* there is a very accurate, though not a very extended, opinion of Lord *Thurlow* (reported by Brown), which carries conviction along with it. The question is, not whether any forfeiture has been incurred, but whether the parties to whom the legacy is given have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay; for I cannot stop in the middle of a sentence. He gives her 10,000*l.*, that is, in effect, two sums of 5000*l.*, one payable upon her marriage with consent. She has not married with consent. She has married without it. Can she claim the 5000*l.* under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to Judges sitting here, to deliver them from the difficulty arising from the rule of the civil law adopted without seeing the ground and the reason of applying it to this country under different circumstances." And see *Clifford* v. *Beaumont*, 4 Russ. 325; *Knight* v. *Cameron*, 14 Ves. 389; but see *Reynish* v. *Martin*, 3 Atk. 330; 1 Wils. 130.

Where a legacy or annuity is given by a parent to his daughter provided she does not marry before a certain age, as for instance the age of twenty-eight,

she will not, it seems, be entitled to the legacy or annuity, if she marry before that age, even with the consent of her parent: *Younge* v. *Furse*, 8 De G. Mac. & G. 756; 3 Jur. N. S. 603, where the Lords Justices reversed the decision of Sir *John Romilly*, M. R., reported 2 Jur. N. S. 864; 26 L. J. Ch. N. S. 117.

There is some doubt, with regard to a personal legacy, whether a condition precedent requiring consent *generally*, without reference to the age of the legatee, is valid, unless it be accompanied by a bequest over on marriage without consent, in which case it is clearly valid: *Malcolm* v. *O'Callaghan*, 2 Madd. 349, 353; *Gardiner* v. *Slater*, 25 Beav. 509. So, likewise, is it where there is another legacy or provision for the legatee in the event of marriage without consent: *Creagh* v. *Wilson*, 2 Vern. 572; *Gillet* v. *Wray*, 1 P. Wms. 284; but see *Hicks* v. *Pendarvis*, Freem. Ch. Rep. 41, 2 Eq. Ca. Ab. 212. In both these instances the testator may be considered to have shown it to be his intention by a gift over to another, in the first, and by a different gift to the legatee in the second case, that the condition should not be taken merely as *in terrorem*.

Conditions subsequent with respect to marriage.]—It seems to be clearly settled, according to the law as administered in Courts of justice in this country, that, if a legacy is given subject to a condition in restraint of marriage which is *general*, and also subsequent, then the condition is altogether void, and the party retains the interest given to him, discharged of the condition; that is, supposing a gift of a certain duration, and an attempt to abridge it by a condition in restraint of marriage *generally*, the condition is primâ facie void, and the original gift remains; see *Morley* v. *Rennoldson*, 2 Hare, 570. There the testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support until she attained twenty-one or married with the consent of his trustees under that age; and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and in case of her death without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards, by a codicil, declared that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was, that she should not marry; and in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder. It was held by Sir *James Wigram*, V.-C., that the restraint upon marriage being general, the condition was void, notwithstanding the limitation over. "The question

to be considered," said his Honour, "is that upon which, in fact, I reserved my judgment,—whether, according to the true intent of the second codicil, it must be considered as confirming the gifts made by the will, and then seeking to determine them on the event of marriage, or whether it was not a complete substitution of new bequests, amounting in substance to a limitation during celibacy. Without saying the case is clear, the conclusion to which I have come is, that this codicil does, in point of fact, recognise and confirm the prior bequests by the will. . . . . In the case of *Malcolm* v. *O'Callaghan* (2 Madd. 349), which was cited, marriage *with consent*, was a condition precedent by the will, and the codicil *giving* the legacy to the survivor of the daughters who should die before the age of twenty-five or marriage with consent, was held to keep alive the condition. The testator, in this case, has so expressed himself as to import an intention to create a general restraint upon the marriage of the legatee, and the limitation over with that object is therefore primâ facie void. . . . . I cannot do otherwise than hold, that this is a conditional gift in general restraint of marriage, by which the testator seeks to cut down an interest which he had given by will; and, therefore, that I must hold this to be a void condition."

The result is the same where the property given subject to a condition in general restraint of marriage, arises from the proceeds of land directed to be converted (*Bellairs* v. *Bellairs*, 18 L. R. Eq. 514, per Sir *G. Jessel*, M. R.), or where the property so subject is a mixed fund; the proceeds of realty and personalty directed to be converted and thrown together as an entire fund. *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255. *Bellairs* v. *Bellairs*, 18 L. R. Eq. 510, 516; but a charge on land does not follow the same rule, but follows the rule of the common law, as it is called, as distinguished from the rule of equity. Per Sir *G. Jessel*, M. R. in *Bellairs* v. *Bellairs*, 18 L. R. Eq. 513.

And even where the condition in restraint of marriage is not general, but against marriage with a particular person (*W.* v. *B.*, 11 Beav. 621; and see *Poole* v. *Bott*, 11 Hare, 33), or restraining a widow of a testator from marrying again (*Marples* v. *Bainbridge*, 1 Madd. 590), in the absence of a gift over upon breach of the condition, it has been construed as *in terrorem* merely.

Where, however, there is a gift over on marriage, and even, it seems, where the gift to the widow is made to cease upon marriage, a condition subsequent against marriage generally, attached to a devise or bequest, is valid, not only when the legatee or devisee is the widow of the testator (*Tricker* v. *Kingsbury*, 7 W. R.

V.-C. W. 652; *Craven* v. *Brady*, 4 L. R. Eq. 209; 4 L. R. Ch. App. 296), but also when she is the widow of another person (*Charlton* v. *Coombes*, 11 W. R. V.-C. S. 1038). In *Newton* v. *Marsden*, 2 J. & H. 356, by a will certain trusts were declared for the benefit of the widow of the testator's nephew and her children, under which the widow was entitled to certain rents of real estate, and to annuities charged primarily on real estate, and to be made up, if necessary, out of personal estate, and there was a proviso that, if the widow married again, the trusts for her benefit should absolutely cease and be void. It was held by Sir *W. Page Wood*, V.-C., that the condition was valid. "It seems to me," said his Honour, "that the real principle in the case of a gift by a husband is, that the condition is not regarded as an arbitrary prohibition of marriage altogether, but the conditional gift is considered as made to the widow because she is a widow, and because the circumstances would be entirely changed if she entered into a new relation. The very same consideration applies to this gift, and I think it would be reasonable, on a will of this kind, to hold that the case falls within the principle which governs a gift to a man's own widow. But I prefer to rest my decision on what is perhaps the safer as well as the broader ground, namely, that there is no authority in the common law, independently of the civil law, for saying that a condition restraining the marriage of a widow is void; and having regard to the observations of Lord *Loughborough*, I do not hesitate to say, that I shall not introduce any new doctrine to carry the rule of avoiding restraints on marriage beyond the limits of the old authorities:" and see *Tricker* v. *Kingsbury*, 7 W. R. V.-C. W. 652.

Moreover, a gift over on the second marriage of a *man* will be valid. See *Allen* v. *Jackson*, 1 Ch. D. 399. There, by will, certain property was bequeathed to trustees upon trust to pay the income thereof to R. N. Jackson and his wife during their joint lives, and after the death of either of them, to the survivor for life; with a proviso, that if E. A. Jackson should die in the lifetime of her husband, and he *should marry again*, the income was to be in trust for persons other than the husband. E. A. Jackson died, and her husband married again. It was held by the Court of appeal, reversing the decision of Sir *Charles Hall*, V.-C. (reported 19 L. R. Eq. 631), that the proviso was valid, and that the gift over took effect. "The present state of the law," said *Baggallay, J. A.*, "as regards conditions in restraint of the second marriage of a woman is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enun-

ciation of that law has been gradual. In the first instance, it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making the will in favour of his mother. That, I think, is laid down in Godolphin's Orphan's Legacy, p. 45. Then came the case before Vice-Chancellor Wood of *Newton* v. *Marsden* (2 J. & H. 356), in which it was held to be a general exception by whomsoever the bequest may have been made. Now the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a woman, but no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a man, and following the analogy of the other cases, there seems no reason at all why a distinction should be drawn between the two sexes as regards this matter. It appears to me that this condition is one which may fairly be treated as valid, and I think so the more for this reason. Here is a gift in favour of a man, which, if he is not deprived of it on the occasion of his second marriage, he may very probably, or very possibly, settle upon a second wife, and altogether deprive the original family which was the object of the testator's bounty."

Where a legacy is given to a woman absolutely, at a certain time, and there is a subsequent condition requiring *consent* to marriage, the condition will be construed as *in terrorem*, if there be no bequest over, although there be a diminished gift to the legatee in the alternative of her marrying without consent: *Garret* v. *Pritty*, 2 Vern. 293; 3 Mer. 120, n.

If the power of diminishing the legacy is delegated to another person, the condition will be considered as *in terrorem* merely, in the same manner as if the diminution of the legacy had been provided by the testator in his will: *Wheeler* v. *Bingham*, 3 Atk. 364.

Should, however, the legacy be limited over to another person on the marriage without consent, the condition will not be considered merely as *in terrorem*, but on breach of it, the gift over will take effect: *Stratton* v. *Grymes*, 2 Vern. 357; *Barton* v. *Barton*, 2 Vern. 308. And see 3 Atk. 367.

Different reasons have been assigned by different judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said, that it was the interest of the devisee over which made the difference; and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect.

Whatever might be the ground of decision, it was held, that where the testator only declared that, in case of marriage without consent, the legatee should forfeit what had been before given, but did not say what should become of the legacy, such declaration would remain wholly inoperative." Per Sir *W. Grant*, M. R., in *Lloyd* v. *Branton*, 3 Mer. 117.

It seems that a mere gift of a residue, as is laid down by Lord *Thurlow*, in the principal case, will not be considered as a bequest over, for it has been repeatedly determined that that will leave the legacy in *statu quo*, as it only prevents that which has not been disposed of already, whatever be its amount, from falling, by order of law, to the executor or next of kin : *Paget* v. *Haywood*, cited 1 Atk. 378 ; *Keily* v. *Monck*, 3 Ridg. P. C. 205, 252 ; overruling *Amos* v. *Horner*, 1 Eq. Ca. Ab. 112, pl. 9.

However, there is a clear distinction between a mere residuary bequest, and a direction that a legacy should sink into and form part of the residue ; for that is tantamount to a gift over to the persons participating in the residue : *Wheeler* v. *Bingham*, 3 Atk. 368. And see *Lloyd* v. *Branton*, 3 Mer. 108, 118.

Limitations until marriage as distinguished from conditions.]— Where property is limited to a person until marriage, and upon marriage then over, the limitation is good. " It is difficult," says Sir *J. Wigram*, V.-C., " to understand how this could be otherwise : for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation ; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage. . . . I am satisfied, from an examination of the authorities, that there is no reason to alter my opinion, that a gift until marriage, and when the party marries then over, is a valid limitation. In the case of a widow, there is no question of the validity of such a limitation. It was decided in *Jordan* v. *Holkham*, Amb. 209, that, where an estate was given during widowhood, the estate was determinable by the second marriage ; and an annuity given during widowhood is also good : *Barton* v. *Barton* (2 Vern. 308). In *Scott* v. *Tyler* (ante, 176, 177), Lord *Thurlow*, speaking of the change which the civil law had undergone in its descent, observes, that, in the Novels, widowhood was excepted, and an injunction to keep that state was a lawful condition : *Scott* v. *Tyler*, was certainly a peculiar case ; but, referring to the canon law, Lord *Thurlow*, citing Godolphin, says, that the use of a thing may be given ' during celibacy for the

purpose of intermediate maintenance, and will not be interpreted maliciously to a charge of restraining marriage' (ante, 177), affirming, therefore, the general doctrine, that a gift until marriage would be good. In the case of *Low* v. *Peers*, C. J. Wilmot's Cases, 369, Chief Justice *Wilmot* goes through the cases upon the subject, and shows that, according to his apprehension of the law, a gift until marriage is perfectly good. He notices the case of college fellowships, of customs of manors, of limitations of estates during celibacy, and the express distinction between limitations and conditions; and he remarks, that that distinction is recognised and established, and that the common law allows it. I may refer to the cases, and amongst them to the later ones of *Bird* v. *Hunsdon* (2 Swanst. 342), and *Marples* v. *Bainbridge* (1 Madd. 590), as affirming the same proposition. In those cases, all the reasons the Court referred to were superfluous, if a limitation during celibacy is not good. The Court might have taken the short course, and have said that it was in the nature of a restraint, and therefore could not be supported:" *Morley* v. *Rennoldson*, 2 Hare, 580; *Evans* v. *Rosser*, 2 Hem. & Mill. 190.

In *Webb* v. *Grace*, 2 Ph. 701, A. covenanted to pay to E. C. during her life, subject to the proviso thereinafter contained, an annuity of 40*l.*, the proviso being that in case E. C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to 20*l.* only, which sum should, in such case, be paid and payable to E. C. from the time of her marriage for the remainder of her life. E. C. having married, Lord *Cottenham*, reversing the decision of Sir *L. Shadwell*, V.-C. (reported 15 Sim. 384), held her only to be entitled to the annuity of 20*l.* "The question," observed his Lordship, "turns upon the construction of the covenant; for there really cannot be any doubt as to the rule of law. The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is unnecessary to refer to authorities for this purpose: *Richards* v. *Baker* (2 Atk. 321), *Sheffield* v. *Lord Orrery* (3 Atk. 282), *Gordon* v. *Adolphus* (3 Bro. P. 306, Toml. edit.), were cited in the argument. If, then, this grant is a grant of 40*l.* per annum until marriage, and, from that event happening, of 20*l.* per annum for life, there can be no doubt but that such a gift is lawful, and that, after marriage, there can be no demand for the 40*l.* per annum. The claim is grounded upon contract and obligation on the part of the grantor; the parties claiming must therefore prove that their claim is

within the terms of the contract and obligation. . . . Is there, in the covenant, any contract or obligation to pay 40*l.* per annum after the marriage of E. C.? The argument in favour of the claim assumes that there is an unqualified grant of an annuity of 40*l.* per annum for life, and an attempt to defeat the gift by an illegal condition subsequent. This proposition, I think, fails in all its parts: for there is not any unqualified gift of an annuity of 40*l.* for life; the contract and obligation is, to pay to E. C. during her life, subject to the proviso hereinafter contained, an annuity of 40*l.* at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay 40*l.* per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law, as acted upon in the cases referred to. One of them, indeed—*Sheffield* v. *Lord Orrery*—is, upon this point, stronger than the present; for there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition, giving the property over in the event of marriage; and Lord *Hardwicke* said, that the gift over was to take effect on the marriage. There is another way in which this may be viewed equally fatal to the claim. The contract and obligation is, to pay a certain sum at certain stipulated periods during the life of E. C.; but she is, by the proviso, at each of those periods to be qualified to receive it by the fact of not being married. Can she claim any of such payments, though disqualified by the fact of marriage? The condition, therefore, if there be one, is precedent and not subsequent."

In *Heath* v. *Lewis* (3 De G. Mac. & G. 954) a testator bequeathed an annuity to a single lady (if living and unmarried at the death of a prior annuitant) "during the term of her natural life, if she shall so long remain unmarried:" it was held by the Lords Justices to be a limitation as distinguished from a condition, and that the annuity ceased when the lady married. "It must be agreed on all hands," said Lord Justice *Knight Bruce*, "that it is by the English law competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced—a proposition which, if true (and I do not deny its truth), is, perhaps, not creditable to this English law—that if

a man give an annuity to a woman, who has never married, for life, and afterwards declares that, if she shall marry, the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity. Such is the state of our English law on this subject said, and perhaps truly, to be; and the question argued before us has been, to which of these two classes the gift in this will belongs, being a gift of an annuity to a single lady 'during the term of her natural life, if she shall so long remain unmarried.' This language being the technical and proper language of limitation as distinguished from condition, long known to the English law, and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation as distinguished from a condition, and that the annuity ceased when the lady married."

In the case of *Cooper* v. *Cooper*, 6 Ir. Ch. Rep. 217, a testator by his will, dated in 1841, devised lands to trustees upon trust for B. for life, "provided she does not marry, and from and after her decease or second marriage," for other persons. In 1847 the testator married B., and afterwards made a codicil to his will which had the effect of republishing it. It was held by Lord Chancellor *Brady*, that the devise to B. took effect notwithstanding her marriage to the testator. "Looking," said his Lordship, "at what took place, and at the fact that she had married the testator himself, it would be a very strong thing to decide that where, by his own act, he induced her to break the condition, she was to be deprived of all this estate. I must, however, treat the codicil as a republication, and therefore as declaring that, at all events, at the time of its execution, it was his will that she should take this property unless she should *afterwards* marry." See also *In re Corkers, Minors*, 1 Ir. Jur. 316; *West* v. *Kerr*, 6 Ir. Jur. 141; *M'Culloch* v. *M'Culloch*, 3 Giff. 606.

Where the object of a devisor appears to be, not to restrain marriage, but to provide for a single woman while she is unmarried, a gift over upon her marriage will take effect, and the question as to whether the clause containing such gift amounts to a condition or a limitation is immaterial, inasmuch as such a distinction does not apply to a devise of realty. *Jones* v. *Jones*, 1 Q. B. D. 279.

As to consent to marriage.]—In the case of a condition subsequent a marriage in the lifetime of the father, with his consent, or even his subsequent approbation, is equivalent to a marriage after his death with the consent of trustees. See *Clarke* v. *Berkeley*, 2 Vern. 720; *Coffin* v. *Cooper*, cited 1 V. & B.

481; *Parnell* v. *Lyon*, 1 V. & B. 479; *Wheeler* v. *Warner*, 1 S. & S. 304; *Coventry* v. *Higgins*, 14 Sim. 30. See also *post*, 197.

Upon the same principle, Lord *Rosslyn* held a condition in a will requiring the consent of trustees to marriage not to be applicable to the second marriage of a daughter who had married between the date of the will and the death of the testator, and was a widow at his death. *Crommelin* v. *Crommelin*, 3 Ves. 227.

Where no particular mode is prescribed for trustees to give their consent, it will be presumed that they have given it where they have allowed courtship and marriage to take place without expressing their dissent, especially if from any fraudulent or corrupt motive they have withheld actual consent. *Mesgrett* v. *Mesgrett*, 2 Vern. 580. Lord *Eldon*, approving of this case, in *Clarke* v. *Parker*, 19 Ves. 12, says, nevertheless, that it would be difficult to support it, if consent *in writing* had been required, and that the Lord Keeper laid stress on the circumstance, that, as writing was not required, consent might be signified by acts, without a formal consent. However, in *Lord Strange* v. *Smith*, Amb. 263, although the *written* consent of the mother was made requisite, it was held, by Lord *Hardwicke*, that the mother having made the first offer to Lord Strange, received him at her house, encouraged his addresses to her daughter, and treated with him and his father about the settlement, had thereby given her consent (although it does not appear by the report, that it was in writing); and that she could not withdraw it, on account of the offence she took at Lord Strange, for some reflections which she heard that he had made upon her. Lord *Eldon*, although he cites this case in *Clarke* v. *Parker*, does not notice that the consent was required to be in writing. In *Worthington* v. *Evans*, 1 S. & S. 165, where, however, a letter written by the trustee the day before the wedding, was held to be a sufficient consent in writing, Sir *John Leach*, V.-C., said, "that if there had not been such a letter, inasmuch as the formal consent in writing would have been executed by him, but for the accidental delay occasioned by the other trustee, and not from any change of purpose, the Court would have considered his consent to have been substantially given, according to the will; because he had expressed his full approbation of the marriage, and only did not sign it for a reason personal to himself."

Courts of equity are disposed to put a favourable construction upon the expressions of trustees where consent is requisite, so as to prevent a breach of condition, especially after a mutual attachment has been suffered to grow

up under their sanction. *Daley* v. *Desbouverie*, 2 Atk. 273; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225; *Le Jeune* v. *Budd*, 6 Sim. 441. See, however, Lord *Eldon's* observations on *Daley* v. *Desbouverie*, in *Clarke* v. *Parker*, 19 Ves. 12, 18.

In *Pollock* v. *Croft*, 1 Mer. 181, where there was a bequest of personal estate to A., provided she married with the consent of B., but if she married without such consent, then to C., Sir *William Grant*, M. R., held, that a general permission given by B. after A. attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission without his knowledge, was a sufficient compliance with the requisition; but as the consent only appeared by the answer of B., which could not be read against C., who was an infant, a reference was directed to the Master to inquire what consent was given by B.

The Court has assumed the power, although it be a dangerous one, of examining whether the refusal of consent by a trustee proceeds from any vicious, corrupt, or unreasonable cause: *Dashwood* v. *Lord Bulkeley*, 10 Ves. 245; *Clarke* v. *Parker*, 19 Ves. 18. But even if the person who refuses his consent be the devisee over, he is not obliged to show his reason for dissent — it lies upon the party requiring assent to show that it has been unreasonably refused; "for," as observed by Lord *Eldon*, "the testator must know that he has made necessary the consent of a person who has an interest:" *Clarke* v. *Parker*, 19 Ves. 22. See, however, the remarks of Lord *Hardwicke* in *Hervey* v. *Aston*, Atk. 381; and of Lord *Mansfield* in *Long* v. *Dennis*, 4 Burr. 2052.

If a trustee, whose consent to a marriage is required, refuse to interfere, either by consenting or objecting to a proposed match, the Court will direct a reference to inquire and state to the Court whether the marriage is a proper one: *Goldsmid* v. *Goldsmid*, G. Coop. 225.

If consent be once obtained, unless by fraud or misrepresentation (*Dillon* v. *Harris*, 4 Bligh, 321), it cannot without a sufficient reason be withdrawn, especially if the person so withdrawing his consent would derive a benefit from a marriage without consent: *Lord Strange* v. *Smith*, Amb. 263; *Merry* v. *Ryves*, 1 Eden, 1; *Le Jeune* v. *Budd*, 6 Sim. 441. In *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230, the refusal of the intended husband to make a settlement was held by Lord *Eldon* a sufficient reason for the trustees withdrawing their assent to the marriage, which they had given upon condition of his making it.

When the consent of all the trustees is required, the consent of two, without the third being

consulted, is insufficient, as there is a discretion in him as well as the others (*Clarke* v. *Parker*, 19 Ves. 1); but the consent of one of the executors or trustees who renounced or never acted, would according to the more recent authorities be unnecessary, the authority of consent being annexed to the office. See *Clarke* v. *Parker*, 19 Ves. 15, 16; *Worthington* v. *Evans*, 1 S. & S. 165; *White* v. *M'Dermott*, 7 I. R. C. L. 4. However, in *Graydon* v. *Hicks*, 2 Atk. 16, where the marriage was to be with the consent of the executor Graydon, the executor renounced, and administration was granted to one Timewell, a marriage took place without any consent; but it was objected, that it was not a breach of the condition, because Graydon had renounced, and administration with the will annexed had been granted to Timewell; but Lord *Hardwicke* was of opinion, that the objection was not well grounded, and that the legacy was forfeited; as the word "executor" was a description of every person who should be administrator; and that it was a power not annexed to the office of executor, but independent from the rest of his duty as executor.

Where the condition has become impossible by the person dying whose consent was necessary before marriage, it is an excuse: Per Lord *Hardwicke*, in *Graydon* v. *Hicks*, 2 Atk. 16. And see *Aislabie* v. *Rice*, 3 Madd. 256; *Grant* v. *Dyer*, 2 Dow. 93; *Collett* v. *Collett*, 35 Beav. 312.

Where a legacy is given to a legatee on marriage upon a condition precedent requiring the consent of both parents of the legatee, the consent of the surviving parent will be deemed a sufficient compliance with the condition. See *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753. In that case there was a bequest to the female children of the testator's sister on attaining twenty-one or marrying with the consent of their parents. The testator's sister, whose husband died after the date of the will, had two daughters, one of whom married while an infant, with the consent of her mother. It was held by the Court of Appeal, reversing the decision of Sir *G. Jessel*, M. R., that the consent of the mother was sufficient, and that the daughter marrying with such consent took a vested interest in the legacy. See, also, *Green* v. *Green*, 2 J. & L. 529. A fortiori will this doctrine be applicable in the case of conditions subsequent. See *Collett* v. *Collett*, 35 Beav. 312. So, where a legacy was bequeathed to a lady upon condition of her marrying with the consent of *two* persons who were also executors; on the death of one of them, the condition being subsequent and become impossible, she might marry without the consent of the survivor: *Pey-*

ton v. *Bury*, 2 P. Wms. 626; but see *Jones* v. *Earl of Suffolk*, 1 Bro. C. C. 529.

The subsequent approbation of persons whose consent is necessary to a marriage, is immaterial, because it cannot amount to a performance of a condition, or dispense with a breach of it: *Reynish* v. *Martin*, 3 Atk. 330; *Fry* v. *Porter*, 1 Ch. Ca. 138; 1 Mod. 300. Lord *Hardwicke*, in *Burleton* v. *Humphrey*, Amb. 256, where the marriage was to be with "the consent or approbation" of a trustee, who did not give his approbation until a month after the marriage, struggles to distinguish between consent and approbation; and the condition being in the latter part of the clause expressed in the alternative, inclined to the opinion that the subsequent approbation would do. "Lord *Thurlow*, however," says Lord *Eldon*, "denied that, as he did not see why subsequent approbation, if sufficient after eleven months, would not do at any time during the whole life of the trustee; during which it must be quite uncertain whether the marriage was had in conformity with the condition or not:" *Clarke* v. *Parker*, 19 Ves. 21.

And where the condition was that the party should not marry *against* the consent of the trustees, a marriage contracted *without* their knowledge, but with their subsequent approbation, was held a breach of the condition: *Long* v. *Ricketts*, 2 S. & S. 179.

Where a legacy is to vest or be paid at a particular age, and then there is a clause of forfeiture on marriage without consent, such clause will be construed as having relation to a marriage under the specified age: *Lloyd* v. *Branton*, 3 Mer. 116; *Osborn* v. *Brown*, 5 Ves. 527. And see *Desbody* v. *Boyville*, 2 P. Wms. 457.

The Court may relieve against forfeiture occasioned by the negligence of a trustee. Thus, in *O'Callaghan* v. *Cooper*, 5 Ves. 117, a trust term was limited to trustees, to raise out of real estate portions for daughters, to be paid on marriage, upon condition that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement. A marriage having taken place with the consent of the mother and the privity of the trustee, but by the neglect of the trustee, without any settlement, the husband having before and after the marriage offered all that was required of him, and being ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon the execution of the settlement. See also *Mallon* v. *Fitzgerald*, 3 Mod. 28.

A testator's consent to a marriage to take place *after his death*, does not dispense with a condition of forfeiture annexed to a bequest in his will that the legatee shall forfeit the same in case he marry

without the consent of persons named in the will: *Lowry* v. *Patterson*, 8 I. R. Eq. 372.

Where the testator has not made the consent of *other* persons requisite, the question may arise, when he has imposed any condition with respect either to the time of marriage, or against marriage with a particular person, how far by *his own consent* to the marriage he will be held to have dispensed with the condition, and it seems that where the condition is subsequent, the consent of the person who imposed the condition will remove the consequence of its non-performance. Thus, in *Smith* v. *Cowdery*, 2 S. & S. 358, a testator bequeathed his residuary personal estate unto his executors upon trust to pay and divide the same equally amongst his children Susannah, Mary, Ann, Fanny, and William, when they should respectively attain twenty-one, or on the day of marriage, the interest in the mean time to be applied for their maintenance, "except his daughter Mary, whose share the testator directed should be paid to her upon the day of her intermarriage with any other person *excepting H. T.*, and the interest in the mean time to be applied for her maintenance." And the testator directed that "in case his daughter Mary should at any time thereafter intermarry with H. T., then upon trust to pay and divide her share of the residue of his personal estate" unto and amongst his other children. The testator died on the 1st of June, 1795, but his daughter had during the testator's lifetime, *and with his consent, married H. T.* It was held by Sir *John Leach*, V.-C., that Mary was entitled to her legacy. "The testator," said his Honor, "introduces a condition in his will to prevent the marriage of his daughter Mary with H. T. After the making of his will, his daughter married H. T. with his express consent and approbation; and the condition is thus dispensed with. In coming to this conclusion I follow the cases of *Clarke* v. *Berkeley*, 2 Vern. 729; *Crommelin* v. *Crommelin*, 3 Ves. 227; and *Parnell* v. *Lyon*, 1 Ves. & B. 479."

But the consent of the testator will not dispense with a condition precedent, that is to say where the performance of the condition is necessary before any interest is taken by the intended legatee or devisee. *Bullock* v. *Bennett*, 7 De G. Mac. & G. 283; *Younge* v. *Furse*, 3 Jur. N. S. 603, 8 De G. Mac. & G. 756; *West* v. *Kerr*, 6 Ir. Jur. 141; *Davis* v. *Angel*, 31 Beav. 223.

From these authorities we may come to the conclusion that the consent of the testator in such cases, not testamentarily given, will not dispense with a condition imposed by his will, unless it be a condition subsequent.

As to whether conditions requiring marriage with consent are

broken by a first marriage without consent, so as to disable a legatee from taking upon a second marriage with consent, see *Randal* v. *Payne*, 1 Bro. C. C. 55; *Page* v. *Hayward*, 2 Salk. 570; *Lowe* v. *Manners*, 5 B. & Ald. 917; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Clifford* v. *Beaumont*, 4 Russ. 325; *Beaumont* v. *Squire*, 17 Q. B. 905; *Davis* v. *Angel*, 31 Beav. 223.

Where a condition against marriage was broken by a widow, who concealed her second marriage, her husband, who was aware of the condition, was held bound to refund the income which trustees had paid to her in ignorance of the marriage: *Charlton* v. *Coombes*, 4 Giff. 382; 11 W. R. (V.-C.S.) 1038.

In a case where an estate was limited over in a settlement to the plaintiff on the second marriage of the defendant a widower, the plaintiff filed a bill alleging that the marriage had taken place, and seeking discovery, a declaration of the rights of the parties, and the appointment of new trustees. It appeared by the evidence that no marriage had taken place, but that the defendant was cohabiting with a woman whom he held out to the world to be his wife. It was held, however, by Sir *W. Page Wood*, V.-C., that as the plaintiffs failed in what was really their whole case, they ought to pay the costs of all parties up to the hearing, although incidental relief was granted by the appointment of new trustees: *Preece* v. *Seale*, 3 Jur. N. S. 711.

Persons will not be permitted to allow a long time to elapse without making any claim, and then to insist on a forfeiture and throw on the persons entitled the burden of proving that there has been none. Thus, where a legacy was given, conditional on the consent and approbation of the trustees, and the party entitled in default of consent made no claim until twenty-eight years had elapsed after the marriage, and the trustees and the legatee were all dead, it was held by Sir *J. Romilly*, M. R., although there was no distinct proof of consent, yet that it was to be presumed, under the circumstances of the case. "The ground," said his Honor, "I proceed on is, that after the lapse of twenty-eight years from the marriage, and after the death of the trustees, everything is to be presumed in favour of the legatee. That is the ground on which I proceed in this case. If this contest had taken place immediately after the marriage had occurred, and the fact before me had been, that the trustees knew nothing about it, and gave their approbation subsequently, I should be of opinion, that the legacy was forfeited." *Re Birch*, 17 Beav. 358.

It may be here mentioned that ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying

with the condition: *Porter* v. *Fry*, Vent. 199; *In re Hodges' Legacy*, 16 L. R. Eq. 92; *Astley* v. *Earl of Essex*, 18 L. R. Eq. 290.

Of the laws as administered in England, in contrast with those of Rome, in regard to restraint upon marriage, Mr. Fonblanque has well observed, that "the claims of parental authority, controlled as they are by the law of England, merit considerable respect: nor has the right which individuals have of qualifying their bounty been disregarded. The only restrictions which the law of England imposes are such as are dictated by the soundest policy, and approved by the purest morality: that a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that, what purports to be an act of generosity, shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to refrain from doing that which would serve and promote the essential interests of society; are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise." 1 Fonbl. 257.

Contracts in restraint of marriage, or in fraud of the marriage contract.]—Upon the principle of public policy, contracts in restraint of marriage are held void. Thus, in *Baker* v. *White*, 2 Vern. 215, a widow gave a bond to pay B. 100*l.* if she married again, and B. gave a bond to her, to pay her executors the like sum if she should not marry again. On the marriage of the widow, a bill being filed by her and her husband, the Court ordered her bond to be delivered up to her, and also the bond of B. to be delivered up to him.

So, a contract to marry a particular person, when that person is not bound by corresponding obligation, will be cancelled: "it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion:" *Key* v. *Bradshaw*, 2 Vern. 102; and see *Woodhouse* v. *Shepley*, 2 Atk. 535; *Lowe* v. *Peers*, 4 Burr. 2225; *Cock* v. *Richards*, 10 Ves. 429; *Hartley* v. *Rice*, 10 East, 22. See Dig. Lib. xxxv., tit. 1, l. 62, 63, 64.

A contract by which persons were mutually bound to marry each other has been held valid at law. See *Cock* v. *Richards*, 10 Ves. 438, 439; and *Atkins* v. *Farr*, 1 Atk. 28; *S. C.*, 2 Eq. Ca. Ab. 247. But a bond under a penalty to marry a particular person, given in fraud of a parent or person in *loco parentis* has been set aside in equity: *Woodhouse* v. *Shepley*, 2 Atk. 535.

A covenant to pay a woman a sum of money as long as she continues sole and unmarried is not

illegal: *Gibson* v. *Dickie*, 3 M. & S. 463.

Although the contract may have been mutual and valid at law, a Court of equity has relieved against it, if it were a fraud upon a parent, or a person in *loco parentis*, from whom expectations were entertained. This was much discussed by Lord *Hardwicke*, in the important case of *Woodhouse* v. *Shepley*, 2 Atk. 535, where it seems that the defendant, a tailor by trade, and entitled to a small real estate of about 14*l.* per annum, in the year 1730 made his addresses to the daughter of a man who was esteemed in the neighbourhood to be a person of substance; the courtship had been carried on for some time before it came to the father's knowledge, who, as soon as he was acquainted with it, declared a great dislike to the match, and forbid his daughter giving the suitor any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till January, 1732, when they gave each other mutual bonds in a penalty of 600*l.*, to marry each other thirteen months after the decease of the father. Upon the death of the father, in 1736, a bill being filed by the daughter, Lord *Hardwicke*, upon the whole circumstances taken together, but principally by the encouragement which a different decision might give to disobedience, and fraud on parents, decreed the bond given by the daughter to be cancelled. "The points," said his Lordship, "on which I found my judgment, are these: that bonds of this sort, where parents are living, are liable to great fraud and abuse; that, to decree in favour of such a bond, would be a great encouragement to persons to lie upon the catch to procure unequal marriages against the consent of parents; and though they dare not solemnise the marriage in the lifetime of the parent, but only engage the affection, and draw the unfortunate person into a bond to forfeit their whole fortune, as is the case here, yet it is of very dangerous consequence, and tends to bring great misfortunes upon families.

"Another principal ground of my opinion is, that this tends to encourage disobedience to parents, and indeed is a fraud and imposition on the parent, though there is no actual fraud as between the parties. In this case she lived with her father, and was dependent on him for her portion, and he considered her as a child to be advanced; and though a parent has no power by law to prevent the marriage of his child, yet it is expected that she should take his consent and approbation; and by the laws of some countries that is made necessary. It is, therefore, a fraud on the father, who thinks his child has submitted to his opinion of the match, and in that opinion makes a provision for her, to advance her in marriage, which, had he known of the bond, he would

not have done, or might have done in such a manner as would have prevented the marriage; it is, therefore, in fraud of the father's right of disposing of his fortune among his children, according to their deserts, and may be compared to the cases of bonds given before marriage to return a part of the portion; for there is no fraud in those cases between the contracting parties, but on the parents or friends of one of them, who are deceived, by settling lands equal to the portion that appears to be given; and for such reason such bonds have been set aside. Another ground of relief is the penalty; for this differs greatly in the reasonableness of it from executory promises, where the jury can consider the whole case, and whether the party has been unwarily drawn into such a contract or not, and the change of circumstances since the execution, and give damages accordingly; and though it has been truly said, that a great alteration of circumstances or character would be a ground of relief here, yet that cannot be offered at law against the penalty, and bonds tend in themselves to prevent such circumstances from being properly considered; bonds of this sort therefore, deserve less favour upon this account, though perhaps that alone would not be sufficient to set them aside. As to the cases cited, none of them came up to this: *Key* v. *Bradshaw* (2 Vern. 102). The reason of that case was the inequality of circumstances, and the party being a servant, and the danger of admitting such transactions into families. *Baker* v. *White* (2 Vern. 215) went upon the general restraint of marriage."

In another respect our Courts have very properly not followed the civil law, by which *proxenetæ*, or matchmakers, were allowed to stipulate for a reward not exceeding a certain amount, for promoting marriages; for it has been held in equity, from a very early period, that all contracts or agreements for promoting marriages for reward (usually termed marriage brokage contracts) are utterly void, upon the principle, that every contract relating to marriage ought to be free and open, whereas marriage brokage contracts necessarily tend to a deceit on one party to the marriage, or to the parents or friends: *Roberts* v. *Roberts*, 3 P. Wms. 76; *Chesterfield* v. *Janssen*, 2 Ves. 156; ante, Vol. 1, p. 592.

Nor does the Court interpose for the particular damage done to the party only, but likewise from a public consideration, marriage greatly concerning the public. Per Lord *Talbot*, in *Law* v. *Law*, Ca. t. Talb. 142.

A leading case upon this subject is *Hall* v. *Thynne*, Show. P. C. 76. There Thynne, having an intention to make his addresses to Lady Ogle, gave a bond of 1000*l.* penalty, to pay 500*l.* ten days after his marriage to one

Potter, who assisted in promoting the marriage, which afterwards took effect. After the death of Thynne, Potter brought an action upon the bond against the executors, and proving the marriage, recovered a verdict for the 1000*l.* Thereupon the executors filed a bill in chancery, for relief, as the bond was given for an unlawful consideration. Upon hearing the cause at the Rolls, Sir *John Trevor*, M. R., decreed the bond to be delivered up, and satisfaction to be acknowledged upon the judgment: this decree being reversed by Lord Keeper *Somers*, the executors appealed to the House of Lords. It was argued, on behalf of the appellants, that such bonds to matchmakers and procurers of marriage, were of dangerous consequence, and tended to betraying and oftentimes to the ruin, of persons of quality and fortune. That, if the use of such securities and contracts should be allowed and countenanced, they might prove the occasion of many unhappy marriages, to the prejudice and discomfort of the best of families. That such bonds and securities had always been discountenanced, and relief in equity given against them, even so long since as the Lord *Coventry's* time, and long before, and particularly in the case of *Arundel* v. *Trevillian*, 4 Feb. 11 Car. 1 (1 Ch. Rep. 87); and that marriages ought to be procured and promoted by the mediation of friends and relations, and not of hirelings. That, if such bonds were not vacated, when questioned in a Court of equity, it would be an evil example to executors, trustees, guardians, servants, and other people having the care of children; and therefore it was prayed that the decree of the Lord Keeper might be reversed, and it was reversed accordingly: *S.C.*, 1 Eq. Ca. Ab. 89, pl. 3; 3 P. Wms. 76; 3 Lev. 414. The vice of such a consideration was afterwards pleadable at law: (*Collins* v. *Blantern*, 2 Wils. 347).

And so far has the principle been carried, that Lord *Redesdale* declared a bond void which was given as a remuneration to the obligee for having assisted the obligor in effecting an elopement and marriage without the consent of the wife's friends, although it was given voluntarily after marriage, and without any previous agreement for the same. *Williamson* v. *Gihon*, 2 S. & L. 357, 362.

The fact of the match being an equal or proper one, as in *Hall* v. *Potter*, will not render a marriage brokage contract valid: *Cole* v. *Gibson*, 1 Ves. 506; and such contract being contrary to public policy, is not capable of confirmation: *Cole* v. *Gibson*, 1 Ves. 503, 506, 507; *Roberts* v. *Roberts*, 3 P. Wms. 74, and Cox's note (1); and money paid pursuant to such contract has been recovered back in equity: *Smith* v. *Bruning*, 2 Vern. 392; *Goldsmith* v. *Bruning*, 1 Eq. Ca. Ab. 89, pl. 4.

Upon the same principle, every contract by which a parent or guardian obtains any security for promoting or consenting to the marriage of his child or ward, is void: *Keat* v. *Allen*, 2 Vern. 588; *S. C.*, Prec. Ch. 267. So, in *Duke of Hamilton* v. *Lord Mohun*, 2 Vern. 652; Gilb. Eq. Rep. 297, the mother being guardian, on the marriage of her daughter, insisted upon having from the intended husband a bond, in a penalty that he would give her a release of all accounts as guardian, within two years after the marriage. The bond was set aside, as the case was in the nature and within the reason of marriage brokage bonds, and that there was no difference between giving a bond for procuring a marriage, and a bond to release part of what became due.

Upon similar grounds, all contracts upon a treaty for a marriage, tending to deceive or mislead one of the parties to it, or their relatives, will be held void. Thus a security given by a son without the privity of his parents, who provided for him on his marriage, to return part of the portion of his wife, is void: *Turton* v. *Benson*, 1 P. Wms. 496; and see *Kemp* v. *Coleman*, Salk. 156. So, where, upon a marriage, a settlement was agreed to be made of certain property, by relations on each side, and after the marriage one of the parties procured an underhand agreement from the husband to defeat the settlement, it was set aside, and the original agreement carried into effect: *Peyton* v. *Bladwell*, 1 Vern. 240; *Stribblehill* v. *Brett*, 2 Vern. 445; *S. C.*, Prec. Ch. 165.

So, where a man, on the treaty for the marriage of his sister, let her have money, privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, it was decreed to be delivered up: *Gale* v. *Lindo*, 1 Vern. 475; and see *Lamlee* v. *Hanman*, 2 Vern. 499. So, where a father, having, upon the marriage of his son, made a settlement of an annuity upon the wife in full for her jointure, and in lieu of dower, the son, privately, without the knowledge of his intended wife or her father, gave a bond to indemnify his father against the annuity or rent-charge, it was held void by Sir *W. Grant*, M. R., as a fraud upon the faith of the marriage contract. *Palmer* v. *Neave*, 11 Ves. 165.

Relief will be granted in such transactions, although the party to the marriage seeking it be particeps criminis; thus, in *Redman* v. *Redman*, 1 Vern. 343, upon a treaty of marriage between A. and the daughter of B., B. would not consent to the marriage, because A. owed 200*l.* to C. A.'s brother thereupon gave his bond to secure the debt, and A.'s bond was cancelled; A., however, without the knowledge of B., but with

the privity of his daughter, gave a counter-bond to his brother. Upon A.'s death, it was held, that the wife, though a party to the fraud, might set aside the bond; and the Lord Chancellor said, that if A. had been alive, and a party, he might also have been relieved.

The principle upon which this class of cases proceeds was much discussed in the leading case of *Neville* v. *Wilkinson*, 1 Bro. C. C. 543. There Mr. Neville, being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to, at the desire of Neville concealed a demand which he had against him; after the marriage he attempted to recover it, and a bill was filed by Mr. Neville to restrain him. Lord *Thurlow* held, that Wilkinson, having made a misrepresentation, a Court of equity must hold him to it; observing that the principle on which such cases had been decided was, "that faith in such contracts was so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it." And see *Scott* v. *Scott*, 1 Cox, 366; *Shirley* v. *Ferrers*, cited 11 Ves. 536; *The Vauxhall Bridge Company* v. *The Earl of Spencer*, Jac. 67.

But equity will not interfere if another equally innocent person would thereby be injured. Thus, in *Roberts* v. *Roberts*, 3 P. Wms. 65, A. treated for the marriage of his son, and in the settlement on the son there was a power reserved to the father to jointure any wife whom he should marry in 200*l.* per annum, he paying, or securing the payment, of 1000*l.* to the son. The father, treating about marrying a second wife, the son, pursuant to an agreement with the second wife's relations, released the 1000*l.*, but at or soon after the marriage took a new bond from his father, without the privity of the second wife or her relations. Upon a bill being filed by the father, Sir *Joseph Jekyll*, M. R., refused to set aside the bond given to the son, observing, that, whatever arguments could be made use of in favour of the father's second wife or of the father, to prove that he ought to be discharged of the bond for payment of the 1000*l.*, the very same arguments might be urged on behalf of the son and his wife, to prove that it ought to be paid. Thus, supposing it to be a hardship upon the father's second wife that her husband should be forced to pay this 1000*l.*, in breach of the public and open agreement made by the son, was it not equally a hardship upon the son's wife, and as much a violation of the open and fair agreement made on her marriage, that the 1000*l.* should not be paid upon the father's making a second jointure, the consequence of which would be, that, as the agreement on the

son's marriage was first, it ought to have the preference? *Qui prior est in tempore, potior est in jure.* See the remarks on this case in *Lee* v. *Hayes*, 17 J. C. L. R. (N.S.) 394.

As to settlements or contracts by a woman about to be married in fraud of marital rights, see *Countess of Strathmore* v. *Bowes*, ante, Vol. 1, p. 446, and note.

As to Conditions annexed to Gifts for the purpose of effecting the separation of Husband and Wife.]—Upon principles of public policy it has been held, that where bequests are made to married women upon condition of their living separate from their husbands, the condition is void, being considered *pro non scripto*, and the bequest will be good. Thus, in the old case of *Tennant* v. *Brail*, Toth. 141, where a man bequeathed a sum of money to his daughter, "if she will be divorced from her husband," it was held that the gift was good, though the condition was void. So in the case of *Brown* v. *Peck*, 1 Eden's Rep. 140, where a testator directed "that if his niece lived with her husband, his executors should pay her 2*l.* per month, and no more; *but if she lived from him, and with her mother*, then they should allow her 5*l.* per month." It was held by Lord Keeper *Henley*, that the niece was entitled to the monthly payment of 5*l.*, and his Lordship thought "that the condition annexed, being impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure."

The same principle was acted upon in the recent case of *Wren* v. *Bradley*, 2 De G. & Sm. 49: there a testator bequeathed an annuity to his daughter, a married woman, "in case she should be living apart from her husband, and should continue so to do" during the life of his widow, with a direction that if at any time the annuitant should cohabit with her husband, the annuity should cease. By the same will he bequeathed a share in the residue, upon trust to pay the income to the same daughter during such time as she should continue to live apart from her said husband; but should she at any time cohabit with him, the testator directed that during such time the income should be paid between other legatees. The will also contained a trust for children of the daughter by any other husband. At the date of the will the daughter and her husband were living apart; but before and at the date of the testator's death they were reconciled and living together, and so continued to live. It was held by Sir *J. L. Knight Bruce*, V.-C., that the daughter was entitled to the bequests. "It is impossible," said his Honor, "to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation, and prevent the wife

from living with her husband; and that, by that wish, by that object its provisions to her were influenced and directed. The weight of authority, and the principles of the civil law, as far as I consider them applicable, seem to me to render a decision in this case in the daughter's favour consistent at once with technical equity and moral justice."

This principle is not applicable where the bequest is of such a nature as not to influence the conduct of the husband and wife, and the bequest to the husband or wife living apart from each other is to take effect immediately on the death of the testator. See *Shewell* v. *Dwarris*, Johns. 172: in that case a testatrix made a bequest of a moiety of her residuary personal estate to her nephew, provided and on the express condition that he should be residing with his then present wife, if she should be living at the time of the testatrix's decease, but in case they should not at that time be living together as man and wife, then (subject as aforesaid) she gave and bequeathed one half of such moiety of the said residue unto the wife absolutely, and the other half part thereof to the husband. It was held by Sir *W. Page Wood*, V.-C., that the bequest was good notwithstanding the rule which avoids gifts providing for a future separation. "The rule," said his Honor, "which avoids gifts providing for a future separation between husband and wife does not apply to a case like the present. Here the gift is by will, and merely provides for either contingency, namely, that of the husband and wife living together or separate at the moment when the will must take effect, namely, at the death of the testatrix. The bequest cannot influence their conduct, but takes effect immediately on the death, according to the then state of facts."

As to separations effected between husband and wife by their mutual consent, see the note to *Stapilton* v. *Stapilton*, post.

ROBINSON *v.* PETT.

De Term. Paschæ, 1734.

[REPORTED 3 P. WMS. 132.]

NO ALLOWANCE TO AN EXECUTOR OR TRUSTEE FOR HIS CARE AND TROUBLE.—*The Court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains; neither will it alter the case, that the executor renounces, and yet is assisting to the executorship; nor even, though it appears that the executor has deserved more, and benefitted the trust, to the prejudice of his own affairs.*

S. C. 2 Eq. Ca. Ab. 454, pl. 10.

THE question was, whether an executor who had renounced, but had yet been assisting in the trust, according to the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance.

Robert Pett, a considerable draper and mercer at Aspallstoneham, in Suffolk, made his will in October, 1710, whereby he devised the surplus of his real and personal estate to his grandchildren, and appointed the defendant Pett, who had been first his servant, and afterwards his journeyman, together with one Larkin, executors, giving to each of his executors 100*l.* for their trouble about the execution of their trust, and directing, that if the defendant Larkin should refuse the executorship, he should lose his legacy; but if the defendant Pett should refuse to take on him the executorship, yet that he should have his 100*l.* paid him, providing he would be aiding and assisting in the management and execution of the trusts.

Larkin only proved the will, and the defendant Pett renounced the executorship.

On a bill brought by the plaintiffs, the grandchildren,

against the executors, for an account of the personal estate, the defendant Pett was allowed his 100*l.* legacy; but he likewise insisted to have 400*l.* more for his extraordinary pains, trouble, and expense of time in and about the affairs of the testator, particularly for having made up some very intricate accounts, and got in some desperate debts; and there was some proof that the defendant Pett had greatly benefitted the testator's estate, and prejudiced his own (he himself being a mercer), and that he had neglected his own trade, and lost some customers while he was looking after the concerns of his testator.

This cause was first heard before the Master of the Rolls, Sir *Joseph Jekyll*, who declared it to be a rule so settled, *that a trustee or executor in trust should not have any allowance for his care and trouble, unless there were some particular words in the will for that purpose* (*a*), that he could not break into it, and that there was the less occasion to do so in the present case, as the testator had here given the defendant an express legacy of 100*l.* for his care and trouble; so that the testator himself had set an estimate and value upon it of 100*l.*, which, since the defendant had accepted, the Court would not increase.

(*a*) See *Ellison* v. *Airey*, 1 Ves. 115; *Willis* v. *Kibble*, 1 Beav. 560.

From this decree there was an appeal to the Lord Chancellor, before whom it was insisted by the Attorney and Solicitor-General (who had both signed the petition of appeal), that the defendant Pett having renounced the executorship, and the other executor only having proved the will, the defendant Pett was as a stranger; and in regard that he appeared to have done these eminent services to the estate so much to his own prejudice, he was entitled to a *quantum meruit* in the same manner as if he had not been an executor; so that this was out of the common case, and to be considered as if the defendant had been employed in the nature of a bailiff, &c.; for which reason it was prayed that the Master might be directed to have regard to, and make some allowance for, the great trouble and successful pains taken by the defendant, in relation to the affairs of the testator.

LORD CHANCELLOR TALBOT.—It is an established rule, *that a trustee, executor, or administrator, shall have no allowance for his care and trouble;* the reason of which seems to be, *for that, on these pretences, if allowed, the trust estate might be loaded, and rendered of little value* (*a*); besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not.

(*a*) See *Moore* v. *Frowde*, 3 My. & Cr. 50, where Lord *Cottenham* approves of this reason.

The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept the executorship; otherwise, if both the executors had renounced, and the ordinary had thereupon granted administration. And if this were to make any difference, it would be an art practised by executors to get themselves out of this rule, which I take to be a reasonable one, and to have long prevailed. But further, in the present case, the testator has by his will expressly directed what should be the defendant's recompense for his trouble, in case of his refusing the executorship; viz., that he still should have the 100*l.* legacy, to which I can make no addition. However, it being a hard case, let the defendant take back the deposit (*b*).

Where there are two executors, and one renounces, he is still at liberty to accept of the executorship. *Seeus* where both renounce and administration is granted; though in this matter the common lawyers differ from the civilians; the latter holding that a renunciation once made, though only by one of them, is peremptory. See *Howes* and *Downes* v. *Lord Petre*, Salk. 321; *The King* v. *Simpson*, 3 Burr. 1463. As to the necessity of an executor intending to act before he can claim a legacy, see *Harrison* v. *Rowley*, 4 Ves. 212, 216; *Harford* v. *Browning*, 1 Cox, 302; *Reed* v. *Devaynes*, 2 Cox, 285, 3 Bro. C.C. 95; *Brydges* v. *Wotton*, 1 V. & B. 134; *Stackpoole* v. *Howell*, 13 Ves. 417; *Dix* v. *Reed*, 1 Sim. & Stu. 237; *Calvert* v. *Sebbon*, 4 Beav. 222; *Wildes* v. *Davies*, 1 Sm. & G. 485; *Hanbury* v. *Spooner*, 5 Beav. 630; *Compton* v. *Bloxham*, 2 Coll. 201; *Piggott* v. *Green*, 6 Sim. 72; *Hollingsworth* v. *Grassett*, 15 Sim. 52; *Cockerell* v. *Barber*, 2 Russ. 585; *Angerman* v. *Ford*, 29 Beav. 349; *Lewis* v. *Matthews*, 8 L. R. Eq. 277. But he may claim legacy if not given to him quâ executor. *Jewis* v. *Lawrence*, 8 L. R. Eq. 45; *Bubb* v. *Yelverton*, 13 L. R. Eq. 131; *In re Reeve's Trusts*, 4 Ch. D. 841.

(*b*) Reg. Lib. B. 1732, fol. 322, 1733, fol. 333, by which it appears the Master of the Rolls directed generally, that all parties should have just allowances, and on appeal by the defendant Pett, this decree was affirmed, but the particular gravamen is not stated.

There is no rule better established than that stated by Lord *Talbot* in the principal case, viz., *that a trustee, executor, or administrator shall have no allowance for his care and trouble.* It proceeds upon the well-known principle, almost invariably acted upon

by Courts of equity, that a *trustee shall not profit by his trust.* "The reason of the rule," observes Lord *Cottenham*, "is well stated in *Robinson* v. *Pett:* 'The reason seems to be, for that, on these pretences, if allowed, the trust estate might be loaded and rendered of little value.' It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear, but that the principle, if allowed, would lead to such consequences in general:" *Moore* v. *Frowd*, 3 My. & Cr. 50; and see *New* v. *Jones*, 1 Hall & T. 634; *Hamilton* v. *Wright*, 9 C. & F. 111; *In re Imperial Land Co. of Marseilles*, 4 Ch. D. 566, 580.

And so strict is the rule, that, although the trustee or executor may, by the direction of the author of the trusts, have carried on a trade or business at a great sacrifice of time, he will be allowed only all reasonable expenses he may have incurred in the conduct of the trust, but nothing as a compensation for his personal trouble or loss of time: *Brocksopp* v. *Barnes*, 5 Madd. 90; *Barrett* v. *Hartley*, 2 L. R. Eq. 789.

The rule is also applicable to an executor carrying on the business of his deceased partner: (*Burden* v. *Burden*, 1 V. & B. 170; *Stocken* v. *Dawson*, 6 Beav. 371;) and an executor or trustee will not, except under an authority contained in the instrument creating the trust (*Douglas* v. *Archbutt*, 2 De G. & Jo. 148); or a contract with his cestui que trust (post, p. 216) be entitled to make a profit out of his trust by his professional business. Thus, a factor acting as executor, is not so entitled (*Scattergood* v. *Harrison*, Mos. 128); nor is a commission agent (*Sherriff* v. *Axe*, 4 Russ. 33). So, an executor and trustee, acting as auctioneer in the sale of the trust property, cannot charge for commission (*Kirkman* v. *Booth*, 11 Beav. 273); nor can an attorney or solicitor, or his firm, charge his cestui que trust save for expenses and costs out of pocket (*New* v. *Jones*, 1 Hall & T. 632; *Bainbrigge* v. *Blair*, 8 Beav. 588; *Todd* v. *Wilson*, 9 Beav. 486; *Gomley* v. *Wood*, 3 J. & L. 702; *Pollard* v. *Doyle*, 1 Drew. & Sm. 319; *Collins* v. *Cary*, 2 Beav. 129), though the business was done by a partner who was not a trustee (*Christophers* v. *White*, 10 Beav. 523); but the costs of his town agent in a cause will be allowed (*Burge* v. *Brutton*, 2 Hare, 273); and it seems that where by an agreement between solicitors in partnership one of them being a trustee is not to participate in the profits or to derive any benefit from business done for the trust, he may employ his partner as solicitor to the trust, and pay him the ordinary charges: (*Clack* v. *Carlon*, 30 L. J. N. S. (Ch.) 639; 7 Jur. N. S. 441;) and under peculiar circumstances an inquiry may be directed to give some remune-

ration or compensation to a solicitor for his loss of time and trouble (*Marshall* v. *Holloway*, 2 Swanst. 453; *Bainbrigge* v. *Blair*, 8 Beav. 595).

A general release, where the cestui que trust has been assisted by an independent solicitor, may prevent a cestui que trust from insisting upon his right to have a settled account opened against a solicitor being a trustee, although he may have charged for professional services: *Stanes* v. *Parker*, 9 Beav. 385; *In re Sherwood*, 3 Beav. 338, 341. Secus, if he had not such assistance: *Todd* v. *Wilson*, 9 Beav, 486. And see *Barrett* v. *Hartley*, 2 L. R. Eq. 789.

The rule was also very properly applied to the case of an assignee of a bankrupt, who had acted as solicitor to the fiat, and who, though allowed to charge for his clerk's time employed in the business of the bankruptcy as costs out of pocket, was not allowed any profit thereupon: *Ex parte Newton*, 3 De G. & Sm. 584.

As a mortgagee with a power of sale stands in a fiduciary relation with regard to the mortgagor, he will not be allowed, either alone or conjointly with his partner in any business, to derive any profit from the sale. Thus, in the recent case of *Matthison* v. *Clarke*, 3 Drew. 3, a mortgagee with power of sale employed the firm of auctioneers, of which he was a member, to sell the mortgaged property for him. It was held by Sir *R. T. Kindersley*, V.-C., that they were not entitled to any commission. So in another recent case where B., a solicitor, one of the mortgagees with a power of sale, arranged with another solicitor to "act as his agent" in the matter of the mortgage on agency terms. It was held by Sir *J. Romilly*, M. R., that a sum of money paid to B. as his share of the profits, inured for the benefit of the persons entitled to the equity of redemption. *In re Taylor*, 18 Beav. 165: and see *Broad* v. *Selfe*, 11 W. R. (M. R.) 1036; 9 Jur. N. S. 885; *Eyre* v. *Hughes*, 2 Ch. D. 148.

Although it is clear that a solicitor made party to a cause as trustee, who either acts for himself or employs his partner to do so, will be allowed his costs out of pocket only (*Lyon* v. *Baker*, 5 De G. & Sm. 622; *Pollard* v. *Doyle*, 1 Drew. & Sm. 319), it was upon no very intelligible principle held by Lord *Cottenham*, in *Cradock* v. *Piper* (1 Hall & T. 617, 628; 1 Mac. & G. 664, affirming the decision of Sir L. *Shadwell*, V.-C., 17 Sim. 41), that the circumstance of a solicitor being a trustee will not prevent him from receiving his usual costs, where he acts as solicitor in a suit for any of the cestuis que trust, or where he acts for himself and his co-trustees, or cestuis que trust jointly, provided the costs are not increased by his being one of the parties for whom such joint ap-

pearance is made. And see *Fraser* v. *Palmer*, 4 Y. & C. Exch. Ca. 517; but see *Bainbrigge* v. *Blair*, 8 Beav. 588; and *Manson* v. *Baillie*, 2 Macq. 80, where Lord *Cranworth*, C., observed, "that he was inclined to think that the true principle was considerably trenched upon by Lord *Cottenham*, when he said that a solicitor might act as a solicitor for his co-trustee, and be allowed professional charges, as he apprehended that the true principle is, that *each* trustee should be a check and control on each and all of the co-trustees, a principle which was placed in danger by the allowance of a pecuniary profit" (p. 82). Lord *Brougham* also disapproved of the decision of *Cradock* v. *Piper*, and expressed great doubts as to the soundness of that decision "to the length to which it goes" (p. 91).

Certainly there is no inclination to extend the doctrine laid down by Lord *Cottenham* in *Cradock* v. *Piper*, for it has been decided that it does not apply to the case of a solicitor being a trustee and acting for himself and co-trustee in the administration of the trust estate out of Court: *Lincoln* v. *Windsor*, 9 Hare, 158; *Broughton* v. *Brougkton*, 2 Sm. & Giff. 422; 5 De G. Mac. & G. 160.

Where a solicitor who is a trustee is a defendant as a trustee, and is held to be entitled to his costs, the course of the Court is to direct them to be taxed as between solicitor and client (*York* v. *Brown*, 1 Coll. 260). In a recent case, where a mortgagee had acted as his own solicitor in a suit in defence of his own title, Sir *R. T. Kindersley*, V.-C., refused to allow him, as against a second mortgagee, any other costs except his costs out of pocket: *Sclater* v. *Cottam*, 3 Jur. N. S. 630.

A solicitor who is trustee, is not obliged to account for any profits, which he may have made professionally, by his charges against a mortgagor upon the security of whose property he advanced monies belonging to the trust. Thus, in *Whitney* v. *Smith*, 4 L. R. Ch. App. 513, a trustee, who was a solicitor, sold out stock forming part of the trust estate, and invested it on mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He also derived some profit as a solicitor in consequence of the employment of part of the mortgaged estates for building purposes. It was held by the Lords Justices of the Court of Appeal, that the plaintiff could not charge him with the profit thus made, as having been made by the employment of the trust estate in his business. "No doubt," said Lord Justice *Giffard*, "if trust money is laid out in such a thing as the purchase of cotton, or if it is lent out upon

bills of exchange, or if it is put into a business and actually turned over and used in the business, the cestuis que trust are entitled if they think fit, to an account of the profits, and to have the profits. But what has taken place here is this—the money has been lent by the trustee upon certain securities which, probably, were not securities justified by the trust. He happened to be a solicitor, and I have no doubt that the loan of that money tended to bring him custom in his profession of a solicitor. But no case has gone the length of saying, that because a loan of that sort made by a trustee who happens to be a professional man, tends to bring him custom in that profession, he charging the estate nothing for his work and labour, it not being in any sense the produce of the trust estate—no case has gone the length of saying that the cestuis que trust are entitled to the profits of that. I think it very unjust that they should be so entitled. The utmost the matter comes to is this: that he, being a solicitor, the loans probably put him in the way of getting some business, and by that means conduced to his getting profits from that business. But that is not fairly the produce or profit of the trust estate, or a matter with which the cestuis que trust have anything to do."

There are, however, some few exceptions to the rule laid down in the principal case. Thus, the trustees and guardians managing the estates of West India proprietors, according to the Acts of Assembly, are entitled to a commission not above 6*l.* per cent. as long as they personally take care of the management and improvement of the estates committed to their charge; but not if they leave the island and trust the management to others, acting as attornies (*Chambers* v. *Goldwin*, 5 Ves. 834; 9 Ves. 254, 257, 267, 273; *Denton* v. *Dary*, 1 Moore, P. C. C. 15; and see *Henckell* v. *Daly*, *Ib.* 51). But although they have no right to be paid their commission during absence, they are entitled to what they have actually paid to others for the management of the estate, provided the payments be in themselves reasonable; as to which, if it be disputed, an inquiry will be directed (*Forrest* v. *Elwes*, 2 Mer. 68); and although a trustee individually abstains from acting in the trusts of a will, yet if he is qualified, and is ready and willing to act when called upon by his co-trustee, he is entitled to a share of the commission under the Jamaica Act, 24 Geo. 2, c. 10, s. 8 (*Grant* v. *Campbell*, 1 Moore, P. C. C. 43); and mortgagees in possession are not only under the before-mentioned Act (*Chambers* v. *Goldwin*, 5 Ves. 837; 9 Ves. 268), but also independent thereof, not entitled to any commis-

sion, except what is paid by them to the factor for commission. *Leath* v. *Irvine*, 1 M. & K. 277; and see *Chambers* v. *Davidson*, 1 L. R. P. C. 296, as to the rights of consignees and mortgagees of West Indian produce.

So, an executor appointed in the East Indies was formerly entitled, in passing his accounts in the Courts of equity in this country, to the commission of 5*l.* per cent. upon the receipts or payments, according to the practice in the East Indies. See *Chetham* v. *Lord Audley*, 4 Ves. 72, where Lord *Rosslyn* allowed the commission, observing, that the appointment of an executor in India, no legacy being given to him, was the appointment of an agent for the management of the estate; that there would be no possibility of getting the business done at all without the allowance; and if the executors in England were to get a person to do the business in India, they could not get it done so cheap.

But an Indian executor would not have been entitled to commission if he had a legacy for his trouble, but he would be admitted to renounce the legacy in order that he might claim the commission (*Freeman* v. *Fairlie*, 3 Mer. 24): unless he allowed a long time to elapse before so renouncing. *Ib.* 24, 28.

The law of India is now altered, and no commission will be allowed to an executor there unless it is expressly given to him by the testator. See note to *Matthews* v. *Bagshaw*, 14 Beav. 126.

The general principle that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent entrusted with money or any other property, for the purpose of using it for the owner's benefit. Thus, in *Attorney-General* v. *Edmunds*, 6 L. R. Eq. 381, it having been the practice in the Inland Revenue Department for the purchasers of stamps to be allowed a reduction on payment in cash, the Clerk of the Patents had been accustomed to purchase stamps in the Revenue Office for the accommodation of the patentees, he paying the reduced amount for the stamps, and afterwards receiving the amount in full from the patentees. It was held by Lord Justice *Giffard*, that the Clerk of Patents was liable to account for any profit that might have been made on the purchase of stamps purchased with public moneys, but not for any profit made on the purchase of stamps purchased with his own money. So in *Shallcross* v. *Oldham*, 2 J. & H. 609, the master of a ship having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owner's account, being unable to procure remunerative freight, loaded the ship with a cargo of his own. It was held by Sir *W. Page Wood*,

V.-C., that he was liable to account to the owners for all the profits made by the sale of the cargo, and not merely for the proper freight. See also *Gardner* v. *M'Cutcheon*, 4 Beav. 534.

So likewise, in the absence of any agreement express or implied, a part owner or partner in ships who acts as ship's husband is not entitled to charge the usual commission: *Miller* v. *Mackay*, 31 Beav. 77.

The managing owner of a ship however is, it seems, competent to appoint himself to act as broker to the ship in collecting and distributing freight, there being no incompatibility between those services (as it appears there would be between the services of ship's chandler or ship's carpenter), and his fiduciary character as managing owner: See *Smith* v. *Lay*, 3 K. & J. 105, in which case, however, before allowing the managing owner a commission in respect of the services in question, Sir *W. Page Wood*, V.-C., directed an inquiry, whether according to the custom of shipowners or otherwise, he being managing owner, was entitled to any, and what commission in respect of duties performed by him, and which duties are ordinarily performed by shipbrokers.

In *Waters* v. *Earl of Shaftesbury*, 2 L. R. Ch. App. 231, the agent of a landholder who had contracted with the Land Drainage Company under their Act (12 & 13 Vict. c. 91), to execute the drainage works as agent and surveyor of the company (the landowner finding money for the purpose), and being paid an agreed amount by the company, it was held by Lord *Chelmsford*, L. C., varying the decree of Sir *John Stuart*, V.-C., that notwithstanding the apparent terms of the contract, it might be shown that the agent was not the real contractor, and was not entitled to any profit on the contract.

The creator of the trust may authorise the trustee to make professional charges (*Douglas* v. *Archbutt*, 2 De G. & Jo. 148). Thus, as observed by Lord *Langdale*, M. R., in *Bainbrigge* v. *Blair*, 8 Beav. 597, a testator, though knowing that if his trustee acted as solicitor, and were allowed to make his professional charges, he would be enabled to make business for himself, might, nevertheless, insert an authority in the will, permitting it (and this is not unfrequently done), there would be then no question about the matter. Or he may, as was admitted by Sir *Joseph Jekyll*, M. R., in the principal case, direct generally, compensation to be made to an executor or trustee, for his care and trouble; or he may himself fix it at a particular sum of money, or a salary. See *Webb* v. *The Earl of Shaftesbury*, 7 Ves. 480.

But where the creator of the

trust does not himself fix the amount of compensation, a reference will be directed to settle what will be a proper allowance: *Ellison* v. *Airey*, 1 Ves. 115; *Willis* v. *Kibble*, 1 Beav. 559; *Jackson* v. *Hamilton*, 3 J. & L. 702.

And an annuity given to an executor for his trouble until a general settlement of the testator's affairs will not cease upon the mere institution of a suit. See *Baker* v. *Martin*, 8 Sim. 25, in which case a testator had directed that 100*l.* a year should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should take place. The executor proved and acted. Some time after the testator's death, a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding; it was held by Sir *L. Shadwell*, V.-C., that the annuity had not ceased, as it was not shown that the trouble of the executors had ceased.

Where, however, an annuity was given to a trustee as long as he should continue to execute the office of trustee, it was held that the annuity ceased upon the determination of all active duties by the payment of the whole of the trust fund to a person absolutely entitled, without a devolution of the office of trustee upon any other person. *Hull* v. *Christian*, 17 L. R. Eq. 546.

And if an executor do not act, even if he be rendered incapable of so doing by act of God, he is not entitled to a legacy given to him for his trouble in the executorship. *Hanbury* v. *Spooner*, 5 Beav. 630; *Re Hawkins's Trusts*, 33 Beav. 570; *Slaney* v. *Watney*, 2 L. R. Eq. 418.

Although trustees or executors will not generally be entitled to any allowance for their trouble, they may, nevertheless, contract with their cestui que trust to receive some compensation for acting, or to make professional charges for acting. Such contract, however, would be most carefully watched by the Court, and unless it were perfectly fair, and obtained without any undue pressure upon the cestui que trust, would not be enforced. See *Ayliffe* v. *Murray*, 2 Atk. 58, in which case two persons, executors and trustees under a will, refused to prove the will, or act in the trust, or suffer the cestui que trust to take out letters of administration cum testamento annexo, till he had executed a deed by which he was to pay 100*l.* to Ayliffe, one of the executors, who was the solicitor who drew the will, and 200*l.* to the other, over and above their legacies, within six months after they should have exhibited an inventory. Upon a bill being brought for a specific performance of the contract, and for an account, Lord *Hardwicke* declared, that the deed was unduly obtained, and decreed

that no allowance should be made for the sum of 100*l.* and 200*l.* "With regard to the merits," observed his lordship, "whether upon general grounds, a trustee may make an agreement with his cestui que trust for an extraordinary allowance, over and above what he is allowed by the terms of the trust, I think there may be cases where this Court would establish such agreements, but at the same time would be extremely cautious and wary in doing it.

"In general, this Court looks upon trusts as honorary, and a burthen upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a cestui que trust; and, therefore, this Court has always held a strict hand upon trustees in this particular. If a trustee comes in a fair and open manner, and tells the cestui que trust that he will not act in such a troublesome and burthensome office unless the cestui que trust will give him a further compensation, over and above the terms of the trust, and it is contracted for between them, I will not say this Court will set it aside; though there is no instance where they have confirmed such a bargain. . . . I consider the case in this light:—Two trustees are making an ill use of an authority they had under the will, to extort a reward from a cestui que trust. If they had told him, Give us a further reward, or we will renounce, they had acted fairly, and something may have been said in favour of the contract. The personal estate was vested in them before probate, and could not be got out of them without an actual renunciation; the real estate likewise vested in them, and could not be taken out of them but by an actual assignment; and, sensible of these difficulties upon the defendant, the plaintiffs would not act, in order to force him into their terms.

"This case has been compared to several other cases of fraud, and, amongst the rest, of marriage brokage bonds, and not improperly; for the person who has the reward there, has as much trouble as the trustees have here, and the party giving the reward in those cases, full as willing as the defendant in this; and yet the Court always set those bargains aside as unconscionable. Consider the ill consequences of such a case; suppose it should be necessary that a will should be immediately proved, as in the case of a widow and children. Shall a trustee in whom the testator reposed a trust and confidence, and depended upon his honour and kindness, insist upon such hard terms as to have an unreasonable reward, before he

will either prove the will or act in the trust?"

In the case of *In re Wyche*, 11 Beav. 209, on an application within twelve months, Lord *Langdale* refused to order the taxation of a bill paid under other professional advice, to a trustee who had acted as solicitor for a lady, he having, however, first declared that he would not act, except on the ordinary terms of being paid as between solicitor and client; and the cestui que trust acquiesced in this proposal, and signed a retainer in such special terms as to provide for it. "It is said," observed his Lordship, "that it is extremely difficult for a trustee against a cestui que trust, or for a solicitor against a client, to make the client pay more than the rules of law allow. I will not venture to say, that, in such a case as this, it cannot be done; because, if the parties understand the principle that a trustee, acting as a solicitor in the trust matters, is only entitled to the costs out of pocket,—if the cestui que trust has clear knowledge and proper protection, I should hardly say that such an agreement is illegal, or that it cannot be carried into effect. This lady, from the first, did know that a trustee, acting as solicitor, was not entitled to ordinary costs as between solicitor and client; and it does appear that she had other professional advice besides that given by the trustee himself." See also *In re Sherwood*, 3 Beav. 338; *Barrett* v. *Hartley*, 12 Jur. N. S. 426.

And even if a trustee makes a valid contract with his cestui que trust for compensation for the trouble incident to the trust, it will not be allowed if the trustee, in consequence of his death or otherwise, fail to complete his contract. *Gould* v. *Fleetwood*, Mich. 1732, at the Rolls. 3 P. Wms. 251, n. (A.): 2 Eq. Ca. Ab. 453, pl. 8.

Nor will a contract by a trustee with his cestui que trust for professional charges be enforced, unless in distinct terms it takes the trustee out of the general rule: *Moore* v. *Frowd*, 3 My. & Cr. 45. See, also, *Matthison* v. *Clarke*, 3 Drew. 3; *Broughton* v. *Broughton*, 5 De G. Mac. & G. 160.

But it seems that a trustee may by implication, if clear, be authorised to make professional charges. Thus, in *Douglas* v. *Archbutt*, 2 De G. & Jo. 148, property was assigned to the plaintiff (who was known to the assignor to be an auctioneer, although not so described in the deed) upon trust to sell by public auction or private contract, and out of the sale monies to pay the costs, charges, and expenses of preparing for making and completing such sales, "including the usual auctioneer's commission." It was held by the Lords Justices, affirming the decision of Sir *John Romilly*, M. R., that the plaintiff, if he acted as auctioneer at the sale, could re-

tain his own commission. "The deed," said Lord Justice *Turner*, "contemplates a sale by auction. If the words 'including the usual auctioneer's commission' had not been inserted, it would have been competent to the plaintiff under the other words to charge any auctioneer's commission *paid* by him. These words, therefore, were not wanted for that purpose, and for what purpose can they have been inserted but to authorise the plaintiff to charge auctioneer's commission, if he himself acted as auctioneer?"

Although a solicitor appointed executor "is to be at liberty to charge for his professional services," he will only be entitled to charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors: *Harbin* v. *Darby*, 28 Beav. 325.

A trustee may contract with the Court, that he will not undertake the trust without proper compensation; and if he have undertaken the trust upon the understanding that application should be made to the Court for compensation, a reference will be made to Chambers to ascertain and settle what would be a reasonable allowance both for his past and future services. See *Marshall* v. *Holloway*, 2 Swanst. 432, 553, 454; *Brocksopp* v. *Barnes*, 5 Madd. 90; *Morrison* v. *Morrison*, 4 My. & Cr. 215.

Upon the same principle in the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71), it is enacted that "a trustee (appointed under the Act) shall not without the consent of the committee of inspection, employ a solicitor or other agent, but where the trustee is himself a solicitor he may contract to be paid a certain sum by way of percentage, or otherwise as a remuneration for his services as trustee including all professional services, and any such contract shall, notwithstanding any law to the contrary, be lawful." Sec. 29.

But, although trustees and executors will not, in the absence of contract, be allowed any remuneration for their own trouble and loss of time, they may, in special cases, employ agents, whose expenses will be allowed out of the estate. Thus, a trustee, upon making out a proper case, may employ a bailiff to manage an estate and receive the rents (*Bonithon* v. *Hickmore*, 1 Vern. 316; *Stewart* v. *Hoare*, 2 Bro. C. C. 663); even although a recompense may have been given to him by the creator of the trust for his trouble. Thus, in *Wilkinson* v. *Wilkinson*, 2 S. & S. 237, a testator gave annuities of five guineas each to his trustees, for the care and trouble they

might have in the execution of the trusts, and appointed them executors. Amongst other property, the testator was entitled to about fifty houses in London, thirty-four of which were let at weekly rents. The trustees employed a person to collect those rents, and the Master, on passing their accounts, allowed the salary they had paid to him; and Sir *J. Leach*, V.-C., overruled an exception taken to the Master's report on account of that allowance. "It does not appear to me," observed his Honor, "that the annuity of five guineas to each trustee makes any difference in this case. It is given to them as a recompense for the care and trouble which will attend the due execution of their office; and, if it be consistent with the due execution of their office that they should employ a collector to receive the rent, they will still be entitled to the annuity. A provident owner might well employ a collector to receive such rents; and the labour of such collection cannot be imposed upon trustees." See, also, *Re Westbrooke*, 2 Ph. 631.

So an executor, although he may be a solicitor, may employ another solicitor to do business for him in the management of the testator's affairs (*Macnamara* v. *Jones*, 2 Dick. 587; *Stanes* v. *Parker*, 9 Beav. 389); or an accountant, if the accounts are of a difficult or complicated nature (*Henderson* v. *M'Iver*, 3 Madd. 275; *New* v. *Jones*, 1 Hall & T. 634); or an agent to collect debts at a commission; but the Court will reduce it if too high. See *Weiss* v. *Dill*, 3 My. & K. 26, where an executor, having charged for the employment of an agent, at 5*l.* per cent., to collect debts to the amount of 2000*l.*, an exception, taken to the Master's report, who allowed only 2½*l.* per cent., was overruled by Sir *John Leach*, M. R. "Generally speaking," said his Honor, "executors are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents. It is for the Master to determine whether an executor, who makes a claim for the employment of an agent, ought to be allowed to charge his testator's estate with such a burthen. The Master has here thought that the executor ought not to be allowed to charge the testator's estate with the whole commission claimed, but that 2½*l.* per cent. is a fit allowance. I have some doubt whether in this case the Master ought to have made any allowance; but with the allowance of 2½*l.* per cent. which he has made, the defendants must be content." And see *Hopkinson* v. *Roe*, 1 Beav. 180; *Day* v. *Croft*,

2 Beav. 488. But an executor will not be allowed the charges of a solicitor for doing things which the executor ought strictly to have done himself. *Harbin* v. *Darby*, 28 Beav. 325.

Upon the principle, that a trustee should not profit by his trust, a person, whether he is sole trustee or a trustee jointly with others, will not in general be appointed receiver with a salary, for this would be a mode of giving a trustee emolument (*Anon.*, 3 Ves. 515; —— v. *Jolland*, 8 Ves. 72; *Sykes* v. *Hastings*, 11 Ves. 363; *Sutton* v. *Jones*, 15 Ves. 584; *Nicholson* v. *Tutin*, 3 K. & J. 159); "unless no one else can be procured who will act with the same benefit to the estate, where there is a necessity, from the circumstance, that, by any one else, the estate would not be so well managed" (*Sykes* v. *Hastings*, 11 Ves. 364, per Lord *Eldon*; *Newport* v. *Bury*, 23 Beav. 30); and even where a trustee offers to act as receiver without a salary, the Court will only appoint him to the office on the ground that it is for the benefit of the estate, because it is the duty of the trustee to examine with an adverse eye, and see that the receiver does his duty: *Hibbert* v. *Jenkins*, cited 11 Ves. 363, 364. "The consequence is," says Lord *Eldon*, "the case of appointing a trustee to be receiver is extremely rare, and only where he will act without emolument:" *Sykes* v. *Hastings*, 11 Ves. 364. It is no objection, however, that a person is trustee to preserve contingent remainders: *Sutton* v. *Jones*, 15 Ves. 587. So, it is competent for the Court, as a matter of discretion, to appoint an executor and trustee, consignee, with the usual profits; and where a discretion of that kind has been exercised and acted upon, it will not at a subsequent period be withdrawn: *Marshall* v. *Holloway*, 2 Swanst. 432; *Morrison* v. *Morrison*, 4 My. & Cr. 215, 224.

Upon the same principle as that laid down in *Robinson* v. *Pett*, if a trustee or executor improperly keeps in his own possession trust money which ought to have been invested, or paid over to the person entitled to it, however it may have arisen, whether from a legacy, or a distributive share, or a residue, or the arrears of income, although it be not shown that he made a profit by so doing, and although it be not prayed for by the bill (*Pearse* v. *Green*, 1 J. & W. 135; *Johnson* v. *Prendergast*, 28 Beav. 480; *Blogg* v. *Johnson*, 2 L. R. Ch. App. 229), he will be charged interest, at a rate which may be varied at the discretion of the Court. See *Tebbs* v. *Carpenter*, 1 Madd. 290, 306; *Blogg* v. *Johnson*, 2 L. R. Ch. App. 228.

In general a trustee or executor is not charged with more than 4*l.* per cent. upon the balances in his

hands: *Court* v. *Robarts*, 6 C. & F. 65; *Attorney-General* v. *Alford*, 4 De G. Mac. & G. 843; *Penny* v. *Avison*, 3 Jur. N. S. 62; *Stafford* v. *Fiddon*, 23 Beav. 386; *Johnson* v. *Prendergast*, 28 Beav. 480. But if it can be made to appear that a greater rate of interest than 4*l.* per cent. has been actually made, by a trustee or executor, the Court will not let him make benefit to himself, for he will be compelled to account according to the rate of interest made. *Forbes* v. *Ross*, 2 Cox, 116.

If a trustee or executor employ the trust funds in a trade or adventure of his own, whether he keeps them separate from, or mixes them with, his own private monies, and notwithstanding the difficulties which in the latter case may arise in taking the accounts, the cestui que trust, if he prefers it, may insist upon having the profits made by, instead of interest on the amount of, the trust funds so employed. In the important and leading case of *Docker* v. *Somes*, 2 My. & K. 655, trustees had paid part of the trust funds to their bankers, to the credit of their general account, without distinguishing the same from the monies employed in their own business of ship-chandlers and sail-makers, it was argued that the trustees only ought to be charged interest for the trust monies employed by them. Lord *Brougham*, however, in an elaborate judgment, held that the cestui que trusts might at their option charge them either with interest or with a proportionate share of the profits. See, also, *Piety* v. *Stace*, 4 Ves. 620; *Palmer* v. *Mitchell*, 2 My. & K. 672, n.; *Wedderburn* v. *Wedderburn*, 2 Kee. 41; 4 My. & Cr. 41; 22 Beav. 84, 100, 124; *Fosbrooke* v. *Balguy*, 1 My. & K. 226; *Willett* v. *Blandford*, 1 Hare, 253; *Portlock* v. *Gardner*, Ib. 603; *Parker* v. *Bloxam*, 20 Beav. 295; *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723; *Robinson* v. *Robinson*, 1 De G., Mac. & G. 257.

Should in any case a serious difficulty arise in tracing and apportioning the profits derived by a trustee or executor from the employment of trust funds together with his own, in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits, and it seems the Court would allow interest at 5*l.* per cent. per annum, with yearly rests, that is, with compound interest (*Jones* v. *Foxall*, 15 Beav. 392; *Heighington* v. *Grant*, 5 My. & Cr. 258; 2 Ph. 600; *Walrond* v. *Walrond*, 29 Beav. 586; *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349); and the same interest will be charged by the Court, if the trustee or executor, who is a trader, pays the trust fund into his own account at his bankers' (*Williams* v. *Powell*, 15 Beav. 461, 468; *Sutton* v. *Sharp*, 1 Russ. 146;

Rocke v. *Hart*, 11 Ves. 61. Sed vide *Browne* v. *Southouse*, 3 Bro. C. C. 107); unless he can show that he has not had the benefit thereof in his trade: *Williams* v. *Powell*, 15 Beav. 461, 469.

As the business of a solicitor is not a trade, in which compound interest is made on the money employed therein, compound interest will not be charged on trust moneys paid by a solicitor into the account of his firm, but only interest at 5*l.* per cent.: *Burdick* v. *Garrick*, 5 L. R. Ch. App. 233. Where, however, a testator directs an accumulation to be made, and the executors keep the money in their hands contrary to the express direction of the will, they will be charged with compound interest. *Raphael* v. *Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford* v. *Dornford*, 12 Ves. 127; *Wilson* v. *Peake*, 3 Jur. N. S. 155; *Pride* v. *Fooks*, 2 Beav. 430; *Knott* v. *Cottee*, 16 Beav. 77.

If a person is merely a constructive trustee, from having employed the money of another in trade or business, and does not expressly fill any fiduciary character, as that of trustee or executor, although he must account for the profits of the money he employed, he will have an allowance made to him for his loss of time, skill, and trouble. Thus in *Brown* v. *Litton* (1 P. Wms. 140; 10 Mod. 20), the captain of a ship, having 800 dollars on board, which he intended to invest in trade, died on his voyage, and the mate, becoming captain, took the 800 dollars, and investing them in trade, made great improvements thereof, and on his return to England the executrix of the first captain brought a bill against him for an account. The defendant admitted the receipt of the money, and offered to repay the same with interest, whereas the plaintiff insisted on the profits produced in trade, and the several investments that had been made therewith. Lord Keeper *Harcourt*, however, considering that the defendant was like a trustee, held that he ought clearly to account for the profits made of the money; but that, to recompense him for his care in trading with it, the Master should settle a proper salary for the pains and trouble he had been at in the management thereof. And his Lordship compared it to the case of two joint traders, where, if one dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade; and, that this being an island, all imaginable encouragement ought to be given to trade; and such construction was for the benefit of him who carried out this money with that intent; and there was no reason that his death should so far injure his family and relations, as to deprive them of the benefit which

might accrue from it in the way of trade.

Where on the termination of a partnership, as by bankruptcy (*Crawshay* v. *Collins*, 15 Ves. 218; 1 J. & W. 267), or death (*Brown* v. *De Tastet*, Jac. 284; *Wedderburn* v. *Wedderburn*, 2 Keen 722; 4 My. & Cr. 41; *Flockton* v. *Bunning*, 8 L. R. Ch. App. 323 n.), the continuing or surviving partner, instead of winding up the business, retains the assets of his former partner, he will be decreed to account for the profits derived from it, but proper allowances will be made to him for his management of the business. And see *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Cooke* v. *Collingridge*, Jac. 207; *Willett* v. *Blanford*, 1 Hare, 253.

If a partner in a trading firm dies, and he constitutes one or more of his co-partners his executors, and there is nothing special in the contract of copartnership, and if the assets of the testator are not withdrawn from the copartnership, but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a rule in the Court of Chancery to hold that the estate of the testator is to all intents and purposes entitled to the benefit of a share of the profits which are made in the trade after his death. Per Lord *Cairns*, C., in *Vyse* v. *Foster*, 7 L. R. Ho. Lo. 329. See also the cases there cited.

If, moreover, the partnership articles have given the surviving partners an option to take the interest of the testator on certain terms, at a certain price to be fixed by arrangement after the death of the testator, and the surviving partners, or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option which has been given, such power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place: per Lord *Cairns*, C., in *Vyse* v. *Foster*, 7 L. R. Ho. Lo. 328.

Mere delay, however, by executors in enforcing the payment of the purchase money agreed upon by the partnership articles for the share of their testator from the firm of which some of his executors are members, will not give his estate any right to share in the profits of the business. Thus, in the case of *Vyse* v. *Foster* (7 L. R. Ho. Lo. 318), a testator was partner in a business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stock-taking, and to be paid by instalments extending

over two years, with interest at 5*l.* per cent. per annum, with yearly rests. The value of the testator's share, although ascertained, was not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at five per cent. per annum, with yearly rests. Upon a bill being filed by one of the residuary legatees against the executors, it was held by the House of Lords, affirming the decision of the Lords Justices (reported 8 L. R. Ch. App. 309, which reversed the decree of *Bacon*, V.-C.), that the plaintiff was not entitled to any account of the profits of the partnership, but that the executors, who had improperly delayed getting payment of the purchase-money from the firm, which was in effect an outstanding debt of the firm, were liable to account only to the plaintiff for her share of the residue, with interest at 5*l.* per cent. and annual rests.

Although trustees employing the trust funds in any trade or business are liable to account for the profits made thereby, nevertheless when without authority they lend the trust funds to traders, who with notice of the trust employ such funds in their business, such traders will not be liable to account to the cestui que trust for a share of the profits of the business, but only for the principal and interest: *Stroud* v. *Gwyer*, 28 Beav. 130; *Townend* v. *Townend*, 1 Giff. 210; *Macdonald* v. *Richardson*, 1 Giff. 81; *Simpson* v. *Chapman*, 4 De G. Mac. & G. 154.

An executor lending trust money to a firm of which he is a member is only liable to account for his own share of the profits on the money so advanced, and the interest on the rest: *Jones* v. *Foxall*, 15 Beav. 388; *Vyse* v. *Foster*, 8 L. R. Ch. App. 333, 334.

A trustee cannot make a profit out of the trust by selling the office of trustee. See *Sugden* v. *Crossland*, 3 Sm. & G. 192. There a trustee in consideration of 75*l.* paid to him by the defendant agreed to retire from the trust and cause the defendant to be appointed a trustee in his place. The arrangement was subsequently carried out. Sir *John Stuart*, V.-C., declared the deed appointing the defendant a trustee to be void, and that the sum of 75*l.* should be treated as part of the trust fund. "It is a well-settled principle," he observed, "that if a trustee make a profit of his trusteeship, it shall inure to the benefit of his cestui que trusts. Though there is some peculiarity in the case, there does not seem to be any difference in principle whether the trustee derived the profit by means of the trust property, or from the office itself."

Upon the principle laid down in *Robinson* v. *Pett*, a trustee will

not be allowed to have the sporting over the trust estate, nor to appoint gamekeepers to preserve the game for his own amusement: see *Webb* v. *The Earl of Shaftesbury*, 7 Ves. 488, where Lord *Eldon* directed an inquiry, whether the liberty of sporting could be let for the benefit of the cestuis que trust; and if it could not, he thought the game would belong to the heir. If it was necessary for the preservation of the game, that the trustees should appoint a gamekeeper, he would not be prevented from appointing one, but for that purpose only; for he could not under the will have an establishment of pleasure on the trust estate; and see *Hutchinson* v. *Morritt*, 3 Y. & C. Exch. 547.

So, likewise, a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of a lease (see *Keech* v. *Sandford*, and note, ante, Vol. 1, p. 46); or by selling to (*East India Company* v. *Henchman*, 1 Ves. Jun. 289; *Craven* v. *Bentley*, 18 Beav. 75; *Brookman* v. *Rothschild*, 3 Sim. 153; 5 Bligh, N. S. 165), or purchasing from his cestui que trust (*Fox* v. *Mackreth*, ante, Vol. 1, p. 123). And the principle is applicable to receivers (*In re Ormsby*, 1 Ball & B. 189); and committees of lunatics' estates. *Anon.*, 10 Ves. 103.

A chairman or director of a Railway Company stands in a fiduciary relation towards the Company, and will not, as a general rule, be allowed to derive any profit beyond his salary from his office. Thus, in the case of *The Great Luxembourg Railway Company* v. *Sir William Magnay*, 25 Beav. 586, a railway company furnished a director with a large sum of money, to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. It was held by Sir *John Romilly*, M. R., that the transaction could not stand. And see *Benson* v. *Heathorn*, 1 Y. & C. C. C. 326; *Maxwell* v. *The Port Tennant, &c., Company*, 24 Beav. 495; *The North Midland Railway Company* v. *Hudson*, 25 Beav. 593, 595, cited; *Bluck* v. *Mallalue*, 27 Beav. 398; *Gaskell* v. *Chambers*, 26 Beav. 360; *Hodkinson* v. *The National Live Stock Insurance Company*, 26 Beav. 473; 4 De G. & Jo. 422; *In re The Anglo-Greek Steam Navigation and Trading Company (Limited)*, 35 Beav. 399, 410; *The Liquidators of the Imperial Mercantile Credit Association* v. *Coleman*, 6 L. R. Ho. Lo. 189; varying the decision of Sir *R. Malins*, V.-C., and reversing the decision of Lord *Hatherley*, L. C., who reversed the decision of Sir *R. Malins*, V.-C., reported 6 L. R. Ch. App. 558, nom. *Imperial Mercantile Credit Association* v. *Coleman*; *Kilmer* v. *Barber*, 8 L. R. Ch. App. 56; *In re Imperial Land Company of Mar-*

scilles, Ex parte Larking, 4 Ch. D. 566; *New Sombrero Phosphate Company* v. *Erlanger,* 5 Ch. D. 73.

Upon the same principle, where the Court of Madras had under its general jurisdiction made a general order authorising the registrar of the Court to institute proceedings in certain cases on behalf of infants, and it appeared that the registrar was entitled to receive fees upon proceedings in such suits, as well as on commission upon the amount of monies paid into Court, it was held by the Judicial Committee of Privy Council, that such general order was void, it being against public policy to allow an officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and that all orders made in a suit instituted by the registrar in pursuance of such order ought to be reversed. "Whatever," said *Pemberton Leigh,* P.C., "may be the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmost importance that no person should be appointed for that purpose of whom even a suspicion can exist, that he may be biassed by any personal interest, either in the institution of the suit, or in the mode of conducting it." *Kerakoose* v. *Serle,* 4 Moore, P. C. C. 459.

The principle that a person in a fiduciary position should not derive any profit thereby, seems to have been departed from in those cases which have decided, after some conflict of judicial opinion, that it is not illegal or contrary to public policy for a member of the British legislature to make a profit by an agreement for the withdrawal of his opposition to a bill affecting his property, although it is evident that by such an agreement he necessarily places his private interest in conflict with his duty as a legislator. See *Simpson* v. *Lord Howden,* 1 Keen, 583: there, by agreement between Lord Howden, a peer of Parliament, and the proprietors of shares in a projected railway, it was stipulated on one hand, that Lord Howden should withdraw his opposition to a bill in Parliament for establishing the railway according to a certain line, and on the other hand, that the proprietors, on the bill passing, should pay certain sums to Lord Howden by way of compensation for the injury his land would sustain, and use their best endeavours to procure a deviation from the original line in the next session of Parliament. After the bill for establishing the railway had passed, the proprietors filed a bill to have the agreement delivered up to be cancelled, as being contrary to public policy, and therefore void. Lord *Langdale,* M.R., overruled a general demurrer for want of equity. "The plaintiffs," said his Lordship, "allege that

the agreement is illegal and against public policy, on three grounds:— First, they say that it was a fraud on the other landowners through whose ground the line of railway was intended to pass. Secondly, that it was a fraud on the legislature by procuring an Act of Parliament on a representation that one line of railway was best, and intended to be pursued, but which, in fact, was not intended to be adopted. Thirdly, that it was an illegal act in Lord Howden, who, as a member of Parliament, had no right to make an agreement which necessarily placed his private interest in conflict with his duty as a legislator. It is said, and truly said, that every member of the legislature ought to preserve his judgment free, unbiassed, and disinterested, for the performance of his legislative duties; and it is argued that it is illegal to enter into an agreement which gives him a direct and immediate interest in the very subject with reference to which that duty is to be performed. I do not think it is necessary for me to determine on the present occasion whether this agreement can properly be considered as a fraud on the landowners through whose grounds the line of railway was to pass, or how far the character of the defendant, as a member of Parliament, precludes him from any right, which persons not invested with that character, may have, to enter into such an agreement. It has been held that the withdrawing opposition to a bill in Parliament may be a good consideration for a contract, and it certainly may be so in cases where the provisions of the Act are consistent with, and are not intended to be thwarted by, the provisions of the agreement; but it by no means follows that it should be so in this case. I do not, however, enter particularly into that question, because it appears to me that the second of the grounds alleged by the plaintiffs for considering this agreement invalid is sufficient to enable me to decide on this demurrer." On appeal, the decision of Lord *Langdale* was reversed by Lord *Cottenham*, C. (3 My. & Cr. 97; 1 Railway Cas. 326). The agreement was afterwards held by the Court of Exchequer Chamber, reversing the decision of the Court of Queen's Bench, to be valid at law: *Lord Howden* v. *Simpson*, 1 Railway Cas. 347. See also *Lord Petre* v. *The Eastern Counties Railway*, 1 Railway Cas. 462. See, however, *Vauxhall Bridge Company* v. *Earl Spencer*, 2 Madd. 356, Jac. 64; *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 1 L. R. Eq. 593.

It is not, however, permitted to a person who is a member of a body not of a governing or legislative character, to make, contrary to his duty as a member of such body, a bargain for his own private advantage. Thus, in *Bowes* v.

The City of Toronto, 11 Moo. P. C. C. 463, the mayor and corporation of the city of Toronto, in Canada, were authorised by the Canadian Act, 13 & 14 Vict. c. 84, to issue debentures to a certain amount, to assist in the construction of the Toronto, Simcoe, and Lake Huron Railway. At that period the appellant Bowes was the mayor and a member of Finance Committee, and took an active part in passing a by-law which authorised the issue by the corporation of debentures for the completion of the railway. Bowes at that time was engaged in copartnership with Hall, and their firm, Bowes and Hall, purchased of Story and Company, contractors for the railway company, some of the debentures so issued, which had been assigned to Story and Company by the corporation. Bowes and his partner afterwards sold the debentures, and thereby realised a large profit. This transaction was without the knowledge of the corporation. It was held by the Judicial Committee of the Privy Council (affirming the decree of the Court of Chancery in Canada), that Bowes must, in the circumstances of his being a member of the corporation, and the manner in which he acted throughout the transaction, be treated as the trustee of the corporation, and was not entitled to any benefit received from the sale of the debentures, and was liable to account to the corporation for the ascertained and unquestioned amount of profit made and received by him in the transaction in which he had engaged in respect of the sale of the corporation debentures, and that it was immaterial that the profit from the sale of the debentures was made by Bowes and his partner, Hall, jointly, and not by Bowes alone. "It has been argued," said Lord Justice *Knight Bruce*, in delivering judgment, "that the governing body of the corporation was a deliberative body, and on that ground out of the operation of any civil rules or principles applicable to agents and trustees, and the reported cases of *Lord Petre* v. *The Eastern Counties Railway* (1 Railway Cases, 462), and *Simpson* v. *Lord Howden* (3 My. & Cr. 97), were mentioned; and it was said that members of the British legislature often vote in Parliament respecting matters in which they are personally interested, and do so without censure or risk. We are of opinion, however, that neither the governing character nor the deliberative character of the corporation council makes any difference, and that the council was in effect and substance a body of trustees for the inhabitants of Toronto—trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a legislature, properly so called, who vote

in support of their own private interests, if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which courts, however, are nevertheless bound to apply those principles where they can be applied. The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body, nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. In every purpose at present material, they must be held to be merely private persons, having to perform duties, for the proper execution of which they are responsible to powers above them. We agree that the cases of *Lord Petre* v. *The Eastern Counties Railway*, and *Simpson* v. *Lord Howden*, must at present be viewed as correct expositions of English law; but so viewed, they do not, we conceive, affect the controversy before us."

Allowances to Trustees and Executors.] —Although trustees and executors are not allowed any remuneration for their trouble, they will be allowed all proper expenses out of pocket, whether they be provided for in the instrument creating the trusts or not (*Hide* v. *Haywood*, 2 Atk. 126; *Worrall* v. *Harford*, 8 Ves. 8; *Dawson* v. *Clarke*, 18 Ves. 254; *Attorney-General* v. *The Mayor of Norwich*, 2 My. & Cr. 424) even although remuneration for their trouble may have been allowed them by the author of the trusts (*Wilkinson* v. *Wilkinson*, 2 S. & S. 237; and see *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480). Thus, he will be allowed the expense of travelling (*Ex parte Lovegrove*, 3 D. & C. 763); of fees for counsel (Cary, 14; *Poole* v. *Pass*, 1 Beav. 600); costs of a law suit (*Amand* v. *Bradbourne*, 2 Ch. Ca. 138; *Fearns* v. *Young*, 10 Ves. 184); unless they were improper (*Malcolm* v. *O'Callaghan*, 3 M. & C. 52); or the litigation was occasioned by his own negligence (*Caffrey* v. *Darby*, 6 Ves. 488, 497); or fault, *Peers* v. *Ceeley*, 15 Beav. 209; *Leedham* v. *Chawner*, 4 K. & J. 458.

But it seems he will in no case be allowed interest on his costs: *Gordon* v. *Trail*, 8 Price, 416.

Cestui que trust may obtain leave to tax the costs of the solicitor to the trustee as between solicitor and client (*Re Dawson*, 28 Beav. 605; *Re Press*, 35 Beav. 34; and see *Re Dickson*, 3 Jur. N. S. 29); but the solicitor cannot charge against the trust estate anything not necessary for the administration thereof, though expressly directed by the trustee, but must look for payment of such charges to the trustee personally (*In re Brown*, 4 L. R. Eq. 464); and where a solicitor being an executor has, in conjunction with the other executor, paid a bill for

business done by himself for the testator, a taxation of the costs is not proper in a suit for the administration of the estate, but the taxing master will be directed to state whether any items objected to were fair and proper to be allowed, and to what amount. *Allen* v. *Jarvis*, 4 L. R. Ch. App. 616, and see *Johnson* v. *Telford*, 3 Russ. 477.

Trustees, moreover, without any express provision for that purpose, are entitled to be repaid any expenses properly incurred in the execution of the trust, and to be indemnified against losses arising out of, and in the proper performance of, their duties. Hence it has been held that a trustee is entitled to be allowed the necessary and proper expenses incurred in protecting property committed to his care, whether the threatened injury be immediate and direct, or indirect but probable, as for watching and opposing a Bill in Parliament likely to be injurious to the trust property (*Bright* v. *North*, 2 Ph. 216), for protecting the legal existence of a corporation (*Attorney-General* v. *The Mayor of Norwich*, 2 My. & C. 406); for the proper outlay with interest on the improvement of the trust property (*Quarrell* v. *Beckford*, 1 Madd. 269, 282), for paying off an incumbrance thereon, for which he might have been liable (*Balsh* v. *Hyham*, 2 P. Wms. 453), or in defending the title of the trust property (*Sanders* v. *Hooper*, 6 Beav. 246). And they are entitled to be indemnified by their cestui que trust from any liability arising from their holding shares in his name (*James* v. *May*, 6 L. R. Ho. Lo. 328), and from the costs of any suit or action commenced against them in their fiduciary character, as, for instance, for damages accidentally sustained by a person from the felling of a tree by their orders on the trust estate (*Benett* v. *Wyndham*, 4 De G. F. & J. 259; and see *Att.-Gen.* v. *Pearson*, 2 Coll. 581); or against members of a municipal corporation, for the purpose of impeaching the title or destroying the legal existence of the corporation, which the corporation has defended (*Attorney-General* v. *The Mayor of Norwich*, 2 My. & C. 406.

A trustee, however, who has incurred expenses in breach of his duty (*Leedham* v. *Chawner*, 4 K. & J. 458), or where the deed under which he acts has been set aside as invalid (*Smith* v. *Dresser*, 1 L. R. Eq. 651), is entitled to no expenses, except perhaps the expenses of a reconveyance, if it were necessary. Ib. 655.

Although a trustee ought to keep an account of his expenses, his not having done so will not, it seems, disentitle him to an allowance: *Hethersell* v. *Hales*, 2 Ch. Rep. 158.

And he will have a lien on the trust estate for his expenses (*Ex*

parte James, 1 Deac. & C. 272); but it will not extend to the persons employed by him in the affairs of the trusts (*Worrall* v. *Harford*, 8 Ves. 8; *Lawless* v. *Shaw*, L. & G. t. Sugd. 154, reversed Dom. Proc. 5 C. & F. 129), unless directed to do so by instrument creating the trust (*Williams* v. *Corbet*, 8 Sim. 349; *Consett* v. *Bell*, 1 Y. & C. C. C. 569; *Hibbert* v. *Hibbert*, 3 Mer. 681).

This lien must be satisfied before the cestui que trust can compel a reconveyance from the trustees (*Ex parte Chippendale*, 4 De G. Mac. & G. 19; *Re the Exhall Coal Company*, 35 Beav. 449; and see *Ex parte James*, 1 D. & C. 272); and will have priority over the costs of a suit for the administration of the trust fund (*Morison* v. *Morison*, 7 De G. Mac. & G. 226); or a charge created by the cestui que trust (*Re Exhall Coal Company*, 35 Beav. 449); and if the trust estate no longer exists, the trustee may proceed in equity against the cestui que trust personally: *Balsh* v. *Hyam*, 2 P. Wms. 453.

The Court has given effect to the lien by ordering the delivery of the deeds relating to the trust property into the custody of the trustee, and by prohibiting any disposition thereof without the discharge of the lien; but the Court has refused to foreclose or direct a sale of the trust property, in order to give effect to the lien, inasmuch as the trust itself would be thereby destroyed. *Darke* v. *Williamson*, 25 Beav. 622.

Accidental Profits of Trustees from Trust.]—A trustee may, however, from accidental circumstances, profit by his trust, as where the cestui que trust dies intestate without heirs; for in that case the lord cannot claim by escheat, and, subject to the right of creditors, the trustee may retain possession, not by any title of his own, but because no other person can show a title. This was determined after much discussion in the important case of *Burgess* v. *Wheate*, 1 Eden, 177. There A., being seised in fee ex parte paternâ, conveyed real estate to trustees, in trust for herself, her heirs and assigns, to the intent that she should appoint, and for no other use, intent or purpose whatsoever. A. died without having made any appointment, and without heirs ex parte paternâ. It was held by Lord Keeper *Henley*, and Sir *Thomas Clarke*, M. R., first, that the maternal heir was not entitled; and, secondly, that there being a terre tenant, the Crown, claiming by escheat, had not a title by subpœna to compel a conveyance from the trustee, the trust being absolutely determined; but no opinion was given upon the right of the trustee: and see

Attorney-General v. *Sands*, Hard. 496; Tudor's L. C. Real Prop. p. 664, 2nd ed.; *Davall* v. *New River Company*, 3 De G. & Sm. 394; *Cox* v. *Parker*, 22 Beav. 168.

Upon the same principle, where land is devised to trustees upon trust to convert into money for purposes which either fail or never take effect, and the testator dies without heirs, the lord cannot claim by escheat, as there are tenants in possession; nor has the Crown any right to come into equity to ask that the land should be converted, in order that it may take the money as bona vacantia, nor even if the land has been unnecessarily converted, can the Crown make good any claim, as the money will be the absolute property of the trustees: *Taylor* v. *Haygarth*, 14 Sim. 8; *Walker* v. *Denne*, 2 Ves. Jun. 185; *Cradock* v. *Owen*, 2 Sm. & Giff. 241.

But a trustee must convey to trustees according to the directions of a testator, although the trusts for which the conveyance was directed may have failed or never arisen: *Onslow* v. *Wallis*, 16 Sim. 483, 1 Mac. & G. 506. See also *Jones* v. *Goodchild*, 3 P. Wms. 33.

In case of the attainder of the cestui que trust for felony, it seems to have been the opinion of Lord Keeper *Henley*, and Sir *Thomas Clarke*, M. R., that if he were pardoned by the Crown, he might enforce the trust: see 1 Eden, 210, 255. Lord *Mansfield*, however, observed, that he could find no clear and certain rule to go by; and yet he thought equity would follow the law throughout: 1 Eden, 236.

It seems, however, doubtful whether the heir of a person executed for felony could sue the trustee. See Br. Ab. tit. "Feff. al. Us." 34. But see now 33 & 34 Vict. c. 23, abolishing the forfeiture of lands and goods for treason and felony.

It is however clear, that upon failure of the heirs of the cestui que trust, the heir of the trustee cannot come into equity as plaintiff, to assert his right. See 1 Eden, 212; and *Williams* v. *Lord Lonsdale*, 3 Ves. 752, in which case a copyhold (duly surrendered) was devised to A. and his heirs, in trust for B. and his heirs. Upon the death of B. without heirs, it was held by Lord *Rosslyn*, that the heir of the trustee had no equity to compel the lord to admit him; and his bill was dismissed, without costs. "The only point," observed his Lordship, "determined in *Burgess* v. *Wheate*, was that the Crown entitled as it was supposed by escheat upon the death of the cestui que trust, had not a title by subpœna in this Court to make the heir of the trustee, having merely a legal estate, convey; that there was no equity for this Court to exercise jurisdiction. Is not the converse of that equally true?

If the lord has no equity in that case, can I find any ground of equity where the person having the legal estate, and telling me he has no beneficial interest, desires me to act for his benefit upon the estate of the lord? The Court considers the mere legal estate as nothing."

But the Court of King's Bench has by mandamus compelled the lord to admit the heir of a trustee, although he had a mere legal title: *The King* v. *Coggan*, 6 East, 431; *S. C.*, 2 Smith, 417; *King* v. *Wilson*, 10 B. & C. 80.

Lord *Mansfield* asked, in *Burgess* v. *Wheate* (see 1 Eden, 185), whether, in the event of the attainder of the cestui que trust, the right would not result to the creator of the trust; but no notice appears to have been taken of this observation, nor does the question ever appear to have been determined, and since the passing of 33 & 34 Vict. c. 23, it has ceased to be important.

If the cestui que trust of real or personal chattels, having no next of kin, dies, either intestate (*Jones* v. *Goodchild*, 3 P. Wms. 33; *Rutherford* v. *Maule*, 4 Hagg. 213; *Taylor* v. *Haygarth*, 14 Sim. 8), or, if under the old law, having made a will, he appointed an executor, who either expressly or by implication was excluded from all beneficial interest, so as to be converted into a mere trustee (*Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Barclay* v. *Russell*, 3 Ves. 424; *Henchman* v. *Attorney-General*, 3 My. & K. 492; *Cave* v. *Roberts*, 8 Sim. 214), the Crown in either case, by virtue of its prerogative, may claim the chattels as bona vacantia: *Powell* v. *Merrett*, 1 Sm. & Giff. 381; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Read* v. *Stedman*, 26 Beav. 495; *Dacre* v. *Patrickson*, 1 Drew. & Sm. 182. But if under the old law there was nothing in the will to convert the executor into a trustee; or if, since the passing of 11 Geo. 4 & 1 Will. 4, c. 40, it appears to be the intention that he shall be the beneficial owner, the Crown cannot make good its claim. See note to *Attorney-General* v. *Sands*, Tudor's L. C. Real Prop. 676, 2nd ed.; see also *Dyke* v. *Walford*, 5 Moore, P. C. C. 434; *Ellcock* v. *Mapp*, 3 H. L. Cas. 492; *Russell* v. *Clowes*, 2 Coll. 648; *Williams* v. *Arkle*, 7 L. R. Ho. Lo. 606.

As aliens could not before the Naturalization Act, 1870 (33 & 34 Vict. c. 14), hold lands as against the Crown, it was contended, but unsuccessfully, that trustees to whom lands were devised in trust for an alien, were entitled to hold the lands discharged of the trust. See *Barrow* v. *Wadkin*, 24 Beav. 1; 3 Jur. N. S. 679; 5 W. R. 695, where Sir *John Romilly*, M. R., held that the trust ought to be executed for the Crown. See also *Sharp* v. *St. Sauveur*, 7 L. R. Ch. App. 343, overruling *Rittson* v. *Stordy*, 3 Sm. & Giff. 230.

It has been before shown that an alien, although he could not hold land, was entitled to the proceeds of lands devised to trustees to sell for his benefit: *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 4 My. & Cr. 525; and see ante, Vol. 1, p. 845.

These questions will not now often arise, inasmuch as, by the Naturalization Act, 1870 (33 Vict., c. 14) (which is not, however, retrospective) aliens may take, acquire, hold, and dispose of, property of every description, like British-born subjects.

ASHBURNER *v.* MACGUIRE.

1784.—*July 18th*, 1786.

[REPORTED 2 BRO. C. C. 108.]

SPECIFIC LEGACY—ADEMPTION.]—*Legacy of interest and principal of a bond is specific, and is partially adeemed by the testator having received part of the debt by dividends declared after the bankruptcy of the debtor. Legacy of "my 1000l. East India Stock," is specific, and is adeemed in toto by the testator's selling the stock.*

WILLIAM MACGUIRE, by his will, dated 27th September, 1778, bequeathed (inter alia) as follows:—

"Item, I bequeath to my sister Jane Ashburner, the interest arising from *her husband William Ashburner's bond to me for principal, 2500l. sterling* during her life, independent of her present or any future husband, amounting to 175*l. sterling per annum. Item*, I bequeath *the principal of the said bond, on the decease of my said sister Jane Ashburner, to her four daughters, Elizabeth, Anne, Sarah, and Sophia, to be equally divided among them* or the survivors of them. *Item*, I bequeath to Mr. William Beawes, *now* at school with the Rev. Mr. Everett, at Felstead, in Essex, *my capital stock of 1000l. in the Indian Company's Stock*, with the dividend thereon arising, which dividend is to pay for his education and maintenance till he is qualified for holy orders, and then the capital to be laid out in the purchase of a living for him in the church. This stock is to be continued or disposed of, at the discretion of my executors."

William Ashburner, the debtor, became a bankrupt in February, 1780. In March the testator proved this debt

under the commission, and, 16th May, 1781, received a dividend thereon of 4*s.* 3*d.* in the pound.

The testator died 12th July, 1781. Since his death, another dividend of 2*s.* 9*d.* has been made to the bankrupt's creditors.

The testator, at the time of making his will, was possessed of 1000*l.* East India Stock, and no more, but sold out the whole of it before his death. Beawes, the legatee of this stock, was a natural child of the testator.

The bill was brought by Mrs. Ashburner, her four daughters, and Beawes, to have the whole sum of 3500*l.* secured for Mrs. Ashburner and her daughters, and to have such part of it as is due out of the estate of Ashburner the bankrupt paid by his assignee, and the residue paid by the personal estate of the testator out of his general effects; and that the personal representative of the testator might also purchase with the testator's personal estate 1000*l.* East India Stock, and transfer the same for the use of the plaintiff Beawes, as directed by the will. The defendants, the administratrix and residuary legatees, insisted that the plaintiffs, the Ashburners, were entitled only to what remained due to the testator at the time of his death out of the estate of the bankrupt; and that the legacy of East India Stock to Beawes was adeemed by the testator's disposing of it in his lifetime.

The cause was heard before the *Lord Chancellor* in 1784, and on the 18th of July 1786, he gave judgment.

Lord Chancellor Thurlow, after stating the case, said—The claim of Mrs. Ashburner and her daughters depended on two questions:

First, whether the bond was given as a specific legacy; which depends on this, whether the manner in which the sum is mentioned, turns it to a pecuniary legacy, or, as the civilians call it, a demonstrative legacy, that is, a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it; or whether it be what they call a *legatum nominis* or *legatum debiti.*

What is a demonstrative legacy.

The second question is, whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends in respect of the debt, or, as the bankrupt's estate may be insufficient to pay the residue.

I will take the second point first; for this is clearly a specific legacy, according to all the definitions. Wherever a debt, or a part of a debt, is the subject bequeathed, it is a *legatum nominis*, or *legatum debiti*. I shall not stand long upon that point.

The bequest of a debt or part of a debt is specific.

With respect to the second point, as to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognised by Lord *Talbot* and Lord *Hardwicke*. It is, that where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed, but if paid in without suit or demand, there is no intention to adeem; and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord *Camden*, in *The Attorney-General* v. *Parkin* (*a*), expressly exploded this distinction; so did Lord *Macclesfield* (*b*). I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinb. sect. 20, p. 7 (p. 548, 6th edit.). But I doubt if the authors cited by him support him. Godolphin (Orphan's Leg., 4th edit. 434), referring to the same books, states the rule differently; and so have other writers.

There is no distinction as to ademption, between voluntary payment, or payment after demand.

(*a*) Amb. 566.

(*b*) *Lord Thomond* v. *Earl of Suffolk*, 1 P. Wms. 461.

By the civil law, it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare, by his conduct, that such a change was no ademption. The case put is of a gold chain, which the testator, after having bequeathed it by his will, converts into a cup; the legacy is not adeemed, because the cup might be restored to its former shape.

Rules in the civil law.

1. Where subject-matter of a legacy is changed, but may be restored to its former state, it is not adeemed.

This has not been adopted by our law. There is no ground to say, that, after a legacy is extinguished, a man, by his conduct, may revive it. It is contrary to common sense, as appears by the instance put. The gold chain may have been given as a legacy, because it had been

Not adopted by the law of England.

long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased.

2. Where the subject-matter cannot be restored to its former shape, legacy is adeemed.

There is an exception, or limitation to this rule, where the testator alters the form, so as to alter the specification of the subject; as by making wool into cloth, or a piece of cloth into a garment: there the legacy is adeemed, because the subject-matter cannot be restored to its former state.

Distinction not adopted by the law of England.

This distinction is intelligible, in an action where the thing sued for cannot be recovered *in specie;* but it is not intelligible, when applied to a legacy; and, what is more material, never was adopted by our law.

Where legacy of debts not adeemed according to the civil law.

As to legacies of debts, according to the civil law, where the testator had sued for, but had not recovered, or had got judgment, but not execution, or had actually recovered the debt, but had set the money apart for the legatee, or, by words, declared he did not intend to revoke the legacy; in none of these cases was the legacy adeemed. But there is no authority in the civil law for the distinction between a debt being paid without demand, and in consequence of a demand.

No distinction there whether debt be paid with or without demand.

According to the law of England as a general rule, where a testator bequeaths a debt and afterwards receives payment thereof, the legacy is adeemed.

Besides, although it can be ascertained where a suit was commenced for a debt, it may be extremely difficult to ascertain whether any demand has been made. If the testator receive payment of the debt, the legacy is gone, unless it appear from the manner of his disposing of the money afterwards, that he means to preserve it for the legatee. Lord *Camden*, in *The Attorney-General* v. *Parkin*, held there was no distinction between voluntary payment and payment on a demand, and that in both cases the legacy was extinguished; he added, that where the sum is specified in the bequest, it is a general legacy, as I shall mention on the other point. But the distinction between, I bequeath (*a*) *the* 500*l. due on a bond from A. B.*, and I bequeath *the bond from A. B*, is very slender; and so admitted to be by his Lordship.

(*a*) This distinction is recognised by Lord *Hardwicke* in *Ellis* v. *Walker*, Amb. 310, and by Lord *Camden* in *Attorney-General* v. *Parkin*, Id. 506, but is now overthrown.

In the civil law there is a distinction taken between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and a specific legacy, where he bequeaths a particular thing.

On the first point, I am clear this is a specific legacy. If the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies, and the question had been, whether this legacy should have been contributive to the pecuniary legacies, I believe no man in the profession would have doubted.

When the testator made his will, 5300*l.* was due to him from William Ashburner, by bond; he meant to relinquish that bond for the benefit of the family; not by way of release to the husband, but by way of settlement; and that this debt, whether it turned out well or ill, should go to the family: the interest to his sister for her life, the principal among her daughters. In this case, the bequest must be considered as specific, although the sum be mentioned; *for I cannot agree to Lord Camden's distinction.*

As to the legacy of East India Stock to the plaintiff Beawes, there is no case to countenance his claim. The testator says, "I give *my* capital stock to," &c.; the pronoun *my* has been relied on, in many cases, in deciding the legacy to be specific.

The testator, after making his will, sold his stock, which made it as if it had never existed; *the legacy is adeemed*, according to all the cases.

Review of cases as to the effect of the animus adimendi.

In questions upon legacies of debts, the cases have crept beyond the original principle, which was the distinction between demonstrative and specific legacies, and recourse has been had to the *animus adimendi*, which has nothing in common with the other principle.

In *Pettiward* v. *Pettiward*, Rep. t. Finch, 152, the Court was of opinion, from all the circumstances, that the testator intended to give a legacy of 2000*l.*, although the debts pointed out for the payment of it amounted only to 1700*l.*; and, therefore, decreed the deficiency to be made good out of the general assets. In *Pawlet's Case*, Raym. 335, the legacy was held to be a pure legacy, or a legacy *in numeratis*, and not *legatum nominis;* and although the debt was paid to the testator, the legacy was decreed. In *Lord Castleton* v. *Lord Fanshaw*, 1 Eq. C. Abr. 298,

a legacy of a debt was held to be specific, although the sum was named.

In *Orme* v. *Smith*, 1 Eq. Ca. Abr. 302; Gilb. Rep. 82; and 1 Vern. 681, the payment was voluntary; and, from thence was inferred an argument, that there was no *animus adimendi* (*a*).

(*a*) See as to the intention of the testator, Domat. tom. 2, p. 186. Vide *Coleman* v. *Coleman*, 2 Ves. jun. 640.

In *Lord Thomond* v. *Earl of Suffolk*, 1 P. Wms. 461, Lord *Macclesfield* disapproved of the distinction between a debt recovered by suit, or paid in voluntarily. A definition of a specific legacy is given by Lord *Macclesfield*, in *Hinton* v. *Pinke*, 1 P. Wms. 539, and the advantages and disadvantages, as between a specific and pecuniary legacy, are mentioned; and, among other instances, that the legatee of a debt, which is lost by the insolvency of the debtor, shall have no contribution from the other legatees. In *Crockat* v. *Crockat*, 2 P. Wms. 164, the testator bequeathed the sum of 550*l.*, which was then in Mr. Ellis's hand; the testator, before making his will, had placed the sum in the hands of Mr. Ellis, and had got his note for it. He had also, before making his will, drawn several bills on Ellis, which had reduced the sum to 430*l.* It was held, by the Master of the Rolls, that, as the drafts were all made before the will, and as the note for the full sum was still standing out, the testator should be considered as renouncing the payments, and that he meant to give the whole 550*l.* as a legacy.

I take it to be clear, if a testator gives a cup, which is in pawn, it is a full gift, and the executor must redeem.

Where a testator makes a specific bequest of a thing in pawn, the executor must redeem it.

In *Ford* v. *Fleming*, 2 P. Wms. 469, and 1 Eq. Ca. Abr. 302, Lord *King* held, that calling in the debt was no ademption, supposing himself bound by the passage in Swinburne, and *Pawlet's case* (*b*). How he could be bound by those cases I cannot conceive. This case determines nothing. *Lawson* v. *Stitch*, 1 Atk. 507, was also cited; the question arose on a deficiency. The case (*c*) at the Rolls, cited 1 Atk. 508, is nonsense, and has often been denied. The question upon the legacy of the stock has been determined uniformly: *Ashton* v. *Ashton*, Ca. t. Talb. 152, and 3 P. Wms. 384, *Partridge* v. *Partridge*,

(*b*) Raym. 335.

(*c*) *Phillips* v. *Cary*; and see *Heath* v. *Perry*, 3 Atk. 103.

Ca. t. Talb. 226, *Purse* v. *Snaplin*, 1 Atk. 414, does not tell at all to the purpose. *Avelyn* v. *Ward*, 1 Ves. 420, is contrary to many cases determined before, and to one by Lord *Hardwicke* himself, viz., *Purse* v. *Snaplin* (*a*).

(*a*) *S. C.* nom. *Pierce* v. *Snaveling*, 1 Ves. 425.

Lord *Camden*, in the *Attorney-General* v. *Parkin* (*b*), decided one point, and left the other open. *Parkin*, in his will, recites that he had certain mortgages, to the amount of £——, and bonds to the amount of £——. He gives all these, by such enumeration, to Pembroke College, Cambridge. To his sisters, who were next of kin, he gave annuities, and declared they should have nothing more under his will. Several sums were afterwards called in, or paid before the testator's death. Lord *Camden* determined, that the sisters were not disappointed by the declaration, that they should have nothing but the annuities; he held the legacy to the College was not adeemed as to the sums paid in, upon the ground that the sum was named, which he at the same time admitted to be slight. The testator certainly meant to give everything to the College, except the annuities; but the bequest is in the strictest form of a specific legacy.

(*b*) Amb. 566.

In (*c*) *Cartwright* v. *Cartwright*, 18th July, 1775, before Lord *Bathurst*, the bequest was "I give 1400*l.* *for which I have sold my estate this day*," &c. The testator afterwards received the whole money, paid it to his banker, and drew out of his hands 1100*l.* of that money. Lord *Bathurst* held this to be a legacy of quantity, and that the receiving was no ademption, on the authority of the *Attorney-General* v. *Parkin*; but it is questionable whether that case supports that determination.

(*c*) Stated in the Appendix to Mr. Wooddeson's 3rd vol. of Views of the Laws of England.

In the case before me, the testator plainly intended that his sister, Sarah Ashburner, and her children, should have the debt, owing to him by her husband, secured as a provision for them.

Decree.

My decree will be, that the bond be delivered up to the wife and children, that they may receive the dividend not received by the testator, and whatsoever may here-

after be payable out of the bankrupt's estate in respect of that debt.

The legacy to Beawes is gone, and the bill must be wholly dismissed as to that claim.

The case of *Ashburner* v. *Macguire*, determined by Lord *Thurlow*, after great consideration—for, according to Lord *Alvanley* (see 4 Ves. 566), he took two years before he gave judgment—is usually referred to as an authority wherever the question arises, whether a legacy is general or specific, and if specific, what amounts to an ademption of it. See *Stanley* v. *Potter*, 2 Cox, 182; *Chaworth* v. *Beech*, 4 Ves. 565, 566; *Innes* v. *Johnson*, 4 Ves. 574.

Legacies are usually said to be of two different kinds, *general* or *specific;* a third, however, may be added, in some degree partaking of the properties of the two former, —a *demonstrative* legacy.

A legacy is *general* where it does not amount to a bequest of any particular thing or money, distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or a horse, or 1000*l.* stock, or 1000*l.*, not referring to any particular diamond ring, horse, stock, or money, as distinguished from others, these legacies will be general.

It may be here mentioned that general pecuniary legacies are bequests of personal property "described in a general manner" within the meaning of the 27th section of the Wills Act (1 Vict. c. 26), where no particular fund is indicated for payment, and they will therefore be payable out of personal estate, which the testator has power to appoint in any manner he may think proper, where there are no assets of which the testator was possessed as his own personal estate, sufficient to pay the legacies: *Hawthorn* v. *Sheddon*, 3 Sm. & G. 293; and see *Spooner's Trust*, 2 Sim. N. S. 129; *Wilday* v. *Barnett*, 6 L. R. Eq. 193; *In re Wilkinson*, 4 L. R. Ch. App. 587.

A legacy is specific, *legatum nominis vel debiti*, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives B. "my diamond ring," "my black horse," "my 1000*l.* stock," or "1000*l.* contained in a particular bag," "or owing to me by C.," or "the diamond ring, black horse, &c., which I shall be possessed of at the time of my death," in these and like instances the legacies are specific. See the definition of a specific legacy by Sir *G. Jessel*, M. R., in *Bothamley*

v. *Sherson*, 20 L. R. Eq. 308, 309.

Where a bequest of particular articles is followed by a gift of the residue, the bequest of such articles, although the testator has prefixed "my," will not be specific, but residuary. See *Fielding* v. *Preston*, 1 De G. & Jo., 438. In that case there was a gift of "my leaseholds, my funded property, and other personal estate not hereinbefore bequeathed." Lord *Cranworth* was clearly of opinion that the gift of the leaseholds and of the funded property would have both been specific, except for the circumstance that the gift "of my funded property" was followed by a gift of the rest of the estate. "My mind," says his Lordship, "has fluctuated on this point, but at last I have arrived at the conclusion that this is not a specific gift of the funded property; and I come to that conclusion because I think it would be very dangerous to hold that in a will where there is a gift of a residue, and the testator unnecessarily chooses to enumerate some particular things in that residuary gift, such a circumstance was sufficient to constitute the things so enumerated specific gifts. It rarely happens that in the gift of the residue something is not mentioned specifically. For instance, a testator may give his horses and all his other personal estate, or his stock-in-trade and the rest of his personal estate. Such gifts could not, I think, be properly held to be specific. Suppose the will to be worded thus, 'I give to Henrietta, her executors, administrators, and assigns, all my other personal estate, including my funded property,' that would not have been specific." See also *Dummer* v. *Pitcher*, 2 My. & K. 262; *Chapman* v. *Chapman*, 4 Ch. D. 800, and the remarks of Sir *G. Jessel*, M. R., in *Bothamley* v. *Sherson*, 20 L. R. Eq. 311.

The result is the same where a general gift of personalty is followed by an enumeration of particular articles. Thus in *Fairer* v. *Park*, 3 Ch. D. 309, a gift by will by a testator to his wife of "all my personal property, all sums of money which I may possess, or which may be owing to me at the time of my decease, together with all the furniture, farming implements, and other things in the family mansion," was held by Sir *C. Hall*, V.-C., not to be a specific legacy. See also *King* v. *George*, 4 Ch. D. 435.

A legacy is *demonstrative*, when, as Lord *Thurlow* observes in the principal case, "it is in its nature a general legacy, but there is a particular fund pointed out to satisfy it." Thus, if a testator bequeaths 1000*l.* out of his Reduced Bank Three per Cents., the legacy will not be specific, but demonstrative. That this species of legacy was recognised by the civil law, is clear. "*Si testator scripserit, aureos quad-*

ringentos Pamphilæ dari volo, ita ut infra scriptum est, ab Julio autore aureos tot, et in castris quos habeo tot, et in numerato quos habes tot, et post multos demum annos decesserit cum jam omnes summæ in alios usus translatæ essent, responsum fuit, Pamphilæ quadringenta deberi; quia vero similius est patremfamilias demonstrare potius hæredibus voluisse, unde aureos quadringentos sine incommodo rei familiaris contrahere possent, quam conditionem fidei-commisso injecisse, quod ab initio pure datum esset." —Voet ad Pand. 35, tit. 1, sect. 5.

Though often a matter of much difficulty, it is of much importance accurately to distinguish these legacies one from the other, because, as will be hereafter more fully shown, a specific legacy will not, upon a deficiency of general assets to pay debts, be obliged to abate, until after the general legacies have been exhausted; but, at the same time, a specific legatee is liable to this disadvantage, that if the thing specifically given be adeemed by the testator either aliening or changing it into a different species of property, he will not be entitled to claim anything by way of compensation out of the general personal estate. But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies until after the fund out of which it is payable is exhausted, and so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the primary means of paying it. See *Mullins* v. *Smith*, 1 Drew. & Sm. 210; *Vickers* v. *Pound*, 6 Ho. Lo. Ca. 885; *Disney* v. *Crosse*, 2 L. R. Eq. 593; *Hodges* v. *Grant*, 4 L. R. Eq. 140.

Before, however, entering upon these topics, it may be more useful to examine some of the cases in which the distinguishing marks of these different kinds of legacies have been discussed, bearing in mind, that, by reason of the consequences, the Court is inclined not to construe a legacy as specific, unless clearly so intended: *Kirby* v. *Potter*, 4 Ves. 752; *Innes* v. *Johnson*, 4 Ves. 568; *Webster* v. *Hale*, 8 Ves. 413; *Dickin* v. *Edwards*, 4 Hare, 276; *Ellis* v. *Walker*, Amb. 310; *Sayer* v. *Sayer*, 7 Hare, 382; *Williams* v. *Hughes*, 24 Beav. 474, 478.

Legacies of money.]—A bequest of a sum of money in such a bag (*Lawson* v. *Stitch*, 1 Atk. 508); or in the hands of a certain person (*Hinton* v. *Pinke*, 1 P. Wms. 540; *Crockat* v. *Crockat*, 2 P. Wms. 164; *Pulsford* v. *Hunter*, 3 Bro. C. C. 416); or even of "all my monies" (*Manning* v. *Purcell*, 2 Sm. & G. 284; 7 De G. Mac. & G. 55; *Larner* v. *Larner*, 26 L. J. N. S. (Ch.) 668), is specific. So

where one partner bequeathed to the other 2000*l.*, which appeared to be due to him on the last settlement, upon certain trusts, if he did not draw it out of the trade before he died, Lord *Hardwicke* held that it was a specific legacy: *Ellis* v. *Walker*, Amb. 310. But a bequest of money for a ring (*Apreece* v. *Apreece*, 1 V. & B. 364), or to purchase government securities (*Lawson* v. *Stitch*, 1 Atk. 507; *Gibbons* v. *Hills*, 1 Dick. 324; *Edwards* v. *Hall*, 11 Hare, 23), or lands (*Hinton* v. *Pinke*, 1 P. Wms. 539), or of an annuity to be purchased out of or charged on the personal estate (*Alton* v. *Medlicott*, cited 2 Ves. 417; *S. C.*, 3 Atk. 694; *Hume* v. *Edwards*, 3 Atk. 693; *Creed* v. *Creed*, 11 C. & F. 508), or of so much money "to be paid in cash" (*Richards* v. *Richards*, 9 Price, 226), is a general legacy. So, "in *Kirkpatrick* v. *Kirkpatrick*, before Lord *Kenyon* when Master of the Rolls, legacies were given to persons in India, and legacies to persons in England, to be respectively out of the effects in the respective countries, that was held to be only a direction as to the payment, not to make them specific," cited in *Roberts* v. *Pocock*, 4 Ves. 158. So, a gift of a legacy, with a direction that it shall be paid as soon as the testator's property in India shall be realised in England, will not make it specific, nor would it fail although the assets had been remitted to England in the lifetime of the testator: *Sadler* v. *Turner*, 8 Ves. 617, 624; and see *Raymond* v. *Broadbelt*, 5 Ves. 199.

Legacies of debts.]—A debt may be specifically bequeathed, either by a gift of the security, as "my East India bonds" (*Sleech* v. *Thorington*, 2 Ves. 562, 563); "my note of 500*l*" (*Drinkwater* v. *Falconer*, 2 Ves. 623); "my navy bills" (*Pitt* v. *Camelford*, 3 Bro. C. C. 160); or by a gift of the sum owing upon the security, as a bequest of "the money due on an interest note given by A." (*Fryer* v. *Morris*, 9 Ves. 360); or "due on A.'s bond" (*Davies* v. *Morgan*, 1 Beav. 405); "the money now owing to me from A." (*Ellis* v. *Walker*, Ambl. 309); "or the interest of 7000*l.*, security on mortgage of an estate belonging to A." (*Gardner* v. *Hatton*, 6 Sim. 93).

A bequest of a debt is equally specific, where it is made to several persons in certain shares and proportions, nor is it the less specific in consequence of a life interest being given in it. Thus, in the principal case, where the testator bequeathed to his sister "the interest arising from her husband's bond, due to me, for principal 3500*l.* sterling," for life, for her separate use, amounting to 175*l.* sterling per annum, and on the decease of his sister, the principal of the said bond to her four daughters, to be equally

divided among them, Lord *Thurlow* held, that the bond was specifically given; and this decision has been approved of and followed in *Chaworth* v. *Beech*, 4 Ves. 555; *Innes* v. *Johnson*, 4 Ves. 568; *Stanley* v. *Potter*, 2 Cox, 180; sed vide *Coleman* v. *Coleman*, 2 Ves. jun. 639; *Duncan* v. *Duncan*, 27 Beav. 386. So a gift of a *part* or *residue* of a debt is specific (*Ford* v. *Fleming*, 1 Eq. C. Ab. 302, pl. 3; 2 P. Wms. 469; *Nelson* v. *Carter*, 5 Sim. 530; and see *Basan* v. *Brandon*, 8 Sim. 171).

If a testator gives a sum out of a debt to one person and the residue to another, the legacies are specific, but if he says, "I give a legacy of a particular sum to A. and desire it to be paid out of a debt due to me," the legacy is demonstrative, as the testator merely points to a fund out of which it is to be paid; *Duncan* v. *Duncan*, 27 Beav. 390, and see *Campbell* v. *Graham*, 1 Russ. & My. 453.

Legacies of stock, government securities, &c.]—Stock, or government securities, may be specifically bequeathed, where the specific thing or corpus is, as in the principal case, described as "*my*" stock (*Barton* v. *Cooke*, 5 Ves. 461; *Choat* v. *Yeats*, 1 J. & W. 102; *Norris* v. *Harrison*, 2 Madd. 279, 280). So, a legacy "of my stock," or "in my stock," or "part of my stock," is a specific gift of an aliquot part of stock: *Kirby* v. *Potter*, 4 Ves. 750, per Lord *Alvanley;* and see *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Mullins* v. *Smith*, 1 Drew. & Sm. 210; *Oliver* v. *Oliver*, 11 L. R. Eq. 506. So, a bequest of "all the stock which I have in the Three per Cents., being, or about 5000*l.*," is specific; *Humphreys* v. *Humphreys*, 2 Cox, 184; *Cockran* v. *Cockran*, 14 Sim. 343; *Gordon* v. *Duff*, 28 Beav. 519; *Bothamley* v. *Sherson*, 20 L. R. Eq. 304; and a bequest "of the interest of the whole of my property in the public funds," was held a specific legacy of 700*l.* Three per Cent. Reduced Annuities, the only property in the public funds which the testator had: *Hayes* v. *Hayes*, 1 Kee. 97. So a bequest "of the interest of 4500*l.* money in the funds," has been held a specific bequest of 4000*l.* consols in the names of trustees for the testatrix: *Page* v. *Young*, 19 L. R. Eq. 501. And see *Vincent* v. *Newcombe*, 1 You. 599; *Kampf* v. *Jones*, 2 Keen, 756; *Shuttleworth* v. *Greaves*, 4 My. & Cr. 35.

The mere possession, by the testator, at the date of his will, of stock or annuities of an amount equal to or greater than the bequest, where it was made merely in general terms, as *of* stocks or annuities (*Partridge* v. *Partridge*, Ca. t. Talb. 226; *Simmon* v. *Vallance*, 4 Bro. C. C. 345; *Webster* v. *Hale*, 8 Ves. 410; *Wilson* v. *Brownsmith*, 9 Ves. 180; *Hayes* v. *Hayes*, 1 Kee. 97; *Johnson* v.

Johnson, 14 Sim. 313); or of stocks or annuities *in* particular funds (*Purse* v. *Snaplin*, 1 Atk. 415; *Bronsdon* v. *Winter*, Amb. 57; *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 565; *Sibley* v. *Perry*, 7 Ves. 523, 529, 530; *Webster* v. *Hale*, 8 Ves. 410); or of India bonds (*Sleech* v. *Thorington*, 2 Ves. 562, 563); or canal shares (*Robinson* v. *Addison*, 2 Beav. 414); would not, unless it appeared clearly to be the testator's intention to refer to the identical stock, annuities, bonds, or shares, of which he was possessed, be considered as specific; for it might be his intention that his executor should purchase them out of his general personal estate.

Although stock be given in general terms, if the testator directs a sale for the benefit of the legatee, the legacy will be specific; for that direction would not have been given if the testator intended the stock to be purchased out of his general personal estate: *Ashton* v. *Ashton*, Ca. t. Talb. 152; 3 P.Wms. 384; *Sleech* v. *Thorington*, 2 Ves. 564; *Simmons* v. *Vallance*, 4 Bro. C. C. 348.

Where a married woman, who has a power of appointment over a fund invested in government stock, by her will gives legacies of specified sums thereof, such legacies will be specific (*Davies* v. *Fowler*, 16 L. R. Eq. 308; and see *Tatham* v. *Drummond*, 2 H. & M. 262); and if the legacies given thereout do not exhaust the fund, a residuary gift thereof will also be specific: *Ib.*

Where there is a bequest not of *part* of certain stock, that is to say, of *stock* out of stock (in which case the legacy, as before shown, is specific as being part of a specific fund), but of *money* out of stock "as of 1000*l.* out of my Reduced Stock," then the legacy will not be specific, but demonstrative: *Kirby* v. *Potter*, 4 Ves. 748; *Deane* v. *Teste*, 9 Ves. 146, 152; *Rogers* v. *Clarke*, 1 C. P. Coop. 376; *Attwater* v. *Attwater*, 18 Beav. 330. And see *Jones* v. *Southall*, 32 Beav. 31. As to this distinction, see *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Mullins* v. *Smith*, 1 Dr. & Sm. 204. So, where a certain sum is given, and the fund in which it is invested is described or pointed out merely, the legacy will be demonstrative: *Raymond* v. *Broadbelt*, 5 Ves. 199; *Gillaume* v. *Adderley*, 15 Ves. 384; *Le Grice* v. *Finch*, 3 Mer. 50; *Sparrow* v. *Josselyn*, 16 Beav. 135; *Thomas* v. *Thomas*, 3 Ir. Ch. Rep. 399; *Mytton* v. *Mytton*, 19 L. R. Eq. 30. So in *Lambert* v. *Lambert*, 11 Ves. 607, where the bequest is "to A., the sum of 12,000*l.* of my funded property, to be transferred in his name, or employed as it shall appear most beneficial to his interest," it was held to be a demonstrative legacy.

But the intention, which always governs in these cases, may show that so much of the identical stock

was intended, in which case the legacy will be specific. Thus, in *Morley* v. *Bird*, 3 Ves. 629, the testator directed A. to pay to certain persons "four hundred pounds out of Seven now lying in the Three per Cent. Consolidated:" Lord *Alvanley* held, that the legacy was specific.

Where a testator makes a specific bequest, for instance, of stock which he accurately describes, that stock only, and not stock of a different denomination, will pass, though the amount be less than what he states it to be (*Gilliat* v. *Gilliat*, 28 Beav. 481; and see cases cited in the note, *Ib.*, page 484); but if he had no such stock as that which he mentions in his will, other stock might pass: *King* v. *Wright*, 14 Sim. 400; *Penticost* v. *Ley*, 2 J. & W. 207; *Gallini* v. *Noble*, 3 Mer. 691; *Drake* v. *Martin*, 23 Beav. 89.

Legacies of personal chattels.]—A bequest of a brooch which I received as a present from A. B. (Touchstone, 433), my horse named Castor (*Ib.*), as many of my horses as will amount to 800*l.* (*Richards* v. *Richards*, 9 Price, 219), any stock of trade of wines and spirituous liquors which I shall be possessed of at the time of my death (*Stewart* v. *Denton*, 4 Doug. 219), all the books in my chambers (*Green* v. *Symonds*, 1 Bro. C. C. 129, n.), will be specific, and can only be satisfied by a delivery in specie.

But where a person having many chattels of the same kind bequeaths them in such terms as not to show that any particular chattel was intended, and so that the bequest will be satisfied by something of the same species of that mentioned, the legacy will not be specific. Thus, if A., having many brooches or horses, bequeath "a brooch" or "a horse," in these and such cases the bequests will not be specific, but general. Roper on Legacies, vol. i. p. 93, 4th ed.

Things ordered by and made for the testator will pass under his will, although not delivered or paid for until after his death: *Field* v. *Peckett*, 29 Beav. 575.

Specific bequest for life of consumable articles.]—A gift for life, if specific, of things "*quæ ipso usu consumuntur*," is a gift of the property, and there cannot be a limitation over after a life interest in such articles (*Randall* v. *Russell*, 3 Mer. 195). Thus it was laid down by Sir *J. L. Knight-Bruce*, V.-C., that a gift of "wine, spirits, and hay," to a woman so long as she should be living unmarried, is a gift of the absolute interest. See also *Andrew* v. *Andrew*, 1 Coll. 690, 691, 692; *Twining* v. *Powell*, 2 Coll. 262.

But this, it seems, will not be the case with regard to consumable articles constituting the testator's stock in trade. Thus in *Phillips* v. *Beal*, 32 Beav. 25 a

wine merchant, possessed of a large stock of wine, by his will gave all his household goods, and everything he might die possessed of, to his wife *for life*, and from and after her decease he bequeathed the whole of his effects that might "*be then remaining*" to his daughter. Lord *Romilly*, M. R., held, that the widow was entitled to all the wine in the house, but not to that used for the purpose of trade. "Wine," said his Lordship, "is one of those things which *ipso usu consumuntur*, and if the testator was keeping the wine for his own consumption, and not for the purpose of sale, it belongs to the widow. This must be ascertained."

So, likewise, in *Cockayne* v. *Harrison*, 13 L. R. Eq. 432, a farmer, after giving to his wife furniture to furnish a comfortable room at his farm at S., bequeathed to her his farming stock at S. during her widowhood, and after her marrying again, or her decease, he gave the same to trustees for sale. The stock consisted, amongst other things, of cattle and stacks of hay. The widow having married again, it was held by Lord *Romilly*, M. R., that the widow was only entitled to a life interest in the farming stock. "I think," said his Lordship, "that the distinction which I took in *Phillips* v. *Beal* (32 Beav. 25) is sound, and that I ought to follow that decision. Here is a gift for life of farming stock, which is made in connection with a gift for life of the business, the stock being necessary to carry on the business; and I think that under these circumstances the legatee is bound to keep up the stock, and further, that if for any reason it is sold off and the business discontinued, she only takes a life interest in the proceeds. Where there is no trade, I am disposed to adopt the view taken in *Randall* v. *Russell*, 3 Mer. 190, and to hold that the legatee takes an absolute interest."

Lord *Hatherley*, C., when Vice-Chancellor, arrived at the same conclusion in *Groves* v. *Wright*, 2 K. & J. 347, with respect to a gift of farming stock and implements of husbandry for life; but the ground his Lordship proceeded on was, that farming stock and implements of husbandry were not things *quæ ipso usu consumuntur*. Vice-Chancellor *Stuart*, however, in *Bryant* v. *Easterson*, 5 Jur. (N.S.) 166, held that a legatee for life of farming stock, consisting, among other things, of growing crops, oxen, sheep, pigs, and horses, took such stock absolutely, as things *quæ ipso usu consumuntur*, and that they did not therefore go to the legatees in remainder. This case, however, appears to be opposed to the modern current of authorities.

Where a man's wearing apparel was given to his widow for life, with remainder over, it was held by Sir *W. Page-Wood*, V.-C., that the wearing apparel did not vest

in the widow absolutely as things *quæ ipso usu consumuntur*, and that the sale thereof, and the payment of the income to the widow for her life, was reasonable. *Re Hall's Will*, 1 Jur. N. S. 974.

If, however, consumable articles are included in a residuary bequest for life, then they must be sold, and the interest only enjoyed by the tenant for life: *Randall* v. *Russell*, 3 Mer. 195. And see *Howe* v. *Earl of Dartmouth*, *post*, p. 296, and note.

Legacies connected with realty.]—Every bequest of a lease for years of land (*Long* v. *Short*, 1 P. Wms. 403), or of tithes (*Rudstone* v. *Anderson*, 2 Ves. 418; *Hone* v. *Medcraft*, 1 Bro. C. C. 261), or of a rent out of a term of years (*Long* v. *Short*, 1 P. Wms. 403), is a specific legacy.

But if, instead of a *rent or annuity* a *gross sum* is given, payable *out* of a term or real estate, that will be a demonstrative legacy, and effect will be given to it although the particular security intended by the testator happens to fail: *Savile* v. *Blacket*, 1 P. Wms. 778; *Fowler* v. *Willoughby*, 2 S. & S. 354; *Livesay* v. *Redfern*, 2 Y. & C. Exch. Ca. 90; *Willox* v. *Rhodes*, 2 Russ. 452; *Creed* v. *Creed*, 11 C. & F. 510; *Severs* v. *Severs*, 1 Sm. & Giff. 400; *Paget* v. *Huish*, 1 Hem. & Mill. 663.

But where the only gift is in the direction to pay the legacy out of a particular fund, as land, the land alone is liable, and if it fails, the legacy fails also: *Spurway* v. *Glynn*, 9 Ves. 483. And see *Dickin* v. *Edwards*, 4 Hare, 273; *Welby* v. *Rockliffe*, 1 Russ. & My. 571.

The proceeds to arise from the sale of land may be so bequeathed as to render the legacy specific. Thus, in *Page* v. *Leapingwell*, 18 Ves. 463, the testator devised an estate in trust to sell, but not for less than 10,000*l.*, and pay several sums amounting to 7,800*l.*, and the overplus monies arising from the sale to A.: Sir *W. Grant*, M. R., held that it was a specific legacy of 10,000*l.*, and the sale producing less, the other legatees were obliged to abate with A.

A similar decision is to be found in the case of a bequest out of personal property. See *Walker* v. *Laxton*, 1 Y. & J. 557. There a testatrix had power to appoint a sum of 2,200*l.*, and by her will after reciting the power she bequeathed the whole sum in several legacies to different persons. *Alexander*, L. C. B., held that, as the amount of these particular gifts and of the fund subject to the power, exactly tallied, the legacies were a charge on the fund only, and that the general personal estate was not liable. See also *In re Jeffery's Trusts*, 2 L. R. Eq. 68.

Annuities.]—Generally speaking Annuities are legacies: *Ward* v. *Grey*, 26 Beav. 491.

And in general, in the construc-

tion of a will, annuities will be comprised within the word "legacies" (*Duke of Bolton* v. *Williams*, 4 Bro. C. C. 361, 376, 385 cited; *Sibley* v. *Perry*, 7 Ves. 534; *Swift* v. *Nash*, 2 Keen, 20), unless there is something in the will to show that the testator himself distinguished between them: *Cornfield* v. *Wyndham*, 2 Coll. 184; *Bromley* v. *Wright*, 7 Hare, 334; *Gaskin* v. *Rogers*, 2 L. R. Eq. 284. It is sometimes important to consider this when the question arises whether under the word "legacies," annuities are charged upon land, or are exempted from the payment of legacy duty.

Again, where legacies are directed to be paid out of real estate, an annuity, being a legacy, will also be charged on the same fund: *Mullins* v. *Smith*, 1 Drew. & Sm. 204, 211.

An annuity when given with words of inheritance is descendable and goes to the heir to the exclusion of executors (*Turner* v. *Turner*, Amb. 782; *Stafford* v. *Buckley*, 2 Ves. 179); *secus* if, although the annuity be perpetual, words of inheritance are not used: *Taylor* v. *Martindale*, 12 Sim. 158; *Parsons* v. *Parsons*, 8 L. R. Eq. 260.

The question often arises, whether an annuity is perpetual or whether it is for life only. The answer to it depends upon the intention of the testator.

If an annuity is given simpliciter, that is, to one generally, a life interest only passes: per Lord *St. Leonards* in *Kerr* v. *The Middlesex Hospital*, 2 De G. Mac. & G. 583; *Yates* v. *Maddan*, 3 De G. Mac. & G. 532; *Potter* v. *Baker*, 13 Beav. 273.

A bequest of 30*l.* a-year to A. together with her children B., C., and D., and *for their joint maintenance*, was held to be a bequest of an annuity to the mother and her children as joint-tenants for the life of the longest liver of them: *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372.

If an annuity be given to one for *life*, and after his death to another simply (*Potter* v. *Baker*, 15 Beav. 492), or to one for life with power to him to give it after his death to another or to one, and after his death to several others or the survivors (*Blewitt* v. *Roberts*, Cr. & Ph. 274; *Yates* v. *Maddan*, 3 Mac. & G. 532, reversing the decision of Sir *L. Shadwell*, V.-C., reported 16 Sim. 613; *Sullivan* v. *Galbraith*, 4 I. R. Eq. 582), unless there are some other circumstances to vary the construction, the subsequent takers, as well as the first annuitant, will take for life only. And see *Barden* v. *Meagher*, 1 I. R. Eq. 250, per *Walsh* (M. R.).

But the will may show that it was the intention of the testator that the annuity should be perpetual: *Mansergh* v. *Campbell*, 25 Beav. 544, 3 De G. & Jo. 232. And see *Robinson* v. *Hunt*, 4 Beav. 450; *Hedges* v. *Harpur*, 3

De G. & Jo. 129; *Warren* v. *Wright*, 12 Ir. Ch. Rep. 401; *Barden* v. *Meagher*, 1 I. R. Eq. 246.

Thus, where a testator speaks of an annuity which he gives to a person for life, as if it were in existence after the death of such person, irrespective of any words added for the purpose of continuing its existence for the benefit of any other person, there the annuity given indefinitely to such other person is a perpetual annuity: per Lord *Truro*, C., 3 Mac. & G. 540; *Drew* v. *Barry*, 7 I. R. Eq. 413.

A gift by will, even since the Wills Act (1 Vict. c. 26), of an annuity without words of limitation, but which by the same will is charged on real estate, is not a devise of a perpetual annuity or rent-charge, but is a gift of an annuity for life as it would have been before the Wills Act: *Nichols* v. *Hawkes*, 10 Hare, 342.

Where, however, an annuity is directed to be provided out of the proceeds of property, or out of property generally, or where an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity if purchased: per Lord *St. Leonards*, C., in *Kerr* v. *The Middlesex Hospital*, 2 De G. Mac. & G. 583; *Potter* v. *Baker*, 13 Beav. 273; 15 Beav. 489; *Pawson* v. *Pawson*, 19 Beav. 146; *Hill* v. *Rattey*, 2 J. & H. 634; *Ross* v. *Borer*, Ib. 469; *Bent* v. *Cullen*, 6 L. R. Ch. App. 235; *Hicks* v. *Ross*, 26 L. T. R. (N. S.) 470; *Evans* v. *Walker*, 3 Ch. D. 211. But the testator may show by the words of his will an intention only to give an annuity for life: *Banks* v. *Braithwaite*, 32 L. J. N. S. (Ch.) 198.

The gift of the produce of a fund, whether particular or reversionary, without limit as to time, is a gift of the fund itself: 3 Mac. & G. 540; 12 C. & F. 161.

A direction to purchase an annuity for A. in the British funds (*Kerr* v. *The Middlesex Hospital*, 2 De G. Mac. & G. 576), or in Government securities (*Ross* v. *Borer*, 2 J. & H. 469), will give him a perpetual annuity. But see *Re Groves' Trusts*, 1 Giff. 74.

A mere charge, however, of an annuity on property devised in fee simple, will not sufficiently show the intention of the testator that the duration of the annuity should correspond with the limits of the estate so charged: *Mansergh* v. *Campbell*, 3 De G. & Jo. 237; *Sullivan* v. *Galbraith*, 4 I. R. Eq. 582.

And a mere direction that an annuity is to be paid out of the testator's "general effects" (*Innes* v. *Mitchell*, 6 Ves. 464), or out of a particular fund (*Wilson* v. *Maddison*, 2 Y. & C. C. C. 372), will not render the annuity perpetual, for it cannot be construed as an

absolute gift of so much of the effects or fund necessary to purchase the annuity.

But other words in the will may show an intention that the annuity should be perpetual: *Pawson* v. *Pawson*, 19 Beav. 146.

If the Court once infers from the will that the testator intended to give a sum certain per annum in perpetuity, the absence of any direction as to the particular part of the testator's property to be segregated or appropriated to meet it, is immaterial, as the Court will take care that a sufficient part of the testator's property is set apart for that purpose: *Stokes* v. *Heron*, 12 C. & F. 161; *Hill* v. *Rattey*, 2 J. & H. 634, 644; but see the remarks of Lord *Campbell*, C., in *Lett* v. *Randall*, 2 De G. F. & Jo. 392, 393.

The question often arises as to whether an annuity is a charge upon the corpus of a fund, or is payable only out of the income; this is a question of intention. Where a testator directs a sufficient sum to be set apart in order to produce an annuity, and does not leave sufficient assets (*Wright* v. *Callender*, 2 De G. Mac. & G. 652; *Miner* v. *Baldwin*, 1 Sm. & G. 522), or the sum set apart is originally insufficient (*Bright* v. *Larcher*, 3 De G. & Jo. 148; and see *Perkins* v. *Cooke*, 2 J. & H. 393), or becomes so in consequence of a reduction of interest, the annuitant will be entitled to be paid out of the corpus. Thus in *May* v. *Bennett*, 1 Russ. 370, a testator directed his executors to lay out in what Government security they pleased, as much money as would produce the annual interest of 54*l.* 12*s.* per year to his wife during her life, in case she did not marry again. The executors invested in the 5*l.* per cents. a sum which yielded dividends exactly equal to the specified income. Those dividends being afterwards diminished by the conversion of the 5*l.* per cents. into 4*l.* per cents., it was held by Lord *Gifford*, M. R., that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. See also *Mills* v. *Drewitt*, 20 Beav. 632; *Percy* v. *Percy*, 35 Beav. 295.

If the dividends of a fund in Court are insufficient for the payment of an annuity charged upon it, a *prospective* order will be made for the sale from time to time of so much of the corpus as will, together with the dividends, be necessary for raising the amount of the annuity: *Hodge* v. *Lewin*, 1 Beav. 431; *Swallow* v. *Swallow*, Ib. 432, n.

Where the testator shows an intention that the fund out of which the annuity is payable should be *preserved whole* during the life of the annuitant, and at his death go over to another person, then the corpus is not liable

to make up the deficiency of the income of the fund to pay the annuity. Thus in *Foster* v. *Smith*, 1 Ph. 629, a testator devised certain real estates to trustees in trust to receive the rents and profits, and thereout to pay to his wife the clear annuity of 200*l.* during her life, *and from and immediately after the decease of his wife*, upon trust to convey the estates to his three sisters. It was held by Lord *Cottenham*, C. (reversing the decision of *Knight Bruce*, V.-C., 2 Y. & C. C. C. 193), that the annuity was a charge only on the rents which accrued during the life of the widow, and not on the corpus. "There can be no doubt," said his Lordship, "that if the trust had simply been to receive the rents, issues, and profits of the estates when and as the same should become due and payable, and thereout to pay to his wife, if she should survive the testator, an annuity of 200*l.* for her life, that this would have been a charge upon the rents, until the whole amount of the annuity with the arrears had been paid. And the trustees, after the death of the widow, would have been bound to apply the rents accordingly. But in this case a new trust arises on her death; for the trustees are directed, 'from and immediately after that event,' to convey the estate to the sisters; and if they perform their trust, which I think they are bound to do, they would be disabled from applying the subsequent rents to the discharge of the arrears. To obviate this, it is proposed to construe the direction to convey to the sisters on the death of the widow, as if it had been a direction to convey *subject* to the annuity. But this would essentially alter the testator's will; in fact, to make a new will. And I think there is nothing in the will to justify it." See also *Earle* v. *Bellingham*, 24 Beav. 445; *Baker* v. *Baker*, 6 Ho. Lo. Ca. 616; *Turbottom* v. *Earle*, 11 W. R. (V.-C. S.) 680; *Sheppard* v. *Sheppard*, 32 Beav. 194; *Taylor* v. *Taylor*, 17 L. R. Eq. 324; *Michell* v. *Wilton*, 20 L. R. Eq. 269.

But where an annuitant acquiesced during her whole life without asserting her right to be paid the full annuity by resorting to the corpus, and stood by allowing dealings to take place on the faith that the corpus was not liable to diminution, it was held that her representatives could not enforce a claim to any arrears of the annuity: *Upton* v. *Vanner*, 1 Drew. & Sm. 594.

Where an annuity is charged upon real (*Picard* v. *Mitchell*, 14 Beav. 103; *Hobson* v. *Neale*, 17 Beav. 182; *Byam* v. *Sutton*, 19 Beav. 556; *Howarth* v. *Rothwell*, 30 Beav. 516; and see cases cited, Ib., p. 519, note) or personal (*Gordon* v. *Bowden*, 6 Madd. 342) property, the corpus is ordinarly liable for the arrears (*Swallow* v. *Swallow*, 1 Beav. 432, n.), even although there be a subsequent

declaration in the will that the annuity is to abate in favour of another in the event of the income of the property being insufficient to pay both: *Pearson* v. *Helliwell*, 18 L. R. Eq. 411.

Secus, where there is a trust to pay the annuities out of the growing profits: *Phillips* v. *Phillips*, 8 Beav. 193; *Miller* v. *Huddlestone*, 3 Mac. & G. 513, 530; *Hindle* v. *Taylor*, 20 Beav. 109; *Addecott* v. *Addecott*, 29 Beav. 460; *Salvin* v. *Weston*, 14 W. R. (V.-C. W.) 757.

Where there is a general and indefinite trust to receive rents and profits for the payment of an annuity, it amounts to an indefinite charge of the annuity on the corpus, which will consequently be payable out of it. Thus in *Phillips* v. *Gutteridge*, 3 De G. J. & S. 332; 32 L. J. (Ch.) 1, a testator bequeathed leasehold land and ground rents to a trustee upon trust to receive the rents, issues, and profits, and pay the annual sum of 60*l.* to H. for her life, and after her decease, to raise by sale or mortgage 400*l.*, to be divided as therein mentioned. And upon further trust, "after the performance of *all* the *before mentioned trusts*, upon trust to assign the said land, ground rents, and premises, or such part thereof as should remain undisposed of, to his son absolutely." It was held by Lord *Westbury*, C., affirming the decision of Sir *J. Stuart*, V.-C., that the annuity was a charge upon the corpus. So, in *Birch* v. *Sherratt*, 2 L. R. Ch. App. 644, a testator directed his trustees to convert and invest his property, and "with and out of the interest, dividends, and annual proceeds thereof, levy and raise the annual sum of 100*l.*," and pay it to his mother for life, "*and from and after the payment of the said annual sum of* 100*l.*, *and subject thereto*," he declared that the trustees should stand possessed of his said trust monies, stocks, and securities, upon the trusts thereinafter mentioned. The income of the estate being insufficient to pay the annuity, it was held by the Lords Justices, reversing the decision of Sir *John Stuart*, V.-C. (4 L. R. Eq. 58), that the deficiency must be paid out of the corpus. "If," said *Rolt*, L. J., "an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact, from and after the annuitant's death, to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but, 'from and after satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate or of the trust fund." See also *Bell* v. *Bell*, 6 I. R. Eq. 239.

An annuity may, according to

the construction of a will, be held to be after the death of the annuitant a continuing charge upon rents and profits, until the arrears of the annuity are paid, but not a charge upon the corpus. Thus, in *Booth* v. *Coulton*, 5 L. R. Ch. App. 684, a testator gave his real and personal estate to trustees, in trust to pay his debts and legacies, and then out of the annual profits of the residue, to pay three life-annuities, and, "*subject as aforesaid*," to stand possessed of the residue, upon trust to apply the income for the benefit of G. Booth for life, and after his death he gave the residue to P. Booth. The income of the residue proved insufficient to pay the three annuities in full, and the trustees paid them rateably till November, 1868, when one of the annuitants died, with an arrear owing to him; the tenant for life being still living. It was held by Lord Justice *Giffard*, varying the decision of Sir *John Stuart*, V.-C., that the annuities were a continuous charge on the rents and profits, and that the rents and profits since November, 1868, must be applied, first in payment of the arrears of the three annuities pari passu, and then in payment of the two subsisting annuities. And see *Stelfox* v. *Sugden*, Johns. 234.

Where a testator directs an annuity to be *purchased*, the annuitant is entitled to receive the money necessary to purchase the annuity (*Ford* v. *Batley*, 17 Beav. 303; *Yates* v. *Yates*, 28 Beav. 641; and see *Palmer* v. *Crauford*, 3 Swanst. 482, 488; *Dawson* v. *Hearn*, 1 Russ. & My. 606; *Woodmeston* v. *Walker*, 2 Russ. & My. 197; *Day* v. *Day*, 1 Drew. 569), even although there be a declaration in the will that he shall not be allowed to receive the value of the annuity in lieu thereof (*Stokes* v. *Cheek*, 28 Beav. 620); for it is obvious that if an annuity were purchased he might sell it immediately. *Ib.* 261.

And it is immaterial in case the annuitant is a man (*Day* v. *Day*, 1 Drew. 569), or an unmarried woman (*Woodmeston* v. *Walker*, 2 Russ. & My. 197; *Re Browne's Will*, 27 Beav. 324), that the annuity is directed to be paid into their hands without power of anticipation, or that there is a gift over upon bankruptcy or alienation: *Day* v. *Day*, 1 Drew. 569, sed vide contra, *Power* v. *Hayne*, 8 L. R. Eq. 262. And if the annuitant dies before the purchase is effected, his personal representative will be entitled to the money so directed to be laid out: *Ib.*, and see *Barnes* v. *Rowley*, 3 Ves. 305; *Palmer* v. *Crauford*, 3 Swanst. 482, 488.

And the result is the same where the money to be invested is to arise from residuary estate (*Day* v. *Day*, 1 Drew. 569), or from the sale of land, and the annuitant dies during the life of a person taking a prior interest.

Thus, in *Bayley* v. *Bishop*, 9 Ves. 6, the testator devised an estate to his wife for life, and after her decease to trustees upon trust to sell, and with the money arising from the sale (after paying certain legacies) to lay out 500*l.* in the purchase of an annuity for his son. The son died during the life of the wife. It was held by Sir *William Grant*, M. R., that the administratrix of the son was entitled to the 500*l.* "It is clear," said his Honor, "that the testator meant an annuity to be purchased with the 500*l.*; which is the same in effect as giving a legacy of 500*l.* to his son; for upon a bill filed he might have received the money; and the Court would not have compelled the trustees to lay it out in an annuity. . . . . Taking this then as a pecuniary legacy of 500*l.*, the question is whether it fails by the death of the son in the life of the widow? I am of opinion that it does not. The remainder to the trustees was a vested interest at the testator's death. If the wife had then been dead, the trust must have been immediately executed, the estate sold, and the money distributed. It was therefore merely on account of the estate for life in the widow, and not with reference to the circumstances of the legatees, that the sale and payment were postponed. It is impossible to reconcile all the cases of legacies payable out of land. But upon the authority of *Dawson* v. *Killet* (1 Bro. C. C. 119), I must hold this vested upon the testator's death." See also *Day* v. *Day*, 1 Drew. 569.

Where, however, a testator does not direct an annuity to be *bought*, but has entered into a covenant to pay, or directs the payment of, one out of his estate, the annuitant is not entitled to have the estate, or a portion of it, sold for the purpose of obtaining payment of the value of the annuity in a gross sum: *Yates* v. *Yates*, 28 Beav. 637, 641.

Whether bequests contained in a residuary clause are specific or general.]—The question, whether a bequest contained in a residuary clause is specific or general, is of much importance where the attempt is made to shift the primary liability of the personalty upon realty (see *Ancaster* v. *Mayer*, ante, vol. i. p. 681); and where the personal estate comprised in such clause consists of property of a wasting nature, as long annuities and leaseholds, and is given to persons in succession. See *Howe* v. *Earl of Dartmouth*, post, 296.

Effect of the Wills Act upon specific bequests.]—Previous to the late Wills Act (1 Vict. c. 26), a bequest of "my stock," "my shares," or "the black horses I now have," would be specific, and would pass only such stocks, shares, or black horses as the

testator possessed at the time when he made his will: *Kirby* v. *Potter*, 4 Ves. 748; *Humphreys* v. *Humphreys*, 2 Cox, 184; *Miller* v. *Little*, 2 Beav. 259.

So, previous to the Wills Act, bequests rendering the time for the ascertainment of the legacies the time of the death of the testator, were nevertheless specific. Thus a bequest of "any stock-in-trade of wines and spirituous liquors which I shall be possessed of at the time of my death" (*Stewart* v. *Denton*, 4 Doug. 219), of "all the horses which I may have in my stable at the time of my death" (*Fontaine* v. *Tyler*, 9 Price, 98), were specific; and see *Stephenson* v. *Dowson*, 3 Beav. 342. It is true that in *Parrott* v. *Worsfold*, 1 J. & W. 594, where the testator gave 1500*l*. Five per Cents, and all other his stocks that he might be possessed of at the time of his death, Sir *Thomas Plumer*, M. R., held that such a legacy was not specific, upon the ground that you cannot have a specific legacy that was not capable of ademption.

This case, however, must be considered as overruled, and contrary to the whole current of authorities, and, as observed by Sir *George Jessel*, M. R., "A specific legacy cannot be subject to ademption when the time of the death is the time for the ascertainment; for a man does not live after his own death, and therefore there is no period at which ademption can take place." See *Bothamley* v. *Sherson*, 20 L. R. Eq. 309, 310.

The question has been frequently raised how far the Wills Act (1 Vict. c. 26) has affected specific bequests.

Now by the Wills Act (1 Vict. c. 26) it is enacted "that every will shall be construed with reference to the real and personal estate comprised in it, *to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will*" (sect. 24).

Upon examining the authorities it will be found that the law under the Wills Act which makes a will speak from the time of the death, has not had the effect of making that which was a specific legacy before not a specific legacy now. It has, however, had the effect of extending specific bequests of that which is generic, so as to make them (in the absence of words indicating a contrary intention) include objects of the same genus, which the testator may have acquired between the time when he made his will and his death. The cases upon this subject are very fully discussed in the important case of *Bothamley* v. *Sherson*, 20 L. R. Eq. 304. There a testator, by will in 1869, made a bequest of all "my shares of stock in the Midland Railway Company" to trustees upon certain trusts. Sir *G. Jessel*, M. R., held that it was a specific legacy. "No doubt," said his lordship,

"one class of specific bequests is affected by the Act, namely, the class of specific bequests described as generic, that is, a specific bequest which points to a class of objects given by the testator, and which from their nature would not naturally be referable to the date of the instrument. A good illustration of this class of bequests is a gift 'of my household furniture.' There are very few persons not *in articulo mortis* who would not expect that some articles of household furniture would wear out, or be broken, or otherwise be parted with, and be replaced by other articles of a similar kind. It would not be natural to assume that a man giving that kind of legacy intended to restrict it to the property of that description which he had at the date of the will. It has been held in *Goodlad* v. *Burnett* (1 K. & J. 341), and in some other cases to which reference has been made, that in cases of that description the new law brings down the specific bequest to the date of the death; in other words, the new law makes a specific bequest of 'my furniture,' to mean not 'the furniture which belongs to me at the time of making this my will,' but 'the furniture which shall belong to me at the time of my death.' *Legacies expressed in both ways were specific before the Wills Act, and they equally remain specific now.* On this point there is an authority with which I entirely agree, but which would be binding upon me even if I did not agree with it. In the case of *Lady Langdale* v. *Briggs* (8 De G. M. & G. 391), the question arose whether a gift of 'my leaseholds' included leaseholds subsequently acquired by the testator as next of kin of a relative. It was contended that the testator meant the leaseholds he had at the time, and that the gift being specific as the law stood before the new Wills Act, was not enlarged by the operation of the Wills Act. On that Lord Justice *Turner* says this: 'Was the bequest of the leasehold estates contained in the will of the testator specific or general? And if it were specific, are the leasehold estates in question to be held to have been included within it by the operation of the 24th section of the New Statute of Wills. Upon the first of these questions, on looking into the authorities, I certainly am not satisfied that this bequest is not specific, though there may be grounds for distinguishing this case,'—that is, on the particular wording of the will. 'But I think it is unnecessary to give any opinion on that point, for, assuming the bequest to be specific, I am of opinion that the leaseholds in question must be held to be included within it by virtue of the above enactment.' He considered that the bequest, if specific under the old law, remained specific, but was enlarged as to its effect

by the operation of the enactment, not that the nature of the bequest was altered at all. I think that must have been the opinion of Vice-Chancellor *Wood* also, from his observations in *Trinder* v. *Trinder* (1 L. R. Eq. 695). I see that I had arrived at that conclusion on a previous occasion, when the case of *Morrice* v. *Aylmer* (10 L. R. Ch. App. 148) was before me. On looking at the case of *Trinder* v. *Trinder* I think it is impossible to discover any meaning at all in the judgment unless we assume the opinion of the Vice-Chancellor to have been what I have first said, although he does not express himself so clearly as the Lord Justice *Turner*." See also *Douglas* v. *Douglas*, Kay, 400; *Moore* v. *Madden*, 2 I. R. Eq. 511; *Beahan* v. *Beahan*, 3 I. R. Eq. 427; *Ferguson* v. *Ferguson*, 6 I. R. Eq. 199; *Corbet* v. *Corbet*, 7 I. R. Eq. 456; *Castle* v. *Fox*, 11 L. R. Eq. 542; *In re Earl's Trust*, 4 K. & J. 673.

But where there is a bequest of a distinct and specific thing, and not of a genus, there is a sufficient indication of "a contrary intention" to exclude the operation of the rule established by the 24th section of the Wills Act, and to limit the operation of the will to the state of things existing at the date of the will. Thus, in *In re Gibson*, 2 L. R. Eq. 669, a testator, being at the time possessed of 1000*l.* "*guaranteed stock*" in the North British Railway, bequeathed to his son "my one thousand North British Railway Preference Shares." After making his will, he sold his North British guaranteed stock, and died possessed of shares and stock in the North British Railway, acquired by several successive purchases, exceeding the amount bequeathed to his son. It was held by Sir *W. P. Wood*, V.-C., that the bequest, being of a specific thing, which had been adeemed, and was not in the testator's possession at the time of his death, a contrary intention, so as to exclude the operation of 1 Vict. c. 26, s. 24, sufficiently appeared upon the will, and that the son was not entitled to have his legacy satisfied out of the North British Railway shares and stocks in the testator's possession at the time of his death. "Suppose," said his Honor, "a man to have, at the date of his will, a picture of the Holy Family, by some inferior artist, and to give by his will 'my Holy Family.' He afterwards disposes of this picture, and subsequently acquires by purchase or gift a very much better one, on the same subject, painted by an eminent artist. Would it not be a monstrous construction to hold, that the picture existing in the testator's possession at the time of his death would pass? When there is a clearly indicated intention upon the face of the will, to give the single specific

thing and nothing else, it would be a very narrow construction of the words of section 24 of the Wills Act, to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things existing at the date of the will. It is true that the testator had not at the date of his will 1000 shares, but 1000 guaranteed stock. But he had nothing else to which the words of the will could be applied, and no one could doubt that this stock was the thing pointed out by the will. After the date of his will he sold this 1000*l.* stock, and purchased not *uno ictu*, but bit by bit, a number of other shares or stock. This bit-by-bit purchase would not come within the reasoning of Lord *Hardwicke* in *Avelyn* v. *Ward* (1 Ves. 423), as being a substitution of one entire fund for another. On the contrary, it was rather like the purchase of some totally different article. . . . . I adhere to my view, that where there is a distinct reference to a distinct and specific thing, and not to a genus, there is sufficient indication of 'a contrary intention,' to exclude the operation of the rule established by the 24th section of the Wills Act, and limit the operation of the will to the state of things existing at the date of the will. In this case, the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the Court to suppose that, having once adeemed the specific bequest, the testator had replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death: that thing, and that only, can be considered as the subject of the bequest. I must, therefore, hold that the claim of the son to have his legacy satisfied out of the New Guaranteed North British Stock existing at the testator's death, fails." See also *Pattison* v. *Pattison*, 1 My. & K. 12.

But nothing will pass as a specific legacy, unless the testator has actually acquired it before the time of his death. Thus, if a testator, who has made a specific bequest of all the money in the public funds of which he may die possessed, gives instructions to his broker to purchase stock, but no stock is purchased until after the death of the testator, it will not pass by his will, even though the broker may in his books have given him credit for the stock (*Thomas* v. *Thomas*, 27 Beav. 537); but if the broker had entered into a contract for the purchase of the stock before the testator's death, the vendor would be held a trustee of the stock for

the testator, and it would consequently pass by his will (Ib. 541). The result would be the same where the broker was the owner of the stock, and gave the owner credit for the amount in his books: *Ellis* v. *Eden*, 25 Beav. 482.

A bequest by a testator of personal property, which he states "I now possess," will not of itself simply indicate "a contrary intention" within the meaning of the Wills Act, so as to exclude subsequently acquired personal property from passing thereunder. See *Wagstaff* v. *Wagstaff*, 8 L. R. Eq. 229. There a testator made a bequest of "all my ready money, bank and other shares, freehold property . . . . . and any other property that I may *now* possess." It was held by Lord *Romilly*, M. R., that the personal estate acquired subsequently to the date of the will passed by the bequest. "I am certainly," said his Lordship, "not disposed to construe any will so as to make real estate go one way, and personal estate another, under the same words; but in this case I am of opinion that *Cole* v. *Scott* (1 Mac. & G. 518) does not apply. There the testator made a will, by which, in effect, he said, 'I do not wish my after acquired real estate, whether freehold or copyhold, to pass,' for as to the freehold and copyhold estates, he devises those 'which are now vested in me,' and then, when he comes to the leasehold estates, he adds, 'or shall be vested in me at the time of my death,' showing that he had clearly in his mind the distinction between the property he was then possessed of and that which he should afterwards acquire. There is no doubt a testator may make his will in this way. The only question is, whether this testator has done so?

"Now, I may compare the expressions which the testator has made use of with two other forms of expression. If the testator had said 'I give all my real and personal estate,' there can be no doubt that after-acquired property would have passed. So, again, if he had said, 'I give all the real and personal estate I possess.' Does it make any difference when he puts in the word 'now'? The words 'I possess' mean the same thing as 'I now possess.' In all these cases the law says that you must read the will as if it had been written on the day of the testator's death, and you must have distinct words, as there were in *Cole* v. *Scott*, in order to show that the property acquired subsequently to the date of the will is not intended to pass."

Legatee's right of selection.]— If a testator bequeaths to a legatee a given number of articles, forming part of a stock of articles of the same description; as, for instance, if he has twenty horses in his stable, and bequeaths six of them, the legatee has the right

of selection (*Jacques* v. *Chambers*, 2 Coll. 435; *Richards* v. *Richards*, 9 Price, 226; *Kennedy* v. *Kennedy*, 10 Hare, 438).

Upon the same principle, if a testator has shares in an undertaking, part of which are fully paid up, and part partially paid up, and he bequeaths a certain number of them specifically, the specific legatee has the option of selecting those shares that are fully paid up (see *Millard* v. *Bailey*, 1 L. R. Eq. 378), even although the shares are given to trustees in trust for the legatees: *Jacques* v. *Chambers*, 2 Coll. 435.

Upon the same principle where the main object of a gift is to benefit the person who is to take, and no other person is interested in the bequest—in such case, if the gift cannot be applied to the purpose specified, or if the legatee prefers to have it otherwise applied, he has the option of saying, that although the testator has expressed his desire that the benefit shall be conferred in a particular form, he does not like to take it in that manner, and may ask the Court to give him the property absolutely. Thus in *Re Skinner's Trusts*, 1 J. & H. 102, a testator bequeathed manuscripts to trustees "for my grandson that they may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards raising a fund to assist him when he goes to College," and bequeathed 1000*l.* towards the printing: it was held by Sir *W. Page-Wood*, V.-C., that the grandson was entitled to elect to take the 1000*l.*, it appearing to be impossible to publish the book at a profit. And see *Sidney* v. *Vaughan*, 2 Bro. P. C. 254; *Palmer* v. *Flower*, 13 L. R. Eq. 250.

Where, however, there is another purpose distinctly and clearly expressed, independent of the object of benefiting the legatee, and beyond the mere intimation of a wish as to the mode by which the benefit should be conferred, the principle will not apply, and the legatee cannot elect: per Sir *W. P. Wood*, V.-C., in *Re Skinner's Trusts*, 1 J. & H. 105; and see *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Trimmer* v. *Danby*, 2 Jur. N. S. 267; *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; *Cowper* v. *Mantell*, 22 Beav. 231.

Ademption of legacies.]—A general legacy, as it is payable out of the personal assets generally, will not, if they are sufficient for that purpose, be liable to ademption, except in the case of a legacy to a child where a subsequent portion is given by the parent or person *in loco parentis*. As to which, see note to *Ex parte Pye*, *post*.

The claims of a specific legatee will be defeated, if the thing specifically bequeathed to him be not in existence at the time of the testator's decease;—the legacy, to use the common expression, being

adeemed. It must not, however, be supposed that the ademption of a specific legacy is in principle in any way similar to the ademption of a general legacy by a portion; for, in the latter case, all depends upon the intention, either express or presumed, of a parent or one *in loco parentis* to substitute a portion for a legacy; in the former, the intention of the testator is immaterial. According to the rule, as laid down by Lord *Thurlow* in the principal case, the question in the former cases will be, whether the legacy be specific, and, if so, whether it is in existence at the testator's death. In a subsequent case, Lord *Thurlow* again repeats the rule laid down in the principal case, in language strongly condemnatory of those authorities which proceeded upon the notion, that the *animus adimendi* should be considered. "When," said his Lordship, "the case of *Ashburner* v. *Macguire* was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them except this—to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and, if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B.; if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate. The idea of proceeding upon the *animus adimendi* has introduced a degree of confusion in the cases which is inexplicable, and I can make out no precise rule from them upon that ground. . . . . It will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not." *Stanley* v. *Potter*, 2 Cox, 182.

A specific legacy of goods at a particular place, will, in general, be adeemed by their removal. Thus, in *Green* v. *Symonds*, 1 Bro. C. C. 129, n., the testator bequeathed to C. all his books at his chambers in the Temple; he afterwards removed the books into the country, and it was held that the removal effected an ademption of the legacy. See also *Heseltine* v. *Heseltine*, 3 Madd. 276; *Colleton* v. *Garth*, 6 Sim. 19; *Spencer* v. *Spencer*, 21 Beav. 548; but see *Blagrove* v. *Coore*, 27 Beav. 138.

The like result will follow if the goods are removed by an agent, with the testator's approbation: *Shaftsbury* v. *Shaftsbury*, 2 Vern. 747.

A legacy of specific chattels will also be adeemed upon their total loss or destruction during the life of, or at the same time as the death of, the testator, even although they may have been insured, and their value recovered from the insurers, for the insurance money

will vest in the executors as part of the residuary estate. See *Durrant* v. *Friend*, 5 De G. & Sm. 343.

A mere temporary or accidental removal may not amount to an ademption. Thus, in *Land* v. *Devaynes*, 4 Bro. C. C. 537, a testator gave all his plate and linen in his house in S. (with the lease) to his wife. He had but one set of plate and linen, which was usually removed, with the family, from house to house. The plate happened to be at B., the country house, at his death, yet it passed to the wife.

So likewise, under a bequest of household furniture, pictures, and books, which might be at the testator's decease in, upon, or about his mansion, it has been held, that pictures removed from the mansion, and in the hands of a picture-cleaner to be cleaned, and books sent to be repaired, passed, but not articles purchased for the mansion, and not sent home at the testator's decease: *Lord Brooke* v. *Earl of Warwick*, 2 De G. & Sm. 425; see also *Spencer* v. *Spencer*, 21 Beav. 548; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302.

So ademption has been held not to take place by the removal for safe custody of plate to a banker's (*Domvile* v. *Baker*, 32 Beav. 604), or of furniture and other articles to a warehouse (*Ib.*).

So it seems that ademption will not take place if the goods are removed on account of a fire. "They should be considered," says Lord *Hardwicke*, "as being in the testator's house at his death, and the legacy is not defeated by that accident" (*Chapman* v. *Hart*, 1 Ves. 271); nor if they are removed fraudulently, to disappoint the legacy, or by a tortious act unknown to the testator: *Shaftsbury* v. *Shaftsbury*, 2 Vern. 747, 748, n. 2; *Domvile* v. *Taylor*, 32 Beav. 604.

A distinction has been taken by Lord *Hardwicke* between a legacy of goods on board a ship and in a house, although he knew of no case of the kind; he thought that the bequest of goods on board a ship must be supposed to be made in consideration of the several contingencies and accidents they were liable to; and if it should be determined, that if by any accident they should not be on board at the testator's death, they should not pass, it would defeat several marine wills. If the goods were removed to preserve them, the ship being leaky, or likely to founder; or if the testator was removed to another ship (a contingency he was subject to daily), and he was forced to obey, this would not defeat the legacy: *Chapman* v. *Hart*, 1 Ves. 273.

Where the words of a bequest have not necessarily a reference to a particular locality, the removal of the articles comprised in the bequest to a different place

from that which they were in at the date of the will, is immaterial. Thus in *Norris* v. *Norris*, 2 Coll. 719, where a testator bequeathed to his wife as follows: "All my interest in my house at Lavender Hill, the furniture, books, pictures, wines," &c. &c. After the date of his will, the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, &c. He afterwards purchased more of these articles, and died at Spencer Lodge. It was held by Sir *J. L. Knight-Bruce*, V.-C., that his wife was entitled to the furniture, books, pictures, and wines which he had at the time of his death. "The language," said his Honor, "must, I conceive, be taken to have been used generally, not with regard to any particular place, nor with regard only to such 'furniture, books, pictures, wines,' &c., as he had when he made his will."

If a debt, specifically bequeathed, be received by the testator, it will be adeemed, for there exists nothing for the will to operate upon: *Rider* v. *Wager*, 2 P. Wms. 329, 330, 331; *Birch* v. *Baker*, Mos. 373; *Badrick* v. *Stevens*, 3 Bro. C. C. 431; *Stanley* v. *Potter*, 2 Cox, 180; *Fry* v. *Morris*, 9 Ves. 360.

So a bequest of policies effected upon the life of another person by the testator will be adeemed, by his receipt of the sums insured upon the death of such person, although the sums so received may have been invested on securities in existence at the testator's death. *Barker* v. *Rayner*, 5 Madd. 208; 2 Russ. 122.

So a specific bequest of a debt due on mortgage will be adeemed by the receipt thereof, although the money may have been re-invested in a mortgage not paid off at the time of the testator's death. See *Gardner* v. *Hatton*, 6 Sim. 93. There the testator bequeathed 7000*l.*, secured on mortgage of an estate at W., belonging to R. T. The 7000*l.* and interest were received after the date of the will by the testator's agent, on his account, and immediately afterwards 6000*l.*, part of it, were invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount. It was held by Sir *L. Shadwell*, V.-C., that the legacy was specific, and notwithstanding the 6000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. "My opinion," said his Honor, "is that when the testator received the whole of the debt, there was an end of the subject, and, consequently, that this is a clear case of ademption." See, also, *Phillips* v. *Turner*, 17 Beav. 194; *Sidebotham* v. *Watson*, 11 Hare, 170; *Gale* v. *Gale*, 21 Beav. 349; *Jones* v. *Southall*, 32 Beav.

31. So likewise a specific legacy of a debt to the debtor will be adeemed by its payment, although the debtor may have incurred a fresh debt to the testator at the time of his death. See *Smallman* v. *Goolden*, 17 L. R. Eq. 67 cited. There the testator gave to his son, "all sum and sums of money due to me from him on bond or bonds, or any other security." The son, at the date of the will, was indebted to the testator by bond, which he afterwards paid off, and became indebted to him by another bond. Sir *Lloyd Kenyon*, M. R., held that the bequest did not include the subsequent bond, *S. C.*, 1 Cox, 329.

And a release by will to the debtor of the interest due on a specific debt up to the death of the testator will be considered as equivalent to a specific legacy of the interest on the debt due at the date of the will, even if made since the Wills Act; and if the debt be paid off before the death of the testator, the legacy of the interest will be adeemed, although interest be due upon a new debt owing to the testator at the time of his death. *Sidney* v. *Sidney*, 17 L. R. Eq. 65.

The principles, therefore, laid down by Lord *Thurlow* being clearly established, we may consider that the distinction taken in some of the older decisions (see *Orme* v. *Smith*, 1 Eq. Ca. Ab. 230, pl. 2; 2 Vern. 681; *Partridge* v. *Partridge*, Ca. t. Talb. 228; *Crockat* v. *Crockat*, 2 P. Wms. 165; *Rider* v. *Wager*, 2 P. Wms. 330; *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms. 464; *Drinkwater* v. *Falconer*, 2 Ves. 624; *Ford* v. *Fleming*, 2 P. Wms. 469; *Ashton* v. *Ashton*, 3 P. Wms. 385; *Hambling* v. *Lister*, Amb. 402), viz. between a voluntary and compulsory payment of a debt to the testator, and the argument which prevailed, that in the former case it might be presumed there was no *animus adimendi*, is no longer of any weight.

A partial receipt of a debt will, as was held by Lord *Thurlow*, in the principal case, only be an ademption *pro tanto*: *Jones* v. *Southall*, 32 Beav. 31; *Makeown* v. *Ardagh*, 10 I. R. Eq. 445.

Under particular circumstances the receipt of a debt has not been held to amount to an ademption. Thus, in *Crockat* v. *Crockat*, 2 P. Wms. 164, the testator, who had placed in a goldsmith's hands 550*l.*, for which he had taken a note payable to him or order, by his will gave to his sister the sum of 550*l.* which was then in the hands of the goldsmith. The testator had, *before* making his will, drawn some bills on the goldsmith for several small sums of money, which, in all, had reduced the 550*l.* to 430*l.* Sir *Joseph Jekyll*, M. R., held, that the legacy was not partially adeemed. "These payments out of the 550*l.* in the hands of Mr. Ellis having been all ordered by the testator *before* the making of his will, this

cannot be said to be an ademption of the legacy, but is an express indication of the testator's intention, that as the note for the full sum of 550*l.* was still standing out, notwithstanding he had ordered the payment in of part of the note, yet he renounced all those payments, and willed that the whole 550*l.* should be the legacy which he gave to his sister." In *Graves* v. *Hughes*, 4 Madd. 381, the testatrix, by a codicil to her will, bequeathed to W. H. & M. H. an arrear of interest due on a mortgage, amounting to 600*l.*, as she computed the same. After making the codicil, she lived eleven years, and received interest from the mortgagor, to the amount of 648*l.* On a reference to the Master, he found that 646*l.* 8*s.* 3*d.* was due to the testatrix for interest when she made her codicil, and that a sum to that amount was due to her for interest when she died; and, upon an affidavit he found that the interest received by the testatrix after the making of the codicil *was so received in respect of interest after the making of the codicil,* leaving outstanding the arrear of interest due when she made the codicil. Sir *J. Leach,* V.-C., held, that the legacy was not adeemed by the receipt of interest subsequent to the making of the codicil. "*Primâ facie,*" said his Honor, "the money received subsequent to the codicil was applicable in payment of the interest which first became due; but the testatrix might, if she chose, apply the money in discharge of the interest which accrued due subsequent to the making of the codicil, and leave the interest due when she made her codicil, as an outstanding debt; and the affidavit mentioned in the Master's report proves that fact, and is admissible as proof of the testatrix's intention:" *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms. 462, 464; *Pulsford* v. *Hunter*, 3 Bro. C. C. 416.

A bequest of a debt may be in its terms so comprehensive as to extend to the fund in its altered state after it has been received by the testator: *Clark* v. *Browne*, 2 Sm. & G. 524.

Where stock is standing in the name of a trustee at the time a testator makes a specific bequest of it, but is afterwards transferred to and sold out by him, and cannot be traced, being spent or mixed with his other monies, the legacy will be adeemed (*Lee* v. *Lee*, 27 L. J. (Ch.) 824); but where a testator makes a specific bequest of the stock, it will not be adeemed by a transfer, after the date of the will, into his own name. *Lee* v. *Lee*, 27 L. J. (Ch.) 824. See, also, *Moore* v. *Moore*, 29 Beav. 496; *Jones* v. *Southall*, 32 Beav. 31.

The question has arisen, whether a testator, who, having made a specific bequest of stock, sells it, and afterwards purchases the

same or a less amount of the same stock, will thereby either wholly or partially revive the specific bequest. Lord *Talbot*, in *Partridge* v. *Partridge*, Ca. t. Talb. 226, 227, seems to have thought that he would. "All cases of ademption of legacies," observed his Lordship, "arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again." And see *Aveling* v. *Ward*, 1 Ves. 426; *Drinkwater* v. *Falconer*, 2 Ves. 625.

According, however, to the rule laid down by Lord *Thurlow*, in the principal case, the intention of the testator will not be taken into consideration. The question will be, Is the identical stock bequeathed by the testator in existence? And if that question is answered, as in such case it must be, in the negative, the legacy is adeemed. See *In re Gibson*, 2 L. R. Eq. 699.

Where, however, the thing specifically given has been changed in name and form only, and is in existence substantially the same, though in a different shape, at the time of the testator's death, it will not be considered as adeemed by such a nominal change. Thus, if stock is converted into a different species by Act of Parliament (*Partridge* v. *Partridge*, Ca. t. Talb. 226, 228; *Bronsdon* v. *Winter*, Amb. 57, 59), or is merely transferred from the names of trustees into the name of the testator (*Dingwell* v. *Askew*, 1 Cox, 427; and see Amb. 260; 3 Bro. C. C. 416; Moore, 273, 376), it will not be adeemed. Upon the same principle, in the case of *Oakes* v. *Oakes*, 9 Hare, 666, where a testator had bequeathed all his Great Western Railway shares, and all other the railway shares which he might be possessed of at the time of his decease: it was held by Sir *George Turner*, V.-C., that the bequest was not adeemed, in consequence of the Great Western shares which the testator had at the date of his will having been converted, by a resolution of the company under the authority of an Act of Parliament, into consolidated stock, but that consolidated stock in the same company, purchased by the testator after the date of his will, did not pass under the bequest of the Great Western Railway shares to the legatee. In the recent case, however, of *Morrice* v. *Aylmer*, 7 L. R. Ho. Lo. 717, it was held by the House of Lords, affirming the decision of the full Court of Appeal, (reported 10 L. R. Ch. App. 148,) reversing the decision of Sir *G. Jessel*, M. R., and overruling on this point the case of *Oakes* v. *Oakes*, that railway stock will pass under a bequest of "shares in any railway."

Moreover, where stock specifically bequeathed has been transferred by fraud or practice, on purpose to disappoint the legacy; or by tortious act, unknown to the testator (*Shaftsbury* v. *Shaftsbury*, 2 Vern. 747, 748, n. 2); or without his authority (*Basan* v. *Brandon*, 8 Sim. 171); or if he die before the authority given to his agents to transfer be carried into effect (*Basan* v. *Brandon*, 8 Sim. 171; *Harrison* v. *Asher*, 2 De G. & Sm. 436): in all these cases there will be no ademption.

Where a person, after making by his will specific bequests, becomes insane, and other persons without authority dispose of the things so bequeathed, the question arises whether they will be thereby adeemed. In the case of *Browne* v. *Groombridge*, 4 Madd. 495, a testator gave to his wife all his ready money and bank notes which he should have about his person, or in or about his usual residence, at the time of his decease. He gave specifically to others all his exchequer bills and stock standing in his name at the time of his decease. The testator became insane, and during his incapacity several large sums of money which were paid to him were invested in his behalf and in his name in the purchase of stock and exchequer bills. His wife died during the testator's lifetime, whereby her legacy lapsed. It was held by Sir *John Leach*, V.-C., that the specific legatees of the stock and exchequer bills were entitled to the stock and exchequer bills so purchased, and that the next of kin of the husband did not take them as being "ready money," to which they were entitled by reason of the lapse of the legacy to his wife. His Honor observed, "that in the bequest to his wife of the ready money and bank notes which testator should have about his person, or in or about his usual residence, at the time of his decease, he could contemplate only the floating cash, which he ordinarily kept about him. That it was the duty of those who managed the testator's affairs, during his incapacity, to act as a provident owner would do, and not to have large sums of money unemployed. That there was no equity between the legatees; and as between them property *duly converted* must be taken in the state and character in which it is found at the death of the testator."

As a general rule, however, notwithstanding the decision in *Browne* v. *Groombridge*, the unauthorised acts of parties will not effect a conversion so as to disappoint the specific legatees of a person who has become insane after he made his will. See *Taylor* v. *Taylor*, 10 Hare, 475. There a testator, who was a shopkeeper, had made a will, bequeathing his leasehold house and shop, and stock-in-trade therein,

to his wife (subject to certain trusts, which failed), and giving his residuary estate in another manner. He became insane. No commission in lunacy was taken out, but his wife not being disposed or competent to carry on the trade, joined with the persons whom he had named executors, and also with the residuary legatees in an agreement for the sale of the leasehold premises and stock-in-trade therein, for a gross sum to be paid by instalments. After this agreement was made, and possession of the property delivered to the purchaser, the testator died. The Court, in an administration suit, approved of the agreement as beneficial to the estate, and directed it to be carried into effect. It was held by Sir *W. Page-Wood*, V.-C., that notwithstanding the agreement for sale, and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock-in-trade must be taken as unconverted at the death of the testator, and passed to the specific legatee. See also *Jenkins* v. *Jones*, 2 L. R. Eq. 323.

But where *personal* property specifically bequeathed by a person who afterwards becomes lunatic, is sold under an order of the Court of Chancery in Lunacy, which does not preserve the rights of the legatees, the bequest will be adeemed. See *Jones* v. *Green*, 5 L. R. Eq. 555.

If a partner, under articles providing for the renewal of the partnership, specifically bequeath his share of the profits (naming the amount), and upon the expiration of the old, new articles are entered into, by which his share in the profits is altered, the legacy will not be adeemed. See *Backwell* v. *Child*, Amb. 260, where Lord *Hardwicke* observed, "that, where a person *in trade* makes a provision out of his share for his family, and afterwards renews the partnership, by which, perhaps, his interest is varied, yet it is not a revocation; if it were, it would occasion great confusion." And see *Ellis* v. *Walker*, Amb. 309.

Generally, where leaseholds are specifically bequeathed, and the testator takes a new lease, the bequest will be adeemed, because the renewed lease is a different thing: the thing given no longer exists (*Abney* v. *Miller*, 2 Atk. 593; *Rudstone* v. *Anderson*, 2 Ves. 418; *Hone* v. *Medcraft*, 1 Bro. C. C. 261; *Slatter* v. *Noton*, 16 Ves. 197); unless, perhaps, where the legal estate is in a trustee (*Carte* v. *Carte*, 3 Atk. 174; *S.C.*, Amb. 28; Ridgw. Ca. t. Hard. 210; *Slatter* v. *Noton*, 16 Ves. 201). So, where a testator, after bequeathing leaseholds by his will, makes an assignment of them upon other trusts, it will amount to an ademption: *Cowper* v. *Mantell*, 22 Beav. 223.

So, where after a testator has bequeathed leaseholds, he has been served by a railway company with notice to treat for the purchase, which has been followed by a valuation of the surveyors, as that will amount to a valid contract to sell the leaseholds to the railway company, the bequest will be adeemed (*Watts* v. *Watts*, 17 L. R. Eq. 217). The legatee, however, will be entitled to the rents of the leaseholds accruing due between the death of the testator and the completion of the purchase by the company. *Ib.*

But as a testator may undoubtedly dispose of the *future*, as well as his present interest in a chattel real, it is a question of intention what the subject of disposition is—whether only the interest which he had at the time of executing the will, or all the interest, though subsequently acquired, which he might have at his death in the leasehold premises; that intention is to be collected from the words used by the testator to express it. Per Lord *Eldon*, in *Slatter* v. *Noton*, 16 Ves. 109. And see *Colegrave* v. *Manby*, 6 Madd. 84.

Where an under-lessee after his will takes an assignment of the original lease, it will amount to an ademption of the bequest of the under-lease (*Porter* v. *Smith*, 16 Sim. 251), but he may by a codicil show his intention of passing his interest as it existed at his death. *Ib.*

And now, by the Wills Act (1 Vict. c. 26, s. 23), it is enacted, "that no conveyance or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." And by sect. 24, "that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy without more, will not set up the general legacy: *Hertford* v. *Lowther*, 7 Beav. 107.

A demonstrative legacy is not liable to ademption, although the fund out of which it is payable be not in existence at the death of the testator, the primary object is the gift of the legacy: the fund out of which it is payable is merely of secondary consideration. "Thus," as observed by Lord *Macclesfield*, "if a legacy was given to J. S., to be paid *out* of such a particular debt, and there

should not appear to be any such debt, or the fund fail, still the legacy ought to be paid, and the failing of the modus appointed for payment should not defeat the legacy itself:" *Savile* v. *Blacket*, 1 P. Wms. 777—779; and see *Ellis* v. *Walker*, Amb. 310; *Chaworth* v. *Beech*, 4 Ves. 565; *Gillaume* v. *Adderley*, 15 Ves. 384; *Smith* v. *Fitzgerald*, 3 V. & B. 5; *Mann* v. *Copeland*, 2 Madd. 223; *Fowler* v. *Willoughby*, 2 S. & S. 354; *Willox* v. *Rhodes*, 2 Russ. 452: *Campbell* v. *Graham*, 1 Russ. & My. 453; *Creed* v. *Creed*, 11 C. & F. 509; *Williams* v. *Hughes*, 24 Beav. 474.

Where, however, a testator shows it to be his intention that a legatee is to be paid out of a particular fund *only*, upon its failure he will have no claim upon the general assets: *Coard* v. *Holderness*, 22 Beav. 391; and see *Bristow* v. *Bristow*, 5 Beav. 289.

The confirmation of a will by a codicil will not revive a legacy adeemed in the interval between the will and the codicil; *Cowper* v. *Mantell*, 22 Beav. 223; and see *Du Hourmalin* v. *Sheldon*, 19 Beav. 389; *Montague* v. *Montague*, 15 Beav. 565; *Sidney* v. *Sidney*, 17 L. R. Eq. 65, 68.

Where the gift of a pecuniary legacy which has been charged upon land is revoked by a subsequent will or codicil, giving all the personalty to another, it will still remain a charge on the real estate, although that would not be so in the case of a specific legacy, which cannot from its nature be charged upon another fund. Thus, in *Kermode* v. *Macdonald*, 3 L. R. Ch. App. 584, a testatrix by her will gave to M. G. "the interest, profits, or produce of 300*l.* British, or thereabouts, invested by her in the General Steam Navigation Company, and also the interest of 200*l.* British, for her life, and upon her decease, she gave "the said principal sum of 500*l.*" to the children of M. G. And she directed that in case of her personal estate proving insufficient for the payment of the legacies therein before mentioned, then such deficiency should be made up out of her real estate by sale or mortgage. And she bequeathed the residue of her personal estate to S. G. and A. T.

By a codicil, the testatrix gave "all her personal estate" to A. C. M. It was held by Lord Justice *Cairns*, (affirming the decision of Lord *Romilly*, M. R., 1 L. R. Eq. 457,) that the whole personal estate passed by the codicil, and that the legacy of 300*l.* was specific, and was absolutely revoked by the codicil, and that the legacy of 200*l.* was revoked, so far as the personalty was concerned, but not with regard to the realty upon which it remained a charge. "The true principles," said his Lordship, "are stated very clearly by Lord *Eldon* in *Sheddon* v. *Goodrich*

(8 Ves. 501). If you have a legacy given and charged upon two funds—and it makes no difference whether it is charged primarily or secondarily upon either—then if you find in a codicil a revocation of the legacy, of course the legacy is gone; but if you have such a charge, and then by a codicil or a subsequent part of a will a revocation of the gift of one of these funds, that does not operate as a revocation of the legacy, which remains unrevoked, and charged upon the other fund. It has been said that a legacy is a gift *pro tanto* of personal estate, and that if you find in a codicil a gift of the whole personal estate, that revokes the gift of the legacy. But that argument seems to assume the whole question in this case. If the will contained nothing but a gift of a pecuniary legacy, then the codicil would have revoked the gift of the legacy; but the will contains not merely a gift of a pecuniary legacy—it also contains a charge on the real estate; and the codicil operates merely on the personal estate."

Charges on, and liabilities in respect of specific legacies how payable.]—A specific legacy, as is laid down in the principal case, will not be adeemed by the testator pledging or pawning it, and the legatee will be entitled to have it redeemed by the executor; or if he fail to perform that duty, the legatee is entitled to compensation out of the general assets: *Knight* v. *Davis*, 3 My. & K. 361; *Ellis* v. *Eden*, 25 Beav. 482; *Bothamley* v. *Sherson*, 20 L. R. Eq. 304, 314.

And it is immaterial whether the testator pledged the subject of the specific legacy for his own debt or for the debt of somebody else (*Bothamley* v. *Sherson*, 20 L. R. Eq. 304), or whether it was liable, as in the case of *wine* on board ship, to freight duties and insurance on report (*Stewart* v. *Denton*, 4 Doug. 219), as in both cases the legatee will be entitled to have the charge existing at the testator's death paid out of the personal estate, or to compensation.

Suppose a case for instance in which a testator pledges for many times more than it is worth, a thing which he afterwards specifically bequeaths, in that case the executor would have no right to apply the personal estate in redemption, but the legatee will be entitled to compensation out of the testator's general personal estate, 20 L. R. Eq. 314.

In the recent case, *Bothamley* v. *Sherson*, 20 L. R. Eq. 304, a testator by his will dated in 1869 made a bequest "of all my shares or stock in the Midland Railway Company" to trustees upon certain trusts. He was at the date of his will entitled to 1000*l.* stock in that company. In February, 1871, he transferred the stock into the names of Messrs. Robarts

& Co. the bankers to secure an advance made by them to Sherson, who gave an undertaking that the stock should be re-transferred within three months. The testator died in 1872, and after his death the bankers sold the stock (which had never been re-transferred) and applied the proceeds in reduction of the debt due from Sherson. Under orders made in the suit Sherson transferred 500*l.* Midland Railway stock into Court, but was unable to make any further transfer. It was held by Sir *G. Jessel*, M. R. that the trustees of the specific bequest were entitled to compensation to the amount of the legacy against the general assets of the testator, and that the fund in Court, therefore, would go to them and not to the residuary legatees. "As I understand," said his Lordship, "the law of specific devises and specific bequests, where a testator has pledged property to secure a debt (and I am not aware that it makes any difference whether he is personally liable or not personally liable for the debt) then as a rule (although there may be exceptions to that rule, as to most others), the legatee has a right to have the specific legacy redeemed out of the testator's general personal estate. . . . If these Midland shares were pledged for ten times their value to Messrs. Robarts, the executor would have no right to apply the personal estate in redeeming them, but would be bound out of the testator's assets to give compensation to the legatee for the amount of the legacy" . . . . and after stating the case of *Stewart* v. *Denton* (4 Doug. 219), in which case there was a specific bequest of "stock-in-trade of wine," upon which freight duties were payable, his Lordship added, "In *Stewart* v. *Denton*, all the judges held that where there is a charge on the legacy which the testator would or might have been liable to pay, that is to say, a charge created by the testator as distinguished from a charge incident to the chattel, such as rent payable under a leasehold estate, or (as has since been decided) calls upon railway shares, such a charge is payable out of the testator's estate. In fact the distinction seems to turn on this: Is the charge one created by the testator for what has been called a temporary purpose, that is with the view of raising money or of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares? In the first case the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case he is not so entitled, because the testator is supposed to give the thing as it is, and the charge

upon it is really not in strictness an incumbrance, but something incident to the nature of the thing. Therefore in this case it appears to be plain, that following the rule that has been laid down, the specific legatee being disappointed by the bankers having sold the shares in question is entitled to compensation to the amount of the legacy against the general assets of the testator."

Where, however, by a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee; it was held by Sir *W. Page Wood*, V.C., that as between the executors and the specific legatees, the specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors: *Ledger* v. *Stanton*, 2 J. & H. 687.

The question by no means unfrequently arises how far a specific legatee of shares is entitled to have calls paid out of the testator's general estate. The cases upon this subject have been carefully reviewed by Sir *John Romilly*, M.R., in his elaborate judgment in *Armstrong* v. *Burnet*, 20 Beav. 424, 437, where it is laid down as the result of the cases, "that where the interest of the testator in the subject matter which he professes to bequeath, is complete, or where it is so treated and considered by him and by all persons unconnected with it, as in the case of a share in an insurance company, then the future calls fall on the legatee and not on the general personal estate; but where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose:" *Marshall* v. *Holloway*, 5 Sim. 196; *Wright* v. *Warren*, 4 De G. & Sm. 367; *Barry* v. *Harding*, 1 J. & L. 475: *Fitzwilliams* v. *Kelly*, 10 Hare. 266; and see *Moffett* v. *Bates*, 3 Sm. & Giff. 468; *Addams* v. *Ferick*, 26 Beav. 384; *Day* v. *Day*, 1 Drew. & Sm. 261. But see *Blount* v. *Hipkins*, 7 Sim. 43; *Jacques* v. *Chambers*, 2 Coll. 435; 4 Railw. Cas. 499; *Clive* v. *Clive*, Kay, 600; *Jones* v. *Ogle*, 14 L. R. Eq. 419; 8 L. R. Ch. App. 192.

Where shares fully paid up are specifically bequeathed, the question whether the specific legatee or the residuary estate is liable to the future calls, depends on the fact whether the calls are actually made before the testator's death. In *Adams* v. *Ferick*, 26 Beav. 384, a testatrix bequeathed shares in a company. Before her death, three calls were authorised at stated intervals, but she died before two of these periods. It was held, by Sir *J. Romilly*, M. R., under the circumstances, and from the practice of the company, that the calls were not to be considered as really made,

until a call-letter had been sent to the shareholders, and that as to those sent after the testatrix's death, the specific legatee and not the residuary estate must bear the calls.

The rule that a specific legatee of shares liable to calls must take them *cum onere*, does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares) as an entire fund: *In re Box*, 1 Hem. & Mill. 552.

The true test is whether the shares have or not been separated from the general residue at the date of the call: *In re Box*, 1 Hem. & Mill. 552.

Legatees' rights in respect of depreciation of specific legacy improperly detained.]—Where executors improperly detain a specific legacy, the legatee will not be allowed to suffer from its depreciation. Suppose, for instance, a horse were bequeathed to A., and the executors were to keep the horse until he were worn out, and then offer him to A., he would not be obliged to take him, as he would be entitled to the value of the horse from the time when the horse was used for any purpose, just in the same way as if the horse had been sold and the price applied in payment of debts, the legatee would have been entitled to the value with interest from the moment it was used for any other purpose: *Chaworth* v. *Beech*, 4 Ves. 563.

Upon the same principle where a debt due on a promissory note was specifically bequeathed, and the executors, thinking that the legacy was a pecuniary one, instead of delivering the promissory note to the legatee, called in the debt, and the money was paid into Court and invested in the purchase of stock, which afterwards became depreciated in value, Lord *Alvanley* held that the legatee was entitled to the sum due upon the note at the time it was paid into Court, with interest at 4*l.* per cent. from that time. "The legatee," said his Lordship, "had a right to the specific legacy. If the assets did not want it, she had a right to have it delivered up. She was not bound to lay it out in the funds: if she had done so, she would have a right to the rise, and be liable to the fall. Instead of that, the executors insisting it should not go out of Court, it was paid in and laid out in stock. It is no more than the case that was put in argument of a legacy of a horse, which the executors refused to let go, lest there should be a deficiency of assets, and having used and worked the horse a considerable time, afterwards offered to return him; the legatee then may insist upon the value." *Chaworth* v. *Beech*, 4 Ves. 555.

So, if the bequest were of specific stock, and it happened to be sold out by the executor, when there was no necessity for the sale

to pay debts, the equity of the legatee is to have the stock replaced according to its value at the end of a year next after the testator's death, since the fund, if not sold, ought then to have been transferred to the legatee: *Morley* v. *Bird*, 3 Ves. 629.

What passes to the legatee as incident to a specific legacy—accretions.]

A gift of a specific legacy carries with it everything incident to the subject-matter of the gift. Therefore, as a general rule, bonuses which accrue due after the death of a testator, upon shares specifically bequeathed by him, belong to the specific legatee (*Maclaren* v. *Stainton*, 3 De G. F. & Jo. 202, reversing *S. C.*, 27 Beav. 460), even although they may arise in consequence of the fraudulent retention of moneys which would have increased the dividends of any former owner, whether he be the testator or any person taking from him. *Ib.* And see *Edmondson* v. *Crosthwaite*, 34 Beav. 30; *The Carron Company* v. *Hunter*, 1 Ho. Lo. Sco. App. 362.

But where a bonus on shares has been declared during the life of the testator, it will not pass to the specific legatee, although payable after the death of the testator: *Lock* v. *Venables*, 27 Beav. 598.

So, in *De Gendre* v. *Kent*, 4 L. R. Eq. 283, in June, 1865, a dividend of 7 per cent. per annum upon certain shares held by the testatrix was declared payable on the 15th of July, 1865, and the 15th of January, 1866. The dividend was declared out of profits earned previous to the declaration thereof. The testatrix died on the 31st of December, 1865. It was held by Sir *W. Page Wood*, V. C., that the January dividend formed part of the corpus of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate. "This dividend," said his Honour, "which was earned in the lifetime of the testatrix, though declared payable at a future time, was a debt due to her at the time of her death, and formed part of the corpus of her estate. She has given the tree to the plaintiff; but as to this particular fruit, it seems to have fallen during her (testatrix's) lifetime."

A bequest of 2000*l.*, "insured on my life" with the H. Company, was held by Sir *J. Romilly*, M.R., to pass a bonus due at the testator's death: *Roberts* v. *Edwards*, 33 Beav. 259, but see *Norris* v. *Harrison*, 2 Madd. 268.

Upon the same principle, the profits of a partnership made during a conventional period, which was wholly included in the testator's lifetime, will be considered to be capital belonging to the testator's estate, although these profits were not ascertained till some time after his death:

Browne v. *Collins*, 12 L.R. Eq.586, 593. And see *Ibbotson* v. *Elam*, 1 L. R. Eq. 188; 35 Beav. 594.

But where the dividends, although earned during the testator's life, are not declared until after his death, they will be considered as income: *Bates* v. *Mackinley*, 31 Beav. 280.

So, likewise, the profits of a partnership, though principally earned during the testator's life, will be considered as income, if the conventional period at which such profits are to be ascertained terminates after the testator's death: *Ibbotson* v. *Elam*, 1 L. R. Eq. 188; *Browne* v. *Collins*, 12 L. R. Eq. 586.

Where a testatrix gave shares in a bank to trustees, to pay the annual proceeds to her daughter for life, and she gave the capital in trust for her grandchildren, it was held by Sir *R. T. Kindersley*, V. C., that the bonuses declared upon the bank shares, *out of the half-yearly profits*, were to be considered as income, and to belong to the tenant for life; but his Honour expressed an opinion that it would have been otherwise if the bonuses had been paid out of an accumulation of profits, running over several years: *Plumb* v. *Neild*, 29 L. J. (N. S.) Ch. 618.

In a recent case, however, it has been held that dividends paid out of a fund arising from such accumulation of profits, if paid as dividend, would belong to the tenant for life as dividends, and would not be considered as capital. See *In re Hopkin's Trusts*, 18 L. R. Eq. 697. There a holder of shares both in the Sun Fire Office and the Sun Life Office, by will gave his personal estate to trustees upon trust to permit his wife to receive the dividends, interest, and income thereof for her life, with remainder over. The testator died in December, 1870. In January, 1873, an extraordinary dividend was declared on the life shares for five years previously; and in July, 1873, a special dividend was declared on the fire shares for the half year previous. It was held by Sir *C. Hall*, V. C., that these dividends were income, and belonged to the tenant for life. "I am of opinion," said his Lordship, "that in the present state of the authorities on this subject the tenant for life is entitled to these dividends, unless, as has been contended, they were paid by the office out of capital. If, indeed, that were so, whether they were called bonus or dividend, they would be payments out of capital, and therefore capital, and would belong to the remainderman, and not to the tenant for life. The constitution of the Sun Office appears to be this: they commenced business with the appropriation of a specific sum of 48,000*l.* out of their capital as a fund which was never to be encroached upon, but, on the contrary, was to be augmented at future times. For four years

they paid no dividend, but at the expiration of that time they began to pay a dividend out of the 48,000*l.*, which, whether it was more or less than that precise fund, was called and considered a separate fund. The dividend so paid did not exceed 5*l.* per cent., but there was a provision for something more, for although paying the dividend out of the 48,000*l.*, another fund was set apart, called the surplus fund, which was invested in the ordinary way. It was provided that at the expiration of twelve years from the date of the deed of settlement of the company—a period afterwards altered to seven years and then to five—dividends were to be paid out of that fund. That fund was appropriated, not as being part of the capital of the concern, but as a dividend fund out of which dividends were declared and made payable. This was, therefore, a case of the ordinary kind, viz., the payment of dividends out of a fund appropriated to that specific purpose."

The result will be otherwise where the profits have been capitalised. See *In re Ezekiel Barton's Trust*, 5 L. R. Eq. 238.

Even where resolutions may be passed by a company that the money is capital, grave questions may arise whether such a resolution may not be at variance with the deed of settlement of the company. *In re Hopkin's Trust*, 18 L. R. Eq. 700.

Where a dividend is declared upon shares during the life of a tenant for life, his representatives will be entitled to it, although it is not paid until after his death (*Wright* v. *Tuckett*, 1 J. & H. 266), unless the deed of settlement provides that in such case it shall be paid to some one else: *Clive* v. *Clive*, Kay, 600.

Ordinarily the income arising from personalty specifically bequeathed is apportionable under the Apportionment Act, 1870 (33 & 34 Vict., c. 35, ss. 2, 5), as between the specific legatee and the estate of the testator (*Pollock* v. *Pollock*, 18 L. R. Eq. 329: *Daly* v. *Attorney-General*, 7 I. R. Eq. 595, overruling *Whitehead* v. *Whitehead*, 16 L. R. Eq. 528), and the act is applicable whether the instrument under which the question arises came into operation before or not till after the passing of the act. *In re Cline's Estate*, 18 L. R. Eq. 213.

Where, however, a testator by a will made before the passing of the act bequeathed the dividends and income *eo nomine* of his share and interest in a company to one for life, with remainder to another absolutely, it was held by the Court of Appeal in Chancery, affirming the decision of Lord *Romilly*, M. R. (reported 14 L. R. Eq. 419) that the bequest included the whole dividends, irrespective of any apportionment. *Jones* v. *Ogle*, 8 L. R. Ch. App. 192; and see the observations thereon

of *Malins*, V. C., in *Capron* v. *Capron*, 17 L. R. Eq. 294, 295.

The Apportionment Act of 1870 does not, it seems, apply to a bequest of shares in a mere private partnership, which, although it may pay what are called dividends, are in reality payments of an entirely different nature, and do not proceed upon the basis of a fixed income recurring from time to time. *Jones* v. *Ogle*, 14 Beav. 419; 8 L. R. Ch. App. 192.

Where a testator had bequeathed some railway shares, "and all his right, title, and interest therein," it was held by Lord *Langdale*, M. R., that moneys which he had paid in advance beyond the calls passed to the legatee: *Tanner* v. *Tanner*. 11 Beav. 69.

Parol evidence, how far admissible in the case of legacies.]—Parol evidence of the state and value of a testator's funded property is admissible, in order to determine whether a legacy is specific or general. See *Attorney-General* v. *Grote*, 2 Russ. & My. 690, where Lord *Eldon* overruled the decision of Sir *W. Grant*, M. R., reported 3 Mer. 316. And see *Boys* v. *Williams*, 2 Russ. & My. 689. In that case a testatrix gave to A. and M. "50*l.* each of Bank Long Annuities now standing in my name." At the date of the codicil and at her death, she possessed Long Annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. It was held by Lord *Brougham*, reversing the decision of Sir *L. Shadwell*, V. C. (reported 3 Sim. 563), that evidence as to the state and value of the testatrix's property in the funds at those respective times was admissible; and, on the effect of that evidence, and the language of the testamentary papers taken together, the bequests to A. and M. were held not to be specific, but pecuniary. "To the proposition," said his Lordship, "that, because the words of the will were clear upon the face of them, extrinsic evidence was inadmissible, it was wholly impossible to accede: that being the case of a latent ambiguity, the very case which, according to all the text writers, formed the exception to the general rule against admitting parol evidence to explain or construe the words of the instrument. It was because the ambiguity was not patent, but latent; that is to say, discoverable only upon reference to the subject matter upon which the will purported to operate, that the Court was justified in resorting to extrinsic evidence at all. It was perfectly true that the Court was not at liberty, in the case of any written instrument, whether a will of real or personal estate, or a deed, to introduce into the consideration of the question of construction any matter furnished by extrinsic evidence for

the purpose of giving a different meaning to the words from that which their plain import conveyed. The Court was not at liberty by matter of fact to overrule the construction, which was matter of law arising on the face of the instrument itself. But that proposition was perfectly consistent with the admission of evidence to explain, though not to control, the language, to aid, though not to vary or alter the construction." And see *Warren* v. *Postlethwait*, 2 Coll. 116, 121; *Collison* v. *Curling*, 9 C. & F. 88; *Innes* v. *Sayer*, 3 Mac. & G. 606; *Horwood* v. *Griffith*, 4 De G. Mac. & G. 700. But see *Millard* v. *Bailey*, 1 L. R. Eq. 378.

Where there is a specific bequest parol evidence is admissible to show what property there is answering to the description of it; but if on that evidence, it appears that there is property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property: *Horwood* v. *Griffith*, 4 De G. Mac. & G. 700.

Abatement of legacies.]—As has been before shown, in the administration of assets, general legacies are not applicable in payment of debts, until after the general personal estate, real estates devised for payment of debts, real estates descended, and real estates charged with payment of debts, have been exhausted; after which general legacies, in priority of specific legacies are applicable; or, if the whole amount of them is not wanted for that purpose, they must abate among themselves pro ratâ. See *Silk* v. *Prime*, 2 L. C. Eq. 137, 138, 4th ed.

A legacy at first sight appearing to be residuary, may be shown by the testator's intention to be specific, in which case it will only abate with other specific legacies. An instance of this is to be found in the case of *Page* v. *Leapingwell*, 18 Ves. 463; there a testator devised land upon trust to sell, but not for less than 10,000*l.*, and gave legacies thereout amounting to 7800*l.*, and "the overplus monies," to A. & B. The estate sold for less than 7000*l.*; Sir *W. Grant*, M. R., held that the other legatees ought to abate equally with A. and B., his Honour being of opinion, that the inference to be drawn from the expressions in the will was, that the testator did not mean by the word "overplus" what it usually imports, viz., whatever shall turn out to be the overplus; but that he was contemplating *a certain overplus*, and was making his disposition accordingly. "I conceive," he added, "the true intention to have been that these persons should take as specific legatees; and therefore they must abate among themselves." See also *Hewitt* v. *George*, 18 Beav. 522; *Hunt* v. *Berkely*, Mose. 47; *Laurie* v. *Clutton*, 15 Beav. 65;

Wright v. *Weston*, 26 Beav. 429; *Duncan* v. *Duncan*, 27 Beav. 386; *Haslewood* v. *Green*, 28 Beav. 1; *Elwes* v. *Causton*, 30 Beav. 554: *In re Jeffery's Trust*, 2 L. R. Eq. 68; *Walpole* v. *Apthorp*, 4 L. R. Eq. 37; *Miller* v. *Huddlestone*, 6 L. R. Eq. 65.

Where, however, a testator neither knows, nor assumes to know, the amount of a fund, and after bequeathing certain portions thereof, he makes a bequest of the residue, the latter must be applied first in payment of debts. See *Read* v. *Strangeways*, 14 Beav. 139; *Williams* v. *Armstrong*, 12 Ir. Eq. Rep. 356; *Vivian* v. *Mortlock*, 21 Beav. 252. And see *Carter* v. *Taggart*, 16 Sim. 423; *Loscombe* v. *Wintringham*, 12 Beav. 46; *Booth* v. *Alington*, 6 De G. Mac. & G. 613; *Greenwood* v. *Jemmett*, 26 Beav. 479; *Harley* v. *Moon*, 1 Drew. & Sm. 623; *Baker* v. *Farmer*, 3 L. R. Ch. App. 537, reversing *S. C.* 4 L. R. Eq. 382; *De Lisle* v. *Hodges*, 17 L. R. Eq. 440.

In *Petre* v. *Petre*, 14 Beav. 197, where a testator having a power of appointment by will over 7100*l.* 3½ per cents., appointed 5000*l.*, part of the trust funds to A. and 500*l.* to B., and the residue to his son. The stock having upon the appointment become liable in equity to the payment of debts, it was held by Sir *John Romilly*, M. R., that the residue was first applicable towards their payment. "The authority," said his Honor, "of *Page* v. *Leapingwell* applies where the testator disposes of an estate which he assumes will produce a given sum, or with an ascertained fund, in which case it is indifferent, whether after he has given certain portions, he specifies the remainder by stating its amount or by comprising it under the term 'residue.' But in this case, so far from knowing the amount of the fund, the testator could have no conception of it; *for it was impossible to ascertain the amount until the fund had been realised by a sale*, and the charges on it known. If in this case it appeared that the testator thought he was dealing with a sum of 7100*l. sterling*, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion to their shares, although the last portions were called 'the residue' but that is not the case here." *De Lisle* v. *Hodges*, 17 L. R. Eq. 440, 449.

The decision, however, of *Petre* v. *Petre* seems to be scarcely consistent with *In re Jeffery's Trust*, 2 L. R. Eq. 68: there a testator bequeathed as follows: "The pink coupons in the pigeon-hole are for 3666*l.*, send those to Irving and Slade, 1, Copthall Court, and he is to pay to Ellen Tomkins 2500*l.*, and the rest for Archdeacon Giles for Bess and Eddie." It was held by Sir *W. Page Wood*, V.-C., that the case fell within the decision in *Page* v. *Leapingwell*, and

that it was plain that it was a specific gift of the coupons of 2500*l.* to A. and the rest to B.

A question sometimes arises between pecuniary and residuary legatees, where there has been a devastavit by the executor, whether the pecuniary legatees ought not to share the loss proportionably with the residuary legatees. The better opinion (in opposition to that of Lord *Cowper*, in *Dyose* v. *Dyose*, 1 P. Wms. 305) is, that they ought not. See *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 478; *Humphreys* v. *Humphreys*, 2 Cox, 184; *Page* v. *Leapingwell*, 18 Ves. 466; and *Wilmott* v. *Jenkins*, 1 Beav. 501; *In re Lyne's Estate*, 8 L. R. Eq. 482.

But the case may be varied by the dealings of the pecuniary legatees with the executor as by suffering their legacies to remain in his hands, and receiving interest thereon, thus making him their debtor; for then they may be considered to have waived their priority under the will, and will only be entitled to have what is left divided between them and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each: *Ex parte Chadwin*, 3 Swanst. 380. See and consider *Mallory* v. *French*, 11 Ir. Eq. Rep. 376. In other words. "If all the legatees have consented that they will have the fund out of which their legacies are payable appropriated as a specific sum, it is the same as if the testator had appropriated it; and if any part of the fund is lost they must all suffer rateably. But unless there is this common consent, we must look to the intention of the testator and to nothing afterwards." Per Lord Justice *Wood*, in *Baker* v. *Farmer*, 3 L. R. Ch. App. 541.

Where, moreover, one of several residuary legatees, or next of kin, has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted (*Peterson* v. *Peterson*, 3 L. R. Eq. 111, 114); but if part of the estate had been previously wasted, the person so paid can be called upon to refund, the rule being that what is available when one is paid, should be equally divisible among all. *Ib.*

But where one residuary legatee calls upon another to refund, upon the ground of being overpaid, the burden of proof lies upon the person requiring the money to be refunded, to show that the payment was made in excess. *Ib.*

Where a legacy is charged on real estate should the personal estate be insufficient to pay it, if the personal estate was sufficient for that purpose at the time of the testator's death, and became inadequate in consequence of a devastavit, the legacy will not be a charge on the real estate: *Richardson* v. *Morton*, 13 L. R. Eq.

123. Secus, if the devisees of the real estate were the same persons as those who wasted the personal estate. *Howard* v. *Chaffers*, 2 Dr. & Sm. 236; *Humble* v. *Humble*, 2 Jur. 696.

As a rule, general legacies and annuities stand upon an equal footing, and upon a deficiency of assets they must abate rateably, and the *onus* lies on any legatee or annuitant seeking priority to make out clearly and conclusively that such priority was intended: *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Thwaites* v. *Forman*, 1 Coll. 409; *Brown* v. *Brown*, 1 Keen, 275.

In *Coore* v. *Todd*, 7 De G. Mac. & G. 520, a testator by his will devised real estate to trustees in fee in trust out of the rents to pay an annuity to A. B. until he attained twenty-five, when he was to be entitled to the possession of the estate, and an annuity of 400*l.* a-year to C. D. for life, and an annuity of 150*l.* for the maintenance during minority of an infant tenant in tail: and "without prejudice to the trusts aforesaid," and "to any jointure to be created under the power thereinafter contained," to pay the surplus rent to the mother of A. B., until he should be entitled to the possession of the estate; and "subject to the trusts aforesaid," the trustees were to hold the estate in trust for A. B. for life, with remainder to his eldest son in tail, with power to A. B. to appoint a jointure to any wife, with the usual powers of distress and entry, to take effect immediately after his decease. A. B. having appointed the jointure died, leaving his widow, who gave birth to a posthumous son, the infant tenant in tail. The income of the estate proving deficient —it was held by Lord *Cranworth*, C., that the annuity of 400*l.*, the jointure and the annuity for the maintenance of the infant tenant in tail must abate pari passu, but that the apportionment was not to be retrospective, so as to affect the amount received by C. D. previously to the birth of the tenant in tail.

However, where a general legacy is given for any valuable consideration, as the relinquishment of dower by a widow (*Burridge* v. *Bradyl*, 1 P. Wms. 126; *Blower* v. *Morret*, 2 Ves. 420; *Davenhill* v. *Fletcher*, Amb. 244; *Heath* v. *Dendy*, 1 Russ. 543; *Norcott* v. *Gordon*, 14 Sim. 258; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421; *Bell* v. *Bell*, 6 I. R. Eq. 239), or of a debt actually due (*Davies* v. *Bush*, 1 Younge, 341), it will be entitled to priority over all other merely voluntary legacies. And this priority as to legacies given in satisfaction of dower is preserved by the Dower Act, 3 & 4 Will. 4, c. 105, s. 12, by which it is expressly enacted, "that nothing in the Act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in

satisfaction of dower are entitled to priority over other legacies."

Where, however, the husband leaves no real estate at all (*Acey* v. *Simpson*, 5 Beav. 35), or none out of which his widow is dowable, as, for instance, where it has all been conveyed to him to uses to bar dower (*Roper* v. *Roper*, 3 Ch. D. 714), the widow will not be entitled to priority over other legatees in respect of a legacy which her husband may have given to her in lieu of dower, because there is nothing of which she is a purchaser. Upon the same principle, in *Davies* v. *Bush*, 1 Younge, 341, where a testator had given a legacy to a person, on condition of his executing a general release of all claims which the legatee had on the testator, Lord *Lyndhurst* was of opinion, that if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees. If no debt were due, and the release were required merely for the sake of peace, then unquestionably the legatee could not be treated as a purchaser.

An annuity charged on the personal estate by a testator, being a general legacy, on a deficiency of assets abates proportionably with the general legacies.

In such cases a value is put upon the annuity, and then a proportional abatement is made between the annuity and the legacies, and then the annuitant, although it is only a life annuity, or his representative, if he be dead, is entitled at once to receive a sum equal in amount to the valuations so abated: *Carr* v. *Ingleby*, 1 De G. & Sm. 362; *Long* v. *Hughes*, Ib. 364: *Wroughton* v. *Colquhoun*, Ib. 357; and see "Forms of Decrees" in those cases.

But if annuities are given as gifts of specific interests in the real estate, they will not abate with legacies charged on the real estate: *Creed* v. *Creed*, 11 C. & F. 491, overruling the decision of *Sugden*, C., in 1 Dr. & War. 416.

As annuities on a deficiency of assets abate with legacies, so they abate among themselves: *Innes* v. *Mitchell*, 1 Ph. 716.

When the corpus of an estate charged with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities: *Wroughton* v. *Colquhoun*, 1 De Gex & Sm. 357; *Todd* v. *Beilby*, 27 Beav. 356.

If all the annuitants are *living* at the period of division, the value must be ascertained as at the death of the testator: *Todd* v. *Beilby*, 27 Beav. 353.

If *all* the annuitants are dead, the arrears of their annuities must be ascertained, and the fund divided in the proportion of those arrears: *Todd* v. *Beilby*, 27 Beav. 353, 356.

If *some* are dead, and the others

living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears, added to the calculated value of the future payments (*Todd* v. *Beilby*, 27 Beav. 353; *Heath* v. *Nugent*, 29 Beav. 226); and it is immaterial that an annuity is reversionary, and falls into possession after the testator's death: *Potts* v. *Smith*, 8 L. R. Eq. 683.

In *Innes* v. *Mitchell*, 2 Ph. 346, a testator gave an annuity of 300*l.* to his three daughters, and the survivors and survivor, with a gift over to the last survivor, of the sum set apart to answer the annuity. After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two, but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, became available. It was held by Lord *Cottenham*, C., reversing the decision of Lord *Lyndhurst*, C. (1 Ph. 710), that, as the last survivor had no opportunity of receiving the capital during her life, the annuity was to be considered as continuing for her benefit, after her sister's death until her own, and therefore, that she was entitled to an apportionment, in respect of the arrears of such annuity during that interval, as well as in respect of the principal fund.

A bequest of an annuity to an executor for his trouble in the conduct and management of the testator's affairs will not be entitled to priority over other legacies: *Duncan* v. *Watts*, 16 Beav. 204.

Where the testator's intention is clearly to prefer one legatee to another, preference will of course be given (*Lewin* v. *Lewin*, 2 Ves. 415; *Marsh* v. *Evans*, 1 P. Wms. 668; *Attorney-General* v. *Robins*, 2 P. Wms. 23; *Beeston* v. *Booth*, 4 Madd. 161, 170; *Stammers* v. *Halliley*, 12 Sim. 42; *Brown* v. *Brown*, 1 Kee. 275; *Weir* v. *Chomley*, 1 Ir. Ch. Rep. 295; *Spong* v. *Spong*, 3 Bligh, N. S. 84; Sugd. Prop. 422; *Dyer* v. *Bessonett*, 4 Ir. Ch. Rep. 382; *Haynes* v. *Haynes*, 3 De G. Mac. & G. 590); but not where it is at all doubtful whether he intended to give such preference. See *Blower* v. *Morret*, 2 Ves. 421; *Beeston* v. *Booth*, 4 Madd. 161; *Eavestaffe* v. *Austin*, 19 Beav. 591; and see *Coore* v. *Todd*, 23 Beav. 92; *Campbell* v. *M'Conaghey*, 8 I. R. Eq. 20.

Specific legacies, as has been shown, are not applicable in the administration of assets in payment of debts, until after general legacies have been exhausted (*ante*, p. 245), nor are demonstrative legacies, that is to say, legacies payable out of a particular fund (*Roberts* v. *Pocock*, 4 Ves. 150; *Lambert* v. *Lambert*, 11 Ves. 607; *Acton* v. *Acton*, 1 Mer. 178); except when they become general

legacies by failure of the fund. *Mullins* v. *Smith*, 1 Drew. & Sm. 210; and persons to whom specific and demonstrative legacies are bequeathed, can compel devisees of land not charged with debt, to abate or contribute with them, pro ratâ, towards their payment. (See *Roberts* v. *Pocock*, 4 Ves. 160; *Long* v. *Short*, 1 P.Wms. 403; *Tombs* v. *Roch*, 2 Coll. 490, 505, 506); and although a specific legacy be charged with debts and legacies, the general undisposed-of residue will be first applicable: *Hewett* v. *Snare*, 1 De G. & S. 333; *ante*, vol. 1, p. 706.

As to the lapse of legacies, see *Elliot* v. *Davenport*, Lead. Cas. Real Prop. 803, 2nd ed. and note.

Time of payment of legacies and interest.]—As a general rule interest is payable on legacies from the time when they become actually due.

With regard to specific legacies, they are considered as severed from the bulk of the testator's property by the operation of the will, *from the death* of the testator, and are specifically appropriated, with their increase and emolument, for the benefit of the legatee from that period; so that interest is computed on them *from the death* of the testator; and it is immaterial whether the enjoyment of the principal is postponed by the testator or not: 2 Rop. Leg. 1250, 4th edit. Thus, where there is a specific legacy of stock, the legatee will be entitled to the dividends from the death of the testator (*Barrington* v. *Tristram*, 6 Ves. 345; see also *Clive* v. *Clive*, Kay, 600), although it may have been directed "to be paid within twelve calendar months" after the testator's decease: *Bristow* v. *Bristow*, 5 Beav. 289.

A demonstrative legacy does not carry interest from the testator's death: *Mullins* v. *Smith*, 1 Drew & Sm. 210.

If the thing specifically bequeathed were reversionary, the legatee would only be entitled to it upon the reversion falling into possession.

A demonstrative legacy, where the property out of which it is payable is reversionary, is only payable where the reversion falls in: *Earle* v. *Bellingham*, 24 Beav. 448.

With regard to general legacies where a testator has fixed a time for their payment, or for the payment of the interest thereon, interest on such legacies will be payable from such time (*In re Tinkler's Estate*, 20 L. R. Eq. 456; *Lord Londesborough* v. *Somerville*, 19 Beav. 295); but where the testator has fixed no time for their payment (*Child* v. *Elsworth*, 2 De G. Mac. & G. 679), they will not be payable until *a year after his decease*; they will therefore, as a general rule, carry interest only from that time, and it will be due even though the payment of the legacy be im-

practicable (*Wood* v. *Penoyre*, 13 Ves. 333, 334; *Gibson* v. *Bott*, 7 Ves. 96); and whether the assets are productive or not (*Pearson* v. *Pearson*, 1 S. & L. 10). So where there is a general legacy of long annuities, the legatee will not be entitled to the dividends accruing before the expiration of a year from the testator's decease: *Collyer* v. *Ashburner*, 2 De G. & Sm. 404.

A case will, however, be taken out of the general rule, where a clear intention is shown that legacies are not to be paid until some time after the expiration of one year from the testator's decease. See *Lord* v. *Lord*, 2 L. R. Ch. App. 782. There a testatrix, having a general power of appointment over property which was the subject of pending litigation, appointed it by will to J. Lord upon trust, "so soon as proceedings in law and equity should be terminated, and the same should come into his possession," to pay certain legacies, and as to the residue upon other trusts. It was held, by the Lord Justices, affirming the decision of Lord *Romilly*, M. R., that the trust to pay the legacies did not arise, and, consequently, that the legacies did not carry interest, until the litigation ended, and the property came into the hands of J. Lord, which was not until more than eighteen years after the death of the testatrix.

A mere reference by the testator to the time when his personal estate shall be received, will not be a sufficiently clear indication of his intention, that the legacy is not to be paid at, and, consequently, that the interest is not to run from, such time. See *Wood* v. *Penoyre*, 13 Ves. 334: there the testator gave a legacy of 900*l.*, to be paid out of money due on an Irish mortgage, "when the same shall be recovered." Sir *W. Grant*, M. R., held that, the words "when recovered" did not suspend or postpone the right to interest.

Although the testator directs legacies to be invested for legatees at a period beyond the expiration of one year from his own death, nevertheless, if the direction for investment is for the convenience of the estate, interest will be paid to the legatees upon the legacies, from a year after the testator's death, if the estate is sufficient then to pay them. See *Varley* v. *Winn*, 2 K. & J. 700: there the testator after bequeathing legacies of 2000*l.* to each of his daughters to be paid to them four years after his decease, the interest to be computed from the end of one year after his decease, and after giving a further sum of 6000*l.* to each of his daughters, added, "which said sum of 6000*l.* to each of them shall be invested in real or government securities by my executors, within seven years, to be computed from the time of my decease in trust for them or their children; but if any of my said daughters

should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue, share and share alike, as they arrive at the age of twenty-one years of age; and if only one, the whole to go to that one only." It was held by Sir *W. Page Wood*, V.-C., that interest was payable on the legacies of 6000*l.* from a year after the testator's death, the estate being sufficient to pay them at the testator's death.

Where, however, the Court decrees a legacy to be a satisfaction for a debt (*Clark* v. *Sewell*, 3 Atk. 99); or where a person charges his real estate with the debts of another man (*Shirt* v. *Westby*, 16 Ves. 393); interest will be given from the death, not merely from a year after the death, of the testator.

Where a testator directs a legacy to be paid before the expiration of twelve months from his death, interest will be due from the time when payment was directed to be made: *Lord Londesborough* v. *Somerville*, 19 Beav. 295.

Another exception "is the case of a legacy by a father or mother to a legitimate child, whether by way of portion or not. If it is given generally, the Court will give interest from the death, to create a provision for its maintenance" (*Beckford* v. *Tobin*, 1 Ves. 310); or where a person puts himself *in loco parentis* (*Wilson* v. *Maddison*, 2 Y. & C. C. C. 372); but the exception is not extended to an adult child (*Raven* v. *Waite*, 1 Swanst. 553; nor where the parent has provided maintenance for his child though not adult out of another fund (*In re Rouse's Estate*, 9 Hare, 649; *Donovan* v. *Needham*, 9 Beav. 164); "nor has the Court extended it to a natural child, for two reasons: first, from the rule of law considering a natural child as no relation,—having, indeed, no civil blood: secondly, that it is not fit for a Court of Justice to give the same countenance to such children as in the case of legitimate children" *Beckford* v. *Tobin*, 1 Ves. 310; *Lowndes* v. *Lowndes*, 15 Ves. 301;) nor has the exception been extended to a wife (*Lowndes* v. *Lowndes*, 15 Ves. 301; *Freeman* v. *Simpson*, 6 Sim. 75; *Milltown* v. *Trench*, 4 C. & F. 276; 11 Bligh, N. S. 1); but where there is a direction to apply a competent part of the interest on a legacy for the maintenance of a natural child (*Newman* v. *Bateson*, 3 Swanst. 689; *Dowling* v. *Tyrell*, 2 Russ. & My. 343), or of a stranger, even where the legacy is contingent (*In re Richards*, 8 L. R. Eq. 119), interest will be payable from the testator's death.

Where an annuity is given by will, it will commence immediately from the testator's death, and consequently the first payment is at the end of a year from his death (*Gibson* v. *Bott*, 7 Ves. 96). But

Lord *Eldon* in that case takes a distinction between an annuity and a legacy for life, for he says, that "if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy, and till the legacy is payable, there is no fund to produce interest;" and he considered it doubtful whether a sum of money directed to be placed out to produce an annuity, is to be considered as a legacy payable at the end of a year, or as an annuity payable from the death: see *Gibson* v. *Bott*, 7 Ves. 97.

But it seems that a person having a life interest in the residue of personalty, is entitled to the proceeds from the death of the testator; or, if it ought to be converted, to such income as it would have produced if converted (*Angerstein* v. *Martin*, T. & R. 232; *Hewitt*, v. *Morris*, T. & R. 241; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Dimes* v. *Scott*, 4 Russ. 195; *Douglas* v. *Congreve*, 1 Kee. 410; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 322; *Taylor* v. *Clarke*, Hare, 161; but see *Taylor* v. *Hibbert*, 1 J. & W. 308; *Stott* v. *Hollingworth*, 3 Madd. 161: *Griffith* v. *Morrison*, 1 J. & W. 311, n.; *Amphlett* v. *Parke*, 1 Sim. 275; *Yates* v. *Yates*, 28 Beav. 637; *Webb* v. *Pollock*, 20 W. R. (V.-C. M.), 796, See *Howe* v. *Earl of Dartmouth*, and note, *post*, p. 296.

But the tenant for life will not be entitled to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way. See *Allhusen* v. *Whittell*, 4 L. R. Eq. 295, 302, where Sir *W. Page Wood* observes, "the authorities clearly show that supposing a testator has a large sum, say 50,000*l.* or 60,000*l.*, in the funds, and has only 10,000*l.* worth of debts, the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration. But the executors, when they have dealt with the estate, will be taken by the Court as having applied in payment of debts such portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts."

And the rule laid down in *Allhusen* v. *Whittell* (4 L. R. Eq. 295, 302), will be applicable, although the income from the continuance of the estate in the business carried on by the testator, has greatly exceeded five per cent., *Lambert* v. *Lambert*, 16 L. R. Eq. 320.

A tenant for life, moreover, of that estate upon which the debts of the testator have been ascertained to be a charge, must keep down all the interest which accrues due, *Marshall* v. *Crowther* 2 Ch. D. 199; see also *Barnes* v. *Bond*, 32 Beav. 653.

Where a legacy is charged on

real property, and no time is fixed for its payment, interest will be due from the testator's death: *Maxwell* v. *Wettenhall*, 2 P. Wms. 26; *Stonehouse* v. *Evelyn*, 3 P. Wms. 254; *Spurway* v. *Glynn*, 2 Ves. 483.

Where, however, real estate is devised upon trust for sale, and out of the proceeds of such sale upon trust to pay legacies, interest on the legacies is only payable from the period of a year after the testator's death as being the period at which the sale of the real estate might reasonably have been effected. *Turner* v. *Buck*, 18 L. R. Eq. 301.

Where the testator has fixed a time for payment of a legacy, as, for instance, on the legatee's attaining a certain age, according to the general rule it will not, although it be vested, carry interest until the arrival of that time (*Heath* v. *Perry*, 3 Atk. 101; *Tyrell* v. *Tyrell*, 4 Ves. 1; and see *Thomas* v. *Attorney-General*, 2 Y. & C. Exch. Ca. 525); except where a legacy is left by a parent or a person *in loco parentis* to an infant, in which case, whether the legacy be vested or contingent, interest on the legacy will be allowed as maintenance from the death of the testator (*Acherley* v. *Wheeler*, 1 P. Wms. 783; *Hill* v. *Hill*, 3 V. & B. 183; *Mills* v. *Robarts*, 1 Russ. & My. 555; *Leslie* v. *Leslie*, L. & G. t. Sugd. 1; *Rogers* v. *Soutten*, 2 Kee. 598; *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Russell* v. *Dickson*, 2 D. & War. 133; *Harvey* v. *Harvey*, 2 P. Wms. 21; *Incledon* v. *Northcote*, 3 Atk. 438; *Chambers* v. *Godwin*, 11 Ves. 2; *Brown* v. *Temperley*, 3 Russ. 263); or if the child be *en ventre sa mere*, from its birth (*Rawlins* v. *Rawlins*, 2 Cox, 425); and although there be a direction for accumulation (*Mole* v. *Mole*, 1 Dick. 310; *M'Dermott* v. *Kealy*, 3 Russ. 264, n.); but whether the whole or part of the interest be allowed for maintenance, will be at the discretion of the Court.

"In the instance of a child," says Lord *Alvanley*, "the Court does not postpone the payment of interest till a year after the death of the parent; for the Court considers the parent to be under an obligation to provide, not only a future, but a present maintenance for his child; and therefore holds, that he could have postponed the time of payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy; which fruit is the only maintenance, and which maintenance he was bound to provide:" *Crickett* v. *Dolby*, 3 Ves. 13.

Where, however, a specific sum is given for maintenance, although it be less than the interest, no more can in general be claimed (*Hearle* v. *Greenbank*, 3 Atk. 717; *Long* v. *Long*, 3 Ves. 286, n.); unless, perhaps, it is clearly insufficient, and the legacy is vested (*Ayns-*

worth v. *Pratchett*, 13 Ves. 321; *Turner* v. *Turner*, 4 Sim. 430). Nor will maintenance be allowed out of a legacy where another fund is provided for that purpose. "It is clear," says Lord *Kenyon*, M. R. "that where other funds are provided for the maintenance, then, if the legacy be payable at a future day, it shall not carry interest until the day of payment comes, as in the case of a legacy to a perfect stranger:" *Wynch* v. *Wynch*, 1 Cox, 433, 434; *Wall* v. *Wall*, 15 Sim. 513; *Donovan* v. *Needham*, 9 Beav. 164; *Rudge* v. *Winnall*, 12 Beav. 357; *In re Rouse's Estate*, 9 Hare, 649.

The exception to the general rule will not be extended to other relatives than children, such as grandchildren, or nephews, or nieces, unless the testator has put himself *in loco parentis*; *Houghton* v. *Harrison*, 2 Atk. 330; *Butler* v. *Freeman*, 3 Atk. 58; *Descrambes* v. *Tomkins*, 4 Bro. C. C. 149, n.; 1 Cox, 133; *Festing* v. *Allen*, 5 Hare, 579; *Crickett* v. *Dolby*, 3 Ves. 10.

But as in the case of a parent or person *in loco parentis*, interest is payable upon the presumed intention of the testator, so it is payable in the case of a future legacy given by a person not standing in that relation to the legatee, if, from the terms of the will, it appears to have been his intention that the legatee should receive maintenance out of the legacy (see *Leslie* v. *Leslie*, L. and G. t. Sugd. 1; *Boddy* v. *Dawes*, 1 Kee. 362). And where a legacy is directed to be paid at a future time, with interest, the interest will be payable from the end of the year after the testator's death: *Knight* v. *Knight*, 2 S. & S. 490, 492.

When a testator's estate is insufficient for payment in full of all his legacies, and the realization of his assets occupies a long time, the moneys from time to time received by the trustees applicable to legacies, will be divisible rateably between capital and income, so as to attribute to income 4*l.* per cent. from the time when the interest became payable on the amount attributed to capital. *In re Tinkler's Estate*, 20 L. R. Eq. 456.

The rate of interest, whether the legacy be or not charged on real estate, is usually 4*l.* per cent. (*Wood* v. *Bryant*, 2 Atk. 523; *Treves* v. *Townshend*, 1 Bro. C. C. 386; *Sitwell* v. *Bernard*, 6 Ves. 543); although the testator may have resided, or had money invested, in a country where a higher rate of interest is allowed (*Malcolm* v. *Martin*, 3 Bro. C. C. 50; *Stapleton* v. *Conway*, 1 Ves. 427; *Bourke* v. *Ricketts*, 10 Ves. 330.) Lord *Alvanley* has observed, that the ground on which the Court gives 4*l.* per cent. interest in such cases is, "that the fund is supposed, in the course of the year, to come into the hands of the executor, and that the executor can

make 4*l.* per cent. of it here. If it were made out, indeed, that the fund was abroad, and greater interest made, it might be otherwise" (*Malcolm* v. *Martin*, 3 Bro. C. C. 54.)

Unless compound interest be directed by the will to be paid on legacies (*Arnold* v. *Arnold*, 2 My. & K. 365), interest will be computed on the principal, and not on the principal and interest (*Perkyns* v. *Baynton*, 1 Bro. C. C. 574; *Crackett* v. *Bethune*, 1 J. & W. 586); except under particular circumstances, as where an executor neglects to obey an express direction to accumulate: *Raphael* v. *Boehm*, 11 Ves. 92; 13 Ves. 590; *Dornford* v. *Dornford*, 12 Ves. 127.

As to whether a legacy or an annuity is given free from legacy duty, see *Haynes* v. *Haynes*, 3 De G. M. & G. 590; *Marris* v. *Burton*, 11 Sim. 161; *Banks* v. *Braithwaite*, 32 L. J. (Ch.) 35; *White* v. *Lake*, 4 L. R. Eq. 188; *In re Coles's Will*, 8 L. R. Eq. 271.

A gift of legacy duty payable on a specific legacy ranks as a pecuniary legacy, and in case of a deficiency of assets must abate along with other pecuniary legacies. *Farrer* v. *St. Catherine's College, Cambridge*, 16 L. R. Eq. 19.

Where the duty on some legacies is charged upon the residuary estate, which proves insufficient for this purpose, the legatees must themselves bear the duty to the extent to which the residue was insufficient to pay the same, and they cannot call upon other legatees whose legacies were not exempted from duty to abate in order to make such payment. *Wilson* v. *O'Leary*, 17 L. R. Eq. 419.

Currency in which legacies are payable.]—In the absence of the intention of the testator appearing upon the will, which would of course be complied with (*Lansdowne* v. *Lansdowne*, 2 Bligh. 91), it will be presumed that a testator intended legatees to be paid in the currency of the country in which he resided, even though he may charge lands in another country with their payment, in which the currency is different. See *Saunders* v. *Drake*, 2 Atk. 466; *Pierson* v. *Garnet*, 2 Bro. C. C. 28; *Malcolm* v. *Martin*, 3 Bro. C. C. 50; *Lansdowne* v. *Lansdowne*, 2 Bligh, 92; *Phipps* v. *Lord Anglesea*, 5 Vin. Abr. 208, pl. 8; 1 P. Wms. 696; *Wallis* v. *Brightwell*, 2 P. Wms. 88, 89; *Noel* v. *Rochfort*, 10 Bligh, N. S. 483; 4 C. & F. 158. And a legacy in a foreign country and foreign coin, as of sicca rupees, by a will in India, if paid by remittance to this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance: *Cockerell* v. *Barber*, 16 Ves. 461; *Campbell* v. *Graham*, 1 Russ. and My. 453; *Yates* v. *Maddan*, 16 Sim. 613.

HOWE *v.* EARL OF DARTMOUTH.
HOWE *v.* COUNTESS OF AYLESBURY.

May 22nd, 1802.

[REPORTED 7 VES. 137.]

CONVERSION OF RESIDUE BEQUEATHED TO PERSONS IN SUCCESSION.]—*General rule, that where personal property is bequeathed for life, with remainders over, and not specifically, it is to be converted into the Three per Cents., subject, in the case of a real security, to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.*

Bequest of personal estate not held specific merely from being combined with a devise of land.

WILLIAM EARL OF STRAFFORD, by his will, dated the 25th of October, 1774, gave to his wife Anne Countess of Strafford, *all his personal estate whatsoever* (except the furniture of Wentworth Castle) for *her life*, subject to the following outpayments and legacies. He also left to her all his houses, gardens, parks, and woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady Anne Conolly for her life: and then to the eldest son of George Byng, Esq.; and afterwards to his second, third, or any later sons he may have by the testator's niece Mrs. Byng; and then to the eldest son and other sons successively of the Earl of Buckingham by his niece Caroline, but all of them to be subject to the following outpayments and legacies. He left his wife the sum of 15,000*l.* to dispose of for ever as she pleases, and the value of 500*l.* in furniture in Wentworth Castle of whatever sort she chooses, else the whole furniture to be hers

if she meets with any difficulty in this disposition. He gave several legacies and annuities, and declared he would have all his debts paid, and gave all his servants a year's wages.

The testator died on the 10th of March, 1791. Anne Countess of Strafford died in his life, on the 9th of February, 1785. Lady Anne Conolly filed a bill for an account of the personal estate, &c. By a decree made at the Rolls on the 17th of May, 1793, the usual accounts were directed; and it was declared that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was directed, who were the next of kin of the testator at the time of his death.

The Master's report, dated the 7th of March, 1793, stated the account of the personal estate, part of which consisted of the following stocks and annuities, standing in the testator's name at his death:—

4320*l.* Bank Stock:

9572*l.* per annum Long Annuities;

750*l.* per annum Short Annuities.

Under orders made in the cause, the sums of 15,000*l.* and 4000*l.* had been paid in by the executors, and laid out in 3*l.* per cent. Consolidated Annuities.

By a decretal order, made on the 7th of May, 1796, the balance of the personal estate in the hands of the executors, and of the interest, &c., was ordered to be paid into the Bank; and that the executors should transfer the 4320*l.* Bank Stock, the 9572*l.* per Annum Long Annuities, and 750*l.* per Annum Short Annuities, to the Accountant-General, in trust in the cause; and that the said funds, when so transferred, should be sold with his privity; and that the money to arise by such sale should be laid out in the purchase of 3*l.* per Cent. Annuities, in trust in the cause, subject to a further order; and that the Master should appropriate a sufficient part of the said Bank Annuities, when purchased, to answer the growing payments of the several annuities; and that, as any of the annuitants should die, the funds appropriated respec-

tively should fall into the general residue, with liberty to apply; and it was ordered, that the interest of the residue of the said Bank Annuities after such appropriation, and also the interest and dividends of the said 4320*l.* Bank Stock, should be paid to the plaintiff Lady Anne Conolly for her life, and on her death any person or persons entitled thereto were to be at liberty to apply; and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the sum of 2067*l.* 6*s.* 1*d.*, the balance of the interest and dividends received by the executors and ordered to be paid into the Bank, it was ordered, that the remainder should be paid to Lady Anne Conolly; and also that 1846*l.* 9*s.* 7*d.*, cash in the Bank, which had arisen from interest of the funds in which part of the testator's personal estate had been invested, should be also paid to her; and that the dividends of 24,619*l.* 4*s.* 10*d.*, 3*l.* per Cent. Bank Annuities, in which the sums received by the executors from the personal estate had been invested, should from time to time be paid to her during her life, and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered, that the executors should get in the outstanding personal estate, and that so much thereof as should consist of interest, should be paid to Lady Anne Conolly, and so much as consisted of principal should be paid into the Bank, subject to farther order.

The Master's farther report, dated the 10th of December, 1796, stated that the Bank Stock and the Long and Short Annuities had been sold, and the produce laid out in 3*l.* per Cent Annuities.

Upon the death of the plaintiff Lady Anne Conolly, the suit was revived by her executors; and the cause coming on before Lord *Alvanley*, then Master of the Rolls, for farther directions on the subsequent report, it was insisted, on the part of Mr. Byng, that Lady Anne Conolly had received, for interest and dividends accrued on the Bank Stock and the Long and Short Annuities, and the produce thereof laid out in Bank 3*l.* per Cent. Annuities,

large sums more than she was entitled to, if those funds had been sold, as they ought to have been immediately after the testator's decease, and the produce invested in a permanent fund, viz., the 3*l.* per Cent. Consolidated Bank Annuities. The Master of the Rolls directed inquiries with reference to that question between the executors of Lady Anne Conolly and Mr. Byng, and the other parties interested in the residue of the personal estate; with liberty to present a petition to re-hear the order of 1796, as to the payments thereby directed to be made to Lady Anne Conolly.

The re-hearing was argued before Lord *Rosslyn*, but no judgment was given.

Mr. *Mansfield*, Mr. *Lloyd*, Mr. *W. Agar*, Mr. *Wingfield*, Mr. Serjeant *Palmer*, Mr. *Bell*, and Mr. *Richards*, for different parties, in support of the petition of re-hearing.

The tenants for life of such funds as Bank Annuities, carrying a higher interest, and Long and Short Annuities, wearing out rapidly, are not entitled to the enjoyment of them in specie; but there is a standing rule of the Court, for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3*l.* per Cents. No party ought to suffer by the circumstance, that what ought to have been done, and what the Court would have directed to be done, immediately on the testator's death, was not done. The state of this question is, that the late Lord Chancellor went out of office without having delivered any opinion upon the point; and Lord *Alvanley* thought he could not decide against the order of the Lord Chancellor; supposing his Lordship to have been of opinion, that there was something particular in this will, upon the distinction between the gift of a general residue for life, with remainder over, and a specific bequest of this sort of property; in which case it could not be sold, and the dividends follow, of course, from the death of the testator; even the rule, that takes place in general legacies, postponing the payment of interest to the end of

a year from the death, not attaching upon it. But there is nothing specific in this will. This is a mere gift of the residue of the personal estate for life, subject to the payment of debts, legacies, and annuities. Under every such will, the Court has always sold this sort of property, if there was any wearing out fund, not specifically given, or to any fund as to which the tenant for life had an advantage over those in remainder (*a*). This is to be found in every decree; and is so familiar, that no report of such a case is to be met with in print. *Cranch* v. *Cranch* (*b*); *Powell* v. *Cleaver* (*c*), and other cases, have been selected, proving the invariable rule to sell Bank Stock, Long and Short Annuities, leases, &c., when the Court is informed by the record of the nature of the property. The consequence is, the residuary legatee is not entitled to anything till the debts and legacies are paid, and the residue ascertained. An objection has frequently been made by

(*a*) *Gibson* v. *Bott*, 7 Ves. 89.

(*b*) James Cranch, by his will, dated the 22nd of June, 1791, after several legacies to his children, gave the residue of his money, lands, tenements, goods, chattels, or estates to his wife for life, and after her death to be equally divided among his children who should be living; and appointed his wife executrix. Decree for an account, such part as was already invested in Government securities was to be transferred to the Accountant-General; and the executrix admitting that 3943*l.* 13*s.* 9*d.* 5*l.* per Cent. Bank Annuities was standing in her name, it was ordered, that the same should be transferred, &c., and the dividends paid to her for life; with liberty for the plaintiffs to apply at her decease.

The Master's report, dated the 11th of July, 1797, stated, that the personal estate consisted of leasehold premises.

By an order, dated the 24th of July, 1797, it was, among other things, ordered, that the 5*l.* per Cent. Bank Annuities, should be sold, and the money laid out in 3*l.* per Cent. Annuities, the interest to be paid to her for life, with liberty to the parties interested in the residue after her death to apply. An inquiry was directed, whether it was for the benefit of the persons entitled to the clear residue of the personal estate to have the leasehold premises sold; and, if it would be for their benefit, it was ordered, that they should be sold; and that the money should be laid out in the 3*l.* per Cents; the dividends to be paid to her for life; with liberty to apply after her death.

(*c*) John Powell, by his will, dated the 8th of August, 1775, devised all his manors, and real estate to Cleaver and others for ninety-nine years; remainder to Arthur Roberts and his first and other sons in tail; remainder to William Roberts and his first and other sons in tail male; remainders over; and he directed his trustees, whom he also appointed his executors, to lay out the residue of his personal estate in the purchase of lands, to be settled to the same uses.

The bill was filed by the first tenant for life, and the usual decree was made. By an order dated the 21st of January, 1788, 552*l.* 3*s* 9*d.* Long Annuities, and 3000*l.* India Stock, standing in the testator's name at his decease, were directed to be sold, and the produce laid out in 3*l.* per Cent. Annuities; and as to 33,610*l.* Bank 4*l.* per Cent. Annuities, and 28,897*l.* Bank 5*l.* per Cent. Annuities, an inquiry was directed, whether the fund of the testator's estate would be in a better condition by selling the same and investing the produce in 3*l.* per Cent. Annuities; and the Master certifying that it would, an order was made on the 21st of May, 1788, for the sale of those funds, and investing the produce in the 3*l.* per Cents.

Elizabeth Hoadley by her will bequeathed the residue of her personal estate to Dr. Ashe for life, and after his decease to be divided among his children: to the sons at the age of twenty-one; to the daughters at that age or marriage.

An order was made, that 11,800*l.* Bank 5*l.* per Cent. Annuities should be sold, and the produce laid out in the 3*l.* per Cents.

Similar orders were made as to 5*l.* per Cent. Annuities in *Chancey* v. *Rees*, *Peppin* v. *Lovewell*, and *Dagley* v. *Leake*; and in *Griffiths* v. *Grieve*, as to 4*l.* per Cent. Annuities. See *Bartholomon* v. *Scholey*, as to Short Annuities.

an annuitant, when the executor has desired to pay the fund into Court, that it would stop the interest. But an executor makes those payments at his peril. The Court has sometimes ordered the interest to be paid to the tenant for life; but that must be considered to have been without prejudice. In the instance of a Short Annuity, the tenant for life would wear out the thing. Some certain rule must be established. The rights of the parties must be the same as if the testator had converted the property immediately before his death. That or some other definite time must be fixed by the Court. It cannot depend upon the account, the acting of the executor, &c. The possibility of collusion between the tenant for life and the executor must be attended to. Suppose the executor was himself tenant for life.

Mr. *Romilly* and Mr. *Trower*, for the executors of Lady Anne Conolly, in support of the decree.

The first question is, whether Lady Anne Conolly was entitled to the annual produce of the personal estate at the death of the testator; if not, the next consideration is, whether, the executors having paid it to her, and particularly the dividends of the Bank Stock, those payments ought to be called back.

The personal estate is given to her for life specifically. As this disposition is expressed, it is the same as if the testator had enumerated the particular articles, of which the personal estate consisted. He has not given his personal estate to his executors, in trust to sell, &c., and that what remains shall be given to those persons: but he has given the personal estate to them specifically, as he has given the land. The Lord Chancellor considered, that there was nothing in the will, which made it necessary for the executor to convert this property into any other fund. For many purposes a bequest of all the personal estate is considered specific; for instance, upon the question of exoneration, where there is a charge of debts. There is no doubt of the general rule: but this question does not depend upon it. In the case put by his Lordship, of a man having an annuity for the life of A., and

bequeathing his personal estate to A. for life, remainder to his son, there was a clear intention that it should be sold. But suppose he had expressly described the annuity, however absurd, it must be considered specific. If the only property was 40*l.* a-year, barely sufficient for a maintenance, and clearly intended for that purpose, upon this principle the rule must extend to that case. The rule is founded in convenience; but there is no fixed principle, that executors are bound of necessity to make the conversion at the testator's death, or any given time afterwards. The executor ought not to change a permanent fund producing a larger interest to another producing a smaller, if such conversion is not required for the payment of debts. The habit is to do it when the executor is called into this Court, not where he is not called upon, and no question is raised. If he is liable to question for not doing so, it must be upon the principle of devastavit. The consequence will be, that there will be no possibility of executing a will without the direction of the Court, if, though not called upon by the remainder-man, he must do it at his own peril immediately. No given period has been ascertained, after which the remainder-man shall have a right to call upon him. The Court makes the conversion, but does not consider the executor as having done wrong in not having converted. No instance can be found, where it has come into Court several years after the death, and the executor has been charged. The period of the conversion in this instance at all events ought to be, not the time of the testator's death, but the year 1796, when the order was made; for it was competent to them to call upon the executor at a prior time.

The second question is of considerable novelty, as to what is to be done with the dividends received, particularly upon the Bank Stock. With reference to the Bank Stock, as distinguished from the Annuities, no case has established that the executor had done wrong by paying to the tenant for life the interest of some permanent fund, though producing more than if the property was

invested in the 3*l.* per Cents.; and to make this party account for what she has received, that proposition must be made out. This must have often occurred. A considerable part of the property might have been out upon securities at 5*l.* per cent. If the tenant for life, to whom the interest was paid by the executor, died insolvent, would that be a devastavit? No such decree was ever made. Upon that hypothesis it would be necessary for the executor immediately to call in all the securities, Bank Stock, India Stock, mortgages, &c., and to invest the whole in 3*l.* per Cents.

The *Lord Chancellor* [*Eldon*] desired the counsel in reply not to trouble himself upon the point whether the bequest was specific, and to advert to the Bank Stock.

Mr. *Mansfield*, in reply.—In this respect there is no difference between the Bank Stock and the Annuities. The price is perfectly accidental, and is never considered. The Court says, first, Bank Stock is the stock of a trading company, not a government fund, secured by the Legislature. The former also produces a high dividend, and is therefore more liable to fluctuation and uncertainty. For these reasons, this Court never suffers those funds to remain which are considered hazardous, and, to a certain extent, wasteful. The tenant for life cannot have any more right to advantage in the shape of that large dividend, than of Long and Short Annuities. The Court goes further, ordering the conversion of 4*l.* per Cents., a government fund, probably on the principle that they are liable to be redeemed, and not so permanent a fund. With respect to refunding, these are trustees. Their conduct cannot affect the rights; and it happens that there are dividends now due to Lady Anne Conolly in Court, which, if the decision is against her, the executors have no objection to apply to the refunding, if it is to take place. If an executor had ignorantly and honestly made the payment, the Court would be unwilling to call upon him; but is there a doubt that the person receiving the payments would be called on? In a few years more these Short Annuities will expire. Suppose the whole

property was in these circumstances. It does not very frequently happen that any payment is made upon the residue before the interference of the Court, which prevents this accident. Several orders may, however, be found. In *Holder* v. *Holder* (*a*), an account was directed of all the excess that had been received of Short Annuities beyond 4*l.* per cent.

(*a*) In Chancery, May, 1789.

Where property is given to persons in succession specifically, they are entitled to enjoy it in specie without conversion.

Lord Chancellor Eldon.—No question arises upon this will, except whether this is a specific bequest of such personal estate as was the testator's at the time of his death. Lord *Rosslyn* is represented to have had considerable doubt whether it was not specific; and if it is, I agree, not only Lady Anne Conolly, up to the date of the decree, but afterwards, and Mr. Byng and the other persons in remainder, must take the specific produce of what is specifically given. But if it is so to be considered, the decree is not correct, considering the bequest specific to the date of that decree, and no longer. It is wrong, therefore, in any way.

As to whether the bequest was specific.

Upon the question, whether this is specific, it must be either upon the words describing the personal estate, or upon the construction of those words, coupled with the devise of all his landed estates.

Every devise of land must of necessity be specific, whether in particular or general terms; otherwise as to personal property and although by 1 Vict. c. 26, s. 24, every will must be construed with reference to the real and personal estates comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator,

With respect to the latter, every *devise of land*, whether in particular or general terms, must of necessity be specific, from this circumstance, that a man can devise only what he has at the time of devising. Upon that ground, in a case at the Cockpit, it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is.

But it is quite different as to *personal estate*. The question must be, *did he mean to dispose of what he had at the date of the will, or of that which he should have at his death?* If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy adeemed: *pro tanto* it is gone. If the question is, whether those subjects, to be acquired between the date of

his will and his death, should pass, I cannot say he did mean that. If not, it can only be specific thus: that the persons to take the personal estate he should have at his death in different interests should enjoy it as he left it.

unless a contrary intention shall appear by the will; the opinion appears generally to have prevailed that a residuary devise of land is also specific. See note, to *Ancaster* v. *Mayer*, ante, vol. 1, p. 723, and cases there cited.

Not one word of this will goes to that. It is given as "all his personal estate;" and the mode in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then, the Court says, *it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first;* and the thing is quite equal; for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If, in this case, it is equitable that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately, in order to yield an immediate interest to the tenant for life. As *in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that, of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth.*

Rule as to the conversion of perishable property given to persons in succession, not specifically.

Justice of the rule, as wasting property is converted for the benefit of persons in remainder, future interests for the benefit of the tenant for life.

As to the annuities charged upon this estate, the tenant for life, if entitled to the whole, would be properly paying out of the aggregate property the annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property which does not consist of perishable interests, and were not to be thrown in proportion upon the perishable part. The ordinary rule of apportioning requires, that, in some degree, a provision should be made out of those,

(the Short Annuities), if they remain, and not out of the 3*l.* per Cents. only.

A residuary legatee of personal estate does not take it specifically, except in cases where all the charges which would previously fall upon it are thrown upon other funds.

The cases alluded to, where personal estate has been taken to be specifically given, do not apply. First, where a residuary legatee takes it [the residue] as a specific gift, not subject to debts, the inference, that he is to take that personal estate, is not made, in general cases, upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix upon other funds charges that would primarily fall upon that fund; and that must be made out, not by conjectures, but by declaration plain, or manifest intention (*a*). That is the principle upon which it is agreed these cases are to be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land; which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific. I am clearly of opinion, therefore, that this is not a case in which the personal estate is in this sense specifically given, with a direction that it shall remain specifically such as it was at the testator's death; and the purposes for which it is given are those for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital bearing interest.

(*a*) See *Ancaster* v. *Mayer*, ante, vol. 1, p. 681, and note.

A residuary bequest of personalty will not be considered as specific, merely because it is comprised in the same clause as a residuary devise of land, which must be taken to be specifically given.

I was astonished when that was doubted. From general recollection, I had considered the practice to be, that the first moment the observation of the Court was drawn to the fact, the Court would not permit property to be laid out, or to remain upon such funds, under a direction to lay it out in government securities, but would immediately order it to be converted into that which the Court deems, for the execution of trusts, a government security.

Bank Stock not a government security,

I pass over what has been said as to real securities; for there is a great difference between real securities, or

Bank Stock, for instance, and government securities. Bank Stock is as safe, I trust and believe, as any government security; but it is not government security; and therefore this Court does not lay out, or leave, the property in Bank Stock; and what the Court will decree, it expects from trustees and executors; I will not state what the Court would do, where executors had not made these conversions. That depends upon many circumtances. But I abide by Lord *Kenyon's* rule in the case of Mr. Champion, an executor, before which time it was doubted whether an executor could lay out the property in the 3*l.* per Cents. Lord *Kenyon*, who was a repository of valuable knowledge, produced a dictum of Lord *Northington*, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that.

and must be sold.

What the Court will decree it expects from trustees, and will protect them in doing it.

It is not so in the case of a mortgage. The Court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person; and it is accident that some part of the assets will produce more interest than a genuine trust security. In some instances, there is little doubt, it may be not only for the benefit of the tenant for life, but for the substantial interest of the remainder-man, that the property should not be shifted from a good real security.

The Court does not call in real security without an inquiry.

The question then is, whether the Court will change the fund, not as between the remainder-man and the executor, but in a question between the tenant for life and the remainder-man; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those who represent him; for the justice of the case, if the tenant for life has received so much, would be, that he should bring it back in case of the executor, who paid him. If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide. I do not like to put it upon the possibility of collusion; but that is not to be totally neglected, for it may happen, that the executor himself

As to the time of conversion.

may be the tenant for life, and then he has an interest in delay. Of necessity there must be a great delay, before there can be a final decree in a cause of great property, and it may be very much protracted where there is an interest. However, I do not put it upon that. But if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered, to all practicable purposes as converted, when it could be first converted. That is the genuine inference from the other principle. If the Court has ever attended to the difficulties often thrown before it, with regard to perishable property of other kinds, as leasehold estate (*a*), &c., it never has as to stock. You can learn the price at which it might be converted on any day, and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor that it should be thrown into a lasting fund; and it is equal to all the parties interested. As to Bank Stock, the Court has ordered 4*l.* per Cents. and 5*l.* per Cents. to be sold and converted into 3*l.* per Cents., upon this ground, that, however likely, or not, that they may be redeemed, the Courts look at them as a fund that is not permanent, though it may remain for ever; and considers, that from that quality, there is an advantage to the present holder, who gets more interest, because they are liable to be redeemed (*b*). I do not know whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in Bank Stock in the execution of a trust to lay it out in government securities, for it is not a government security. Converting that, therefore, the executors would have done what this Court would have ordered, and that falls under the same consideration, and the advantage, if any, ought not to accrue to the tenant for life. The account,

Equity considers conversion effected when it could be first effected.

(*a*) *Gibson* v. *Bott*, 7 Ves. 89. The Court in laying out money in the funds does not attend to the difference in the price of stock.

The Court orders Bank Stock to be converted into 3*l.* per Cents.

(*b*) In a recent case, however, an executrix, who was also tenant for life under a will directing the residuary estate to be sold, and the proceeds invested in government or other good security, was held not to be personally liable for not converting into Consols a sum of Navy £5 per Cent. Annuities forming part of the residuary estate: *Baud* v. *Fardell*, 7 De G. Mac. & G. 628. And see now 22 & 23 Vict. c. 35, s. 32; and 23 & 24 Vict. c 38, ss. 11 & 12, and General Order of Feb. 1861; and *Hume* v. *Richardson*, 31 L. J. N. S. (Ch.) 713; and see note to *Brice* v. *Stokes*, post.

therefore, must go as to that, as well as the Long and Short Annuities, *from the time at which it would have been converted, if the observation of the Court had been drawn to the fact that the executors were possessed of those funds.*

This petition of rehearing is therefore well founded.

Where there is a general bequest of property of a perishable or wasting nature, such as Long Annuities or leaseholds, to persons in succession, an important question arises, whether it is to be converted into other property of a permanent nature, so as to insure the enjoyment of it by every person successively, or whether it is to remain in specie unconverted, leaving to those in remainder only a chance of enjoyment, or at all events of taking the property much diminished in value. It was decided by Lord *Eldon*, in the principal case, which appears to be the first reported case in which the subject was thoroughly discussed, that, as a general rule (and in the absence of any express or implied intention of the testator, that it is to be enjoyed in specie), perishable property is to be converted in such a way as to produce capital bearing interest, and put in such a state that the others may enjoy it after the decease of the first. *Tickner* v. *Old*, 18 L. R. Eq. 426; *Thursby* v. *Thursby*, 19 L. R. Eq. 406.

Upon the same principle, Lord *Eldon* lays it down, that reversionary property (a personal annuity, for instance), not to commence till the expiration of twenty years from the death of the testator, or payable on a contingency, given to persons in succession, ought to be similarly converted. "If, in the one case," observes his Lordship, "it is equitable, that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth." Ante, p. 305. And see the remarks of Lord *Brougham* in *Prendergast* v. *Prendergast*, 3 H. L. C. 218; *Wightwick* v. *Lord*, 3 Jur. N. S. 699; *S. C.* nom. *Lord* v. *Wightwick*, 4 De G. Mac. & G. 803; *Johnson* v. *Routh*, 3 Jur. N. S. 1048, 27 L. J. (Ch.) 305; *Countess of Harrington* v. *Sir*

William Atherton, 2 De G. Jo. & Sm. 352; and the observations of Lord *Cottenham*, in *Pickering* v. *Pickering*, 4 My. & Cr. 298.

The result of the rule laid down by Lord *Eldon*, in *Howe* v. *Lord Dartmouth*, appears to be, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, the interpretation the Court puts upon the bequest is, that the persons indicated are to enjoy the same thing in succession; and in order to effectuate that intention, the Court, as a general rule, converts into permanent investments so much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests. The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be, that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention: Per Sir *J. Wigram*, V. C., 3 Hare, 611.

A few instances may be given of the application of the rule laid down in the principal case.

In *Fearns* v. *Young*, 9 Ves. 549, the testator bequeathed to his wife the *interest of one-half of his property* during her life, with liberty to dispose of one-half of the said half as she might think proper, at her decease; the other half of that half should devolve at her decease to his daughter; and the other half of his said property he bequeathed to his said daughter. The testator was member of a partnership, the term of which expired thirteen months after his decease, and his proportion of the profits during that time amounted to the sum of 2070*l.* 13*s.*, which, according to the articles, was payable, one-half at the end of one year, and the other at the end of two years after the termination of the partnership. Lord *Eldon* allowed an exception to the Master's report, who had allowed the claim of the widow to 1035*l.* 6*s.* 6d., a moiety of the sum of 2070*l.* 13s. as being due to her in the nature of interest money accrued due after the death of the testator. "The rule," said his Lordship, "as to personal estate, is, that what is not specifically given, and consists of an interest wearing out, or an interest at present saleable, but in point of enjoyment future, the whole is converted into money in a question between the tenant for life and the remainder-man; and, though the general rule as to legatees is to give interest from the end of one year from the death, I have seen a great variety of decrees, directing inquiries, how

much of the fund had arisen from interest, and how much from capital; in order to determine between the tenant for life and the remainder-man. In this case, it is impossible to say the widow is to have nothing in the nature of interest upon the capital so formed at the end of thirteen months, on account of the times of payment at the end of two and three years; for it is clear, if the testator had died possessed of a bond, by the condition of which the money had been secured to him, to be paid in two and three years after his death, without interest, between the tenant for life and the remainder-man, a value must have been set upon it at that time, and of its present worth, at least the tenant for life would be entitled to interest. It is like a lease, to commence at the end of one or two years afterwards; but it is saleable immediately, and the sum produced would be a capital; the interest of which, from the end of one year, at least, ought to go to the tenant for life.

"In this case, then, the balance being ascertained at the end of thirteen months, the tenant for life must at least have interest upon such a sum as was at that time the value of the sum so ascertained; regard being had to the fact of the payment in moieties at the end of one and two years from that time. As to the year in which the profit was making, there is great difficulty; but, if the rule is, that between tenant for life and remainder-man, the former is entitled to what is actually produced, as interest from the death, it would be very hard upon the widow, that as it was employed in trade, and making a great deal more than 4 or 5 per cent., she shall not have either the profit or the interest. It is fair, that, if he bound himself to leave his capital in a trade, for the purpose of increase, still the value of the capital at the death, with the additional capital, whatever it might be ultimately, in consequence of being so employed, should yield an interest. It is not very well settled, whether the tenant for life is entitled to the interest from the death, or from a year afterwards. Baron *Thompson* once told me, that the first payment of an annuity was made at the end of a year, and so I took it: but, at that time, the opinion of several of the Masters was, that it was not to be paid until two years; and an annuitant is no more than tenant for life of part of the capital.

"In this case, I think, the defendant ought to have from the death, to the termination of the partnership, interest at a given rate, and not the profit; and then, at the end of the partnership, the capital, by the articles, was a dead fund, in moieties for one and two years; but she is not, therefore, to be deprived of interest upon it, but is entitled to interest upon the capital, though dead, with reference

to the circumstance, that one-half is not to be collected till the end of one year, the other not till the end of two years, calculating what was then the value of the sums respectively; for instance, the value of 1,000*l.*, payable at the end of one year, and another sum of 1,000*l.*, payable at the end of two years. The exception, therefore, must be allowed; and the minutes must be arranged upon that principle."

In *Fryer* v. *Butter*, 8 Sim. 442, the testator gave to M. W. an annuity of 40*l.* for life, payable out of his Long Annuities; and directed, that at M. W.'s death the principal out of which the annuity arose should go to his next of kin then living; and he further directed, that the annuity should be secured on his stock of Long Annuities. The testator died possessed of 509*l.* Long Annuities; Sir *L. Shadwell*, V. C., held, that a fund for payment of the annuity ought to be provided in the Three per Cents., and that the money required for that purpose ought to be raised by the sale of part of the Long Annuities, and that the remainder of the Long Annuities formed part of the testator's residuary estate.

In *Benn* v. *Dixon*, 10 Sim. 636, the testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life; and in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold, and was also seised of real, estate. It was held by Sir *L. Shadwell*, V. C., that the widow was not entitled to the leasehold property in specie during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it. "As the will stands," said his Honour, "there is nothing on the face of it to prevent the application of the rule of law that perishable property must be sold and converted into money, and invested in the funds, in order to produce the same interest to the remainder-man as was enjoyed by the tenant for life." And see *Lichfield* v. *Baker*, 2 Beav. 481; *Sutherland* v. *Cooke*, 1 Coll. 498; *Pickup* v. *Atkinson*, 2 Hare, 625; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Johnson* v. *Johnson*, 2 Coll. 441; *Chambers* v. *Chambers*, 16 Sim. 183; *Lichfield* v. *Baker*, 13 Beav. 447; *Oakes* v. *Strachen*, 13 Sim. 414; *Hood* v. *Clapham*, 19 Beav. 90; *Jebb* v. *Tugwell*, 20 Beav. 84; 7 De G. Mac. & G. 663; *Blann* v. *Bell*, 5 De Gex. & Sm. 658; 2 De G. Mac. & G. 775; *Howard* v. *Kay*, 27 L. J. N. S. (Ch.) 448; *Craig* v. *Wheeler*, 29 L. J. (Ch.) 374; *In re Shaw's Trusts*, 12 L. R. Eq. 125.

The mere absence of a direction to convert the property has never been construed to mean that it should be enjoyed in specie by legatees in succession; *Johnson* v.

Johnson, 2 Coll. 441; *Morgan* v. *Morgan*, 14 Beav. 72, 83.

Where perishable, wasting, or reversionary property is given to persons in succession *specifically*, in the strict sense of that term, then there can be no reason for converting it, (*Vincent* v. *Newcombe*, Younge, 599) although the trustees have had given to them a discretionary power to do so. Thus, in *Lord* v. *Godfrey*, 4 Madd. 455, the testator bequeathed the residue of the stocks and funds then or at his decease standing in his name, after payment of his debts, to trustees, to pay the interest and dividends to his wife for life, with remainder to C. L., and empowered his trustees at their discretion, to change the stock as often as to them should seem fit and proper. At the testator's death there were Long Annuities standing in his name, producing 365*l.* per annum. Sir *J. Leach*, V. C., held, that the widow was entitled to enjoy the Long Annuities in specie. "It would, I think," said his Honour, "be too much to intend that the testator meant to authorise the trustees at their pleasure, to diminish the gift he had before made to his wife. Such a power is given to trustees with a view to the security of the property, and not with a view to vary or affect the relative rights of the legatees." And see *Bethune* v. *Kennedy*, 1 My. & Cr. 114; *Evans* v. *Jones*, 2 Coll. 516; *Marshall* v. *Bremner*, 2 Sm. & G. 237; *Morgan* v. *Morgan*, 14 Beav. 72; *Mills* v. *Brown*, 21 Beav. 1; *Re Llewellyn's Trust*, 29 Beav. 171; *Fielding* v. *Preston*, 1 De G. & Jo. 438; *Boys* v. *Boys*, 28 Beav. 436.

If an intention can be collected from the will, that property shall be enjoyed in specie, as it existed at the death of the testator, although the property be not, in a technical sense, specifically bequeathed, it ought not to be converted. See *Pickering* v. *Pickering*, 4 My. & Cr. 299; *Harris* v. *Poyner*, 1 Drew. 181. And it has been observed by the Vice-Chancellor *Wigram*, in *Hinves* v. *Hinves*, 3 Hare, 611, that, in the more modern cases (unless perhaps, the decisions of the Vice-Chancellor of England, in *Mills* v. *Mills* (7 Sim. 501) and *Benn* v. *Dixon* (10 Sim. 636) must be excepted) the Court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded. See also *Mackie* v. *Mackie*, 5 Hare, 70, 77; *Holgate* v. *Jennings*, 24 Beav. 623; *Thursby* v. *Thursby*, 19 L. R. Eq. 395.

Thus it has been held, that an express direction for sale at a particular period, indicates an intention that there should be no previous sale or conversion: *Alcock* v. *Sloper*, 2 My. & K. 699; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Morgan* v. *Morgan*, 14 Beav. 74, 83; *Skirving* v. *Williams*, 24 Beav.

275 ; *Rowe* v. *Rowe*, 29 Beav. 276.

A direction that certain property—shipping—comprised in a residuary bequest should not be converted during a certain term of years is tantamount to a direction that it should remain in specie during that term, and the tenant for life will be entitled to the income of it while it so remains in specie (*Green* v. *Britten*, 1 De G. Jo. & Sm. 655), or until it is sold under a discretionary power vested in trustees. (*Ib.*)

So, where there was a direction in a will, that trustees should in their sole discretion sell so much, and such part of the residuary estate as they might think necessary, the Court would not interfere with their discretion, so as to prevent the tenant for life enjoying leaseholds in specie, especially as a considerable time had elapsed since such discretion had been exercised: *In re Sewell's Estate*, 11 L. R. Eq. 80.

And where the trust of a residue was to pay the *rents*, issues, profits, and annual proceeds to persons in succession, and it appeared that the testator had no other property except leaseholds, to which the term "*rents*" was applicable, Lord *Langdale* held the testator did not intend the leaseholds to be converted, saying, that he could not declare it to be a case of conversion without striking out altogether the word "*rents*" which was twice repeated in the will: *Goodenough* v. *Tremamondo*, 2 Beav. 512; *Skirving* v. *Williams*, 24 Beav. 275; *Vachell* v. *Roberts*, 32 Beav. 140.

Upon the same principle, in *Alcock* v. *Sloper*, 2 My. & K. 699, Sir *John Leach*, with regard to a general residuary bequest, upon trust to permit the testator's widow to receive the rents, profits, *dividends*, and annual proceeds thereof, for life, held, that the word "*dividends*" had reference to Long Annuities, of which part of the testator's estate consisted, and that the use of the word "*dividends*," was equivalent to a direction that the widow should enjoy the Long Annuities in specie.

These decisions were commented on by Sir *James Wigram*, V. C., in *Pickup* v. *Atkinson*, 4 Hare, 624; and although he appears to admit that some weight was given to the words "*rents*" and "*dividends*," he considers that they depended also upon other circumstances. In that case, where the testator died possessed of leaseholds, Long Annuities, and 3*l.* 5*s.* per Cent. Annuities, and ready money, he held, that a bequest of the rents and profits, dividends, and interest of a residue, comprising that property did not indicate an intention that it was to be enjoyed in specie; he thought that the correct reasoning upon those words, considered alone, must be analogous to that which is applied to the residue itself. The mere enumeration of particulars in the latter case does

not give a specific character to the bequest, because the whole clause is, in effect, a mere residuary bequest. He thought the same observation applied to a case like that; the enumeration of the particulars of income being nothing more than a gift of the income of the residue, which means income only. That conclusion appeared to his Honour to be put beyond dispute when it was considered that the words "rents, profits, dividends, and interest," in that case meant rents, profits, dividends, and interest, not of the property the testator then had, but of such property, real, personal, or mixed, as he might happen to have at the time of his death. The same conclusion arose from the words of the gift over, namely, "the whole of such residue of my said property."

However, in *Cafe* v. *Bent*, 5 Hare, 36, where there was a direction, which referred to the general residue of the estate (which included leaseholds), and not to leaseholds specifically bequeathed, that the trustees should retain a per centage on the *rents* to be collected, his Honour held the direction, fortified by other expressions in the will, was evidence that the testator contemplated the enjoyment in specie of the leasehold property comprised in the general residue, by the legatees. "Although this direction," he observed, "might perhaps be satisfied by applying it to such rents and profits of those leaseholds as should arise before a sale, I think the cases of *Pickering* v. *Pickering*, and *Goodenough* v. *Tremamondo*, are authorities for putting a more precise construction on the word 'rents,' and for holding that this will carries intrinsic evidence that the testator contemplated the enjoyment in specie of the leaseholds in question. This conclusion is fortified by the other circumstances to which I have referred, although those circumstances, standing alone, would not, in my judgment, have been sufficient evidence of the same intention. I have gone at some length into this question, because I consider myself bound by *Howe* v. *Lord Dartmouth*, except where I can find a necessary implication to the contrary." The circumstances referred to by his Honour were a *power of leasing*, which he thought might apply to the leaseholds specifically bequeathed, and a *direction to sell* particular parts of the personal estate; with regard to which the inference had been drawn in argument that the testator did not intend his residuary estate to be sold. His Honour observed, that, standing alone, it would have no effect on his mind; that the rule in *Howe* v. *Lord Dartmouth*, did not proceed upon the assumption that the testator intended his property to be sold, except so far as a testator might be presumed to intend that which the law will imply from

the directions in his will. That the rule proceeded upon this, that the testator has intended the enjoyment of perishable property by different persons in succession; and this the Court could only accomplish by means of a sale. To this also might be added the consideration that the argument might prove too much; for it would prove (if it proved anything) that no part of the residuary estate was to be sold,—a length to which it would be extremely difficult to carry the argument with success. See *Hunt* v. *Scott*, 1 De G. & S. 219; *Howe* v. *Howe*, 14 Jur. 359; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Crowe* v. *Crisford*, 17 Beav. 507; *Blann* v. *Bell*, 5 De G. & Sm. 658, 2 De G. Mac. & G. 775; *Harris* v. *Poyner*, 1 Drew. 174; *Hind* v. *Selby*, 22 Beav. 373; *Wearing* v. *Wearing*, 23 Beav. 99; *Bowden* v. *Bowden*, 17 Sim. 65; *Skirving* v. *Williams*, 24 Beav. 275; *Boys* v. *Boys*, 28 Beav. 436; *Thursby* v. *Thursby*, 19 L. R. Eq. 413.

Where, however, there was an express trust to convert the residuary personal estate into money, immediately after the testator's death, and to invest the amount "in the Bank of England," it was held that a mere direction to permit a person to receive all the rents and profits, *dividends*, or annual produce of his personal estate for life for his own use was not sufficient to qualify the direction to convert, and authorise the trustees to pay the tenant for life the dividends of the Long Annuities in specie: *Bate* v. *Hooper*, 5 De G. Mac. & G. 338, 344.

A direction that powers of attorney should be given to cestuis que trust entitled to receive in succession the income of property, may show the testator's intention that they were to enjoy it in specie. Thus, in *Neville* v. *Fortescue*, 16 Sim. 333, a testator bequeathed all his personal property by reference to limitations of real estate in strict settlement, and then directed that the persons entitled under the limitations should, under letters of attorney and powers from the trustees (which he empowered and required them to grant), receive the yearly dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property under the same restrictions and limitations, and to the same extent on which they held his real estates. Sir *L. Shadwell*, V. C., held that the tenant for life was entitled to the enjoyment of Long Annuities and Bank Stock in specie. "The testator," observed his Honour, "contemplated that various powers of attorney might be necessary to be executed by his trustees, in order to enable the persons who were to enjoy his personal estate in succession to receive the annual proceeds of it. This seems to me to demonstrate that he intended the cestuis que trust to enjoy his personal estate

in the state in which it might be at the time of his death."

But in a recent case a power given in a will by a testator to trustees, after a direction to sell and convert his real and personal estate, "to continue invested any of his government stocks and real securities," was held to be confined to such government stocks as were of a permanent character, and therefore not to include Long Annuities. See *Tickner* v. *Old*, 18 L. R. Eq. 422.

A direction to *divide* property *after* the death of the tenant for life, has been held to indicate an intention that the tenant for life should enjoy the property in specie: *Collins* v. *Collins*, 2 My. & K. 703. And see *Bethune* v. *Kennedy*, 1 My. & Cr. 114; *Pickering* v. *Pickering*, 2 Beav. 31; 4 My. & Cr. 289, 300; *Vaughan* v. *Buck*, 1 Ph. 75; *Oakes* v. *Strachey*, 13 Sim. 414; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Hubbard* v. *Young*, 10 Beav. 203; *House* v. *Way*, 12 Jur. 958; *Holgate* v. *Jennings*, 24 Beav. 623. The Vice-Chancellor *Wigram*, however, has observed, that he could not understand how a direction to divide could help the Court to determine what was to be divided; and he did not think that *Collins* v. *Collins*, turned on that: *Pickup* v. *Atkinson*, 4 Hare, 630. And it must be remarked, that, in some of the older cases, and in *Mills* v. *Mills*, 7 Sim. 501, the direction to divide was not noticed as in any way indicative of the testator's intention.

An exception from a general direction to convert, may show an intention that Long Annuities are to be enjoyed in specie. Thus, in *Wilday* v. *Sandys*, 7 L. R. Eq. 455, a testator gave his residuary estate to trustees in *trust to convert into money such parts thereof as should not at his decease consist* in money, *or* be invested in any of the *public funds or government securities*, and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths, upon other trusts. It was held by Lord *Romilly*, M. R., that the Long Annuities, of which the testator died possessed, were within the exception from the trust for conversion, and that the tenants for life were entitled to enjoy them in specie.

Where a testator seised of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate and also all his leasehold estates and all his goods, chattels and credits, and other personal estate to trustees for persons in succession, it was held that a power given to the trustees (amongst others) in case they should deem it beneficial so to do, to continue the collieries and either

to increase or abridge the business thereof, and to procure any lease of the collieries to be renewed, and to continue the business after such renewal, was a sufficient indication of intention on the part of the testator, that the tenants for life should enjoy the collieries in specie, especially as the tenant for life of one moiety —an unmarried daughter—had power to appoint any part not exceeding one half of the *rents*, issues and profits, interest, dividends and annual income of her moiety during the life-time of any husband for his use, *Thursby* v. *Thursby*, 19 L. R. Eq. 396.

Where a tenant for life is entitled to the enjoyment of leaseholds in specie, and they are taken by a public company, and the purchase-money is paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (8 & 9 Vict. c. 18, s. 74), and as leasehold property is of a wearing-out character, it is evident that the mere interest of the purchase-money cannot be considered an adequate compensation to the tenant for life. Thus, in *Jeffreys* v. *Conner*, 28 Beav. 328, leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in Consols. The tenant for life only received the dividends. It was held by Sir *John Romilly*, M. R., on her death (her representatives consenting to take it) that her estate was entitled, out of the Consols, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life, if the leaseholds had not been taken. See also *Morris* v. *Hodges*, 27 Beav. 625; and *In re Money's Trusts*, 31 L. J., N. S. (Ch.) 496.

Where the tenant for life in such case outlives the term for which he is entitled as tenant for life, he will become absolutely entitled to the whole fund: *In re Beaufoys's Estate*, 1 Sm. & Giff. 20; and see *Phillips* v. *Sargent*, 7 Hare, 33.

Where a tenant for life is entitled to enjoy in specie, the rule is that investments may remain, but debts must be realised; see *Holgate* v. *Jennings*, 24 Beav. 623, in which case Sir *John Romilly*, M. R., appears to have treated Turnpike Bonds as debts.

A power to vary securities is important, as showing that the testator did not intend his residue to remain on perishable securities: *Morgan* v. *Morgan*, 14 Beav. 72, 85. But it is said by Sir *John Leach*, V.-C., in *Lord* v. *Godfrey*, 4 Madd. 459, that such power is given to trustees with a view to the security of the property, and not with the view to vary or affect the relative rights of the legatees.

Where property the subject matter of a bequest given to persons in succession, is found by the trustees of a testator to be so laid

out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate; there the rule is not to convert the property, but to set a value upon it, and to give the tenant for life 4*l.* per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainder-man. See *Gibson* v. *Bott*, 7 Ves. 89; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Meyer* v. *Simonsen*, 5 De G. & Sm. 723; *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601; *Re Llewellyn's Trusts*, 29 Beav. 171. In *Brown* v. *Gellatly*, 2 L. R. Ch. App. 751, the testator Duncan Dunbar, after giving his property to trustees, with full power to realize the same when and in such manner as they might see fit, empowered them to sail his ships for the benefit of his estate, until they could be satisfactorily sold. The ships gained considerable earnings after the testator's death. It was held by Lord Justice *Cairns*, affirming the decision of Lord *Romilly*, M. R., that the tenants for life of the residuary estate were not entitled to the earnings of the ships as income, but (in this respect, varying the decision of the Master of the Rolls) that they were entitled to interest at 4*l.* per cent., on the value of the ships from the testator's death. "With regard to the ships," said his Lordship, "the testator has put them simply in the position of property, which was to be converted cautiously, and in proper time, and as to which, there was no breach of trust in the executors delaying to convert it, but, which was when converted, and when invested, to be enjoyed as the residue of his estate. In that state of things, it seems to me, that this case falls exactly within the third division pointed out by Sir *James Parker*, in the case of *Meyer* v. *Simonsen* (5 De G. & Sm. 723), and that a value must be set upon the ships, as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested, and become a part of the estate." See remarks on this case by *Bacon*, V.-C., in *Thursby* v. *Thursby*, 19 L. R. Eq. 408.

When according to the construction of a will the executors have full power to retain upon certain securities, for as long as they think it advantageous, the money invested by the testator in those securities, or to invest upon securities of any of those descriptions, the money obtained by the conversion of any part of the testator's estate, while any such securities form part of the testator's estate, the tenant for life is entitled to the specific income of the securities, just as

if they had been 3*l.* per cent. Consols: *Brown* v. *Gellatly*, 2 L. R. Ch. App. 751, 758.

When trustees do not convert securities which they were not authorised by the testator to retain, the tenant for life will only be entitled to an income from the testator's death, equal to the dividends of the Consols, which would have been produced by a sale and investment in Consols, at a year from the testator's death, and not as in *Robinson* v. *Robinson* (1 De G. Mac. & G. 247), to an income equal to interest at 4*l.* per cent. on their value: *Brown* v. *Gellatly*, 2 L. R. Ch. App. 751; *Lambert* v. *Lambert*, 16 L. R. Eq. 320, 943; see also *Dimes* v. *Scott*, 4 Russ. 195; *Taylor* v. *Clark*, 1 Hare, 161; *Gibbs* v. *Gibbs*, 26 L. T. (N. S.) 865.

It may here be mentioned that in a recent case where trustees were made liable for having improperly allowed perishable property to remain in specie and to be enjoyed by the tenant for life, they were allowed, by means of an inquiry in the same suit, to recover back against the estate of the tenant for life the amount overpaid to him: *Hood* v. *Clapham*, 19 Beav. 90.

And where trustees had improperly allowed a tenant for life under a will to receive the dividends of Long Annuities till they expired, instead of selling them and investing the proceeds in permanent securities, it was held that the estate of the tenant for life was after her death liable to recoup to the testator's estate the amount which would have been produced by the sale of the Long Annuities: *Tickner* v. *Old*, 18 L. R. Eq. 422.

And where trustees, having a discretion as to the time of conversion, allow reversionary property to remain unsold until it fall into possession, the tenant for life will be entitled to have paid to him in respect of interest out of the property, the amount which he would have received had the trustees sold the property at the end of one year after the testator's death. The principle upon which the Court will proceed in such a case, in calculating what is payable to the tenant for life, is to ascertain the value of the reversion, on the assumption that it was to fall in on the day when it actually fell in; this would represent the capital, had the sale not been delayed, and to pay the difference between the sum so ascertained, and the whole of the property which had fallen into possession to the tenant for life, as representing the income which he would have received had the sale not been delayed: *Wilkinson* v. *Duncan*, 23 Beav. 469; see *Cox* v. *Cox*, 8 L. R. Eq. 343.

HOOLEY *v.* HATTON.

16th May, 1772; *6th Feb.* 1773.

[REPORTED 1 BRO. C. C. 390, n.]

REPETITION OF LEGACIES.]—*A larger legacy given by a codicil held not to be a repetition of a smaller legacy given by a will, it being, in the absence of internal evidence to the contrary, accumulative.*

S. C., 2 Dick. 461; Lofft, 122, nom. *Hatton* v. *Hooley.*

The same specific thing or corpus cannot be given twice.

With regard to legacies of quantity, if a legacy of the same amount is given twice for the same cause, and in the same act, and totidem verbis, or only with small difference, it will not be double: but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation.

THE Lady Isabella Finch, by her will (*a*), bearing date the 30th of August, 1768, gave to Lydia Hooley, her woman, the plaintiff, a legacy of 500*l.* The will was executed in the presence of two witnesses.

By a codicil, she gave Lydia Hooley 60*l.*, to be paid to her.

She afterwards made a second codicil, dated the 28th of October, 1769, in these words:—"I add this codicil to my will: I give Lydia Hooley 1000*l.*" This was in her own handwriting, but not executed before witnesses.

The plaintiff filed her bill for the said legacies and annuity. The question was, whether the last legacy alone

(*a*) In this report of *Hooley* v. *Hatton*, the codicils of Lady Isabella Finch are not set forth in the order in which they ought to stand. By an extract from the registry of the Prerogative Court of Canterbury, it appears that the legacy given to her maid was in these words:—"I give to my woman Lydia Hooley £500, to be paid to her within three months after my decease."

The first codicil was in these words:—"October 28th, 1769.—This codicil I add to my will. I give 1000*l.* to Lydia Hooley.—Cecilia Isabella Finch."

The second codicil was as follows:—"I Lady Cecilia Isabella Finch, do desire this paper writing may be accepted and taken as a codicil to my will. I give to my servant Lydia Hooley, over and besides what I have left her by my will, an annuity of 12*l.* per annum for her life, to be paid quarterly, on the usual days of payment; the first of the said payments to commence on the first of the said days which shall happen after my decease. Lady Isabella Finch further orders the sum of 60*l.* to be paid to Rebecca Hooley.—Cecilia Isabella Finch."—Note by Mr. Miller, 2 Russ. 269.

passed, or the legatee should have both the 1000*l.* and the 500*l.*

The Master of the Rolls (Sir *Thomas Sewell*) had decreed both to the plaintiff, and the defendant appealed to the Chancellor (Lord *Apsley*), who was assisted by the Lord Chief Baron *Smythe*, and Mr. Justice *Aston* (*a*).

(*a*) Sir *S. S. Smythe*, C. B., and Sir *Richard Aston*, J., had, previous to the Great Seal being delivered to Lord *Apsley* as Chancellor, been with him Lords Commissioners.

This case, after having been argued very much at large (Lofft, 122), stood over till Hilary Term, when the Court gave judgment.

Mr. Justice Aston.—There is in this case no internal evidence; therefore, we must refer to the general rule of law.

The counsel applied the rules laid down in the case of *The Duke of St. Albans* v. *Beauclerk* (*b*). It is evident those rules are not general, but go on the particular circumstances of that case. It was contended there, that the fourth codicil was to stand in the room of the first.

(*b*) 2 Atk. 636.

There are four cases of double legacies:—

First, when the same specific thing is given twice, Cujacius takes a distinction between the same *res* and the same *quantity*. In the first case, it can take place but once, "*at eadem quantitas sæpius præstari potest:*" Dig. l. 22, tit. 3, l. 12; Cuj. op. t. 4, 381, 382.

Secondly, where the like quantity is given twice, Lord *Hardwicke*, in *Duke of St. Albans* v. *Beauclerk* (*c*), alluding to the particular circumstances of the case, laid down, one only should be taken, unless an intention appeared to the contrary: Dig. 34, tit. 4, l. 9; but nothing can be collected from hence, as the title of the Digest must be attended to, which expressly says *animo adimendi:* Godolphin's Orphan's Legacy, pt. 3, c. 26, s. 46; Swinb. 526, 530, edit. 1728, where 100*l.* and 100*l.* [are given by different instruments], the legatee [is] entitled to both.

(*c*) 2 Atk. 638.

The doctrine from the repetition of two equal sums in one will being bad, and in a will and codicil being good, attributing the former to forgetfulness, is strange. The case of the Slaves, Dig. 34, tit. 1, l. 18, and that in 2 D'Aguesseau, Pleading the First, page 21, are upon

entirely different principles. It would be strange to suppose Lord *Hardwicke* applied this as a general rule, which would be inconsistent with his recognising (as he did expressly) the authority of Swinb. 526, 530; but said, that the case before him was different, from the internal evidence.

In regard to the cases in the Roman law,—first, where equal sums are given in two distinct writings, both shall pass by the Roman law, and the decisions of this Court are agreeable thereto: Dig. 22, tit. 3, l. 12; and Golthofred's note *in Diversis Scripturis*, Dig. 30, tit. 1, l. 34; *in Eadem Scripturâ*, Cujacius, 4, 311, distinguishes between a *corpus* and quantity: Voet on 31 & 32 Digest; Godolphin, pt. 3, c. 26, s. 46; Swinburne, 526; Ricard, Traité des Donations, Vol. 1, p. 419, 420, 421; *Wallop* v. *Hewett*, 2 Ch. Rep. 70; *Newport* v. *Kynaston*, Rep. t. Finch. 294; Menochius *de Præsumptionibus*, l. 3; 1 Ch. Rep. 58.

Thirdly, as to a less sum in the latter deed, as 100*l.* by will, and 50*l.* by the codicil, the legatee shall take both: Godolphin, pt. 3, c. 25, s. 19; *Ridout* v. *Payne* (*a*), *Pitt* v. *Pidgeon* (*b*).

(*a*) 1 Ves. 1.

(*b*) 1 Ch. Ca. 301.

Fourthly, as to a larger sum after a less, Ricard, Vol. 1, p. 451 (Traité des Donations), folio edition, says, where they are in the *same* instrument, the two sums are not blended, but the legatee has two legacies; and the heir must show that the one was meant to be blended with the other, the presumption being in favour of what is written: *Windham* v. *Windham* (*c*), *Pitt* v. *Pidgeon* (*d*) *Masters* v. *Masters* (*e*).

(*c*) Rep. t. Finch, 267.

(*d*) 1 Ch. Ca. 301.

The law seems to be, and the authorities only go to prove the legacy not to be double where it is given for the *same cause* in the *same act*, and *totidem verbis*, or only with small difference; but where in *different* writings there is a bequest of equal, greater, or less sums, it is an augmentation, and therefore Lydia Hooley is entitled to both the sums of 500*l.* and 1000*l.*

(*e*) 1 P. Wms. 421, 423; and see *Curry* v. *Pile*, 2 Bro. C. C. 225.

Lord Chief Baron Smythe.—I am clearly of the same opinion, and therefore shall be very short.

The intention is the clearest rule; but it is admitted on all hands, here is no internal evidence; we therefore must refer to the rule of law. The rule of law is different with respect to a *corpus* and to quantities.

On the other side was quoted *The Mayor of London* v. *Russell*, Rep. t. Finch, 290, where the words were satisfied by some goods. In *The Duke of St. Albans* v. *Beauclerk*, the last codicil was evidently the same as the first.

(*a*) Lord *Apsley* was afterwards Earl of Bathurst.

Lord Chancellor Apsley (*a*).—It would be sufficient for me to say, I am of the same opinion, if Mr. Justice *Aston* had not referred to me with respect to some of the cases.

By the civil law, where two pecuniary legacies were given by the *same* will, the legatee must prove it was to be doubled; but where the two bequests are in *different* writings, there the presumption shall be in favour of the legatee.

No argument can be drawn, in the present case, from internal evidence; we must therefore refer to the rule of the civil law.

In the case of *The Duke of St. Albans* v. *Beauclerk*, Lord *Hardwicke* laid down the rule as applicable to that case, and not as a general rule. "This question," said Lord *Hardwicke*, "divides itself into different parts. I am of opinion, that, upon the reason of the thing, and according to the best writers, these legacies, being in *different* writings will make no difference in this case." Neither was it put upon being *one* instrument. Certainly, they are different: "And as the will and codicil make but one will." Lord *Hardwicke* quoted Gothofred, "*immo hæres priorem probare inanem esse non tenetur*," but did not speak of proving both will and codicil, as he is represented to do in the report. Then Lord *Hardwicke* considered the internal evidence, and added, "By the power reserved in her will, she has shown her intent to make them *one* instrument" (*b*), which words are omitted in the report.

(*b*) The Lord Chancellor read the words marked with inverted commas, from Lord *Hard-*

Lord *Hardwicke* probably thought that Sir *Joseph Jekyll*, in *Masters* v. *Masters*, gave two reasons, where he

seems to give only one. I will hazard a conjecture upon the pointing of the report, 1 P. Wms. 424; the semicolon in the passage "should not be taken as a satisfaction unless so expressed; that it was," &c., was wrongly placed, and should be after the words "that it was;" by which means the passage would stand, "should not be taken as a satisfaction, unless so expressed that it was; as if both legacies had been given by the same will," &c. This case, therefore, is an authority in point, because there are two distinct writings. *wicke's* original note.

So in *Wallop* v. *Hewett*, 2 Ch. Rep. 70. The Registrar's book shows that the case went upon the general doctrine of the civil law, and not on any internal evidence.

His Lordship further cited *Windham* v. *Windham* (*a*), *Mayor of London* v. *Russell* (*b*), *Newport* v. *Kynaston* (*c*), *Pitt* v. *Pidgeon* (*d*), 3 Huber Prælectiones Leg. Civ. 122, and *Sterling's Case*, in Scotland, 2 Fountainhall, 231; and concluded with saying, I have therefore the satisfaction to think we confirm Lord *Hardwicke's* opinion.

(*a*) Rep. t. Finch, 267.
(*b*) Rep. t. Finch, 290.
(*c*) Rep t. Finch. 294.
(*d*) 1 Ch. Ca. 301.

The decree of the Master of the Rolls affirmed.

Hooley v. *Hatton* has usually been referred to as containing a sound exposition of the law as to the repetition of legacies, when the point to be determined is, whether a second legacy is to be taken as substitutional or accumulative. See *Foy* v. *Foy*, 1 Cox, 164; *Ridges* v. *Morrison*, 1 Bro. C. C. 390; *Coote* v. *Boyd*, 2 Bro. C. C. 529; *Barclay* v. *Wainwright*, 3 Ves. 465; *Suisse* v. *Lowther*, 2 Hare, 432; *Wilson* v. *O'Leary*, 12 L. R. Eq. 531; 7 L. R. Ch. App. 448. And in the case of *Heming* v. *Clutterbuck*, 1 Bligh, N. S. 492, in the House of Lords, Lord *Eldon* said that the general principles upon which cases of this kind are to be decided, are so accurately laid down in the case of *Hooley* v. *Hatton*, that it was unnecessary for him to trouble their Lordships further than by stating it. The rules of the Court of Chancery, and the rules of the civil law upon the subject, were there discussed by the late Mr. Justice *Aston*, and afterwards applied by the Lord Chancellor.

As to the question whether successive appointments are cumulative or substitutionary, see *England* v. *Lavers*, 3 L. R. Eq. 63.

Double gift of the same specific

thing.]—With regard to the first case mentioned by Mr. Justice *Aston*, it is clear that where the same specific thing or *corpus* is given, either in the *same* instrument or in *different* instruments, in the nature of the thing it can but be a repetition; where, for instance, there are two gifts of a ruby ring, and there is no pretence that there are two ruby rings. See *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 638; *Ridges* v. *Morrison*, 1 Cro. C. C. 392; *Suisse* v. *Lowther*, 2 Hare, 432; *Roxburgh* v. *Fuller*, 13 W. R. (M.R.) 39.

Legacies of quantity given by different instruments.]—It is equally clear, as is laid down by Mr. Justice *Aston*, that where a testator, by *different* testamentary instruments, has given legacies of quantity *simpliciter* to the same person, the Court considering that he who has given more than once, must *primâ facie* be intended to mean more than one gift, awards to the legatee all the legacies; and it is immaterial whether any subsequent legacy is of the same amount (*Wallop* v. *Hewett*, 2 Ch. Rep. 70; *Newport* v. *Kynaston*, Rep. t. Finch, 294; *Baillie* v. *Butterfield*, 1 Cox, 392; *Forbes* v. *Lawrence*, 1 Coll. 495; *Radburn* v. *Jerris*, 3 Beav. 450; *Lee* v. *Pain*, 4 Hare, 201, 216; *Roch* v. *Callen*, 6 Hare, 531; *Russell* v. *Dickson*, 4 H. & L. 304), or less (*Pitt* v. *Pidgeon*, 1 Ch. Ca. 301; *Hurst* v. *Beach*, 5 Madd. 358; *Townshend* v. *Mostyn*, 26 Beav. 72; *Wilson* v. *O'Leary*, 12 L. R. Eq. 525; 7 L. R. Ch. App. 448; *Walsh* v. *Walsh*, 4 I. R. Eq. 396), or, as in the principal case, is larger than the first (*Suisse* v. *Lowther*, 2 Hare, 424; *Hertford* v. *Lowther*, 7 Beav. 107; *Lyon* v. *Colville*, 1 Coll. 449; *Brennan* v. *Moran*, 6 Ir. Ch. Rep. 126; *Cresswell* v. *Cresswell*, 6 L. R. Eq. 69, 76; *Wilson* v. *O'Leary*, 12 L. R. Eq. 525; 7 L. R. Ch. App. 448); *à fortiori* will the legatee be entitled to both legacies where there is any variation as to the mode or times of payment of each legacy, as, where the legacy given by a will, and that given by a codicil, are payable at different times, carry interest from different dates, are given over to different persons, (*Hodges* v. *Peacock*, 3 Ves. 735, 737; *Mackensie* v. *Mackensie*, 2 Russ. 262; *Bartlett* v. *Gillard*, 2 Russ. 149; *Guy* v. *Sharp*, 1 My. & K. 589; *Wray* v. *Field*, 6 Madd. 300; *S. C.*, 2 Russ. 257; *Watson* v. *Reid*, 5 Sim. 431; *Strong* v. *Ingram*, 6 Sim. 197; *Robley* v. *Robley*, 2 Beav. 95; *The Attorney-General* v. *George*, 8 Sim. 138; *Lee* v. *Pain*, 4 Hare, 201, 223), or are given upon or for different trusts and purposes (*Sawrey* v. *Rumney*, 5 De G. & Sm. 698), as where a legacy in one instrument is to the separate use of a married woman, and in another a legacy is given to her not to her separate use: *Spire* v. *Smith*, 1 Beav. 419.

The result is the same where the gifts are not *ejusdem generis*, see *Masters* v. *Masters*, 1 P. Wms. 421, 423; in which case an annuity, though of greater value, was held not to be a substitution for a legacy.

It will be observed, that, in the second codicil of Lady Isabella Finch (as taken from Mr. Miller's note), a legacy was expressed to be given to Lydia Hooley, "over and besides" what the testatrix had left her by her will; it does not, however, appear that any conclusion was drawn from those words, to the effect, that, as the testatrix, when she wished to give anything in addition, knew how to express herself, that therefore, when she did not so express herself on conferring a gift, it ought to be taken as substitutional and not accumulative. Some weight, however, seems occasionally to have been given to such words: *Moggridge* v. *Thackwell*, 1 Ves. jun. 464; *Barclay* v. *Wainwright*, 3 Ves. 466; *Mackensie* v. *Mackensie*, 2 Russ. 273; *Townshend* v. *Mostyn*, 26 Beav. 72. And in *Allen* v. *Callow*, 3 Ves. 289, Lord *Alvanley*, referring to the circumstance that one legacy was expressly given *in addition* to another, said, "That is not an insignificant circumstance, but it is not decisive, for the same thing was done in *Hooley* v. *Hatton*; but it does strengthen the argument of those who contend that one of those dispositions was substituted for the other." See also the observations of Lord Chancellor *Sugden* in *Russell* v. *Dickson*, 2 D. & War. 133. See *S. C.* affirmed Dom. Proc. 4 H. L. Cas. 293. And in *Lee* v. *Pain*, 4 Hare, 201, 221, Sir *J. Wigram*, V.-C., after examining all the authorities, and observing that the Lord Chancellor *Sugden* had stated, with great accuracy, all that could be said upon the subject, adds: "Upon these authorities it is that I found the observation, that it may well be doubted whether the words in question can safely be relied upon, except in corroboration of an argument arising from other circumstances,—whether the use of superfluous words in one part of a will is alone sufficient to reduce the proper effect of words in another part of the same instrument,—whether, in such a case, the rule *expressio eorum quæ tacitè insunt nihil operatur*, ought not to be applied." But, in *Lee* v. *Pain*, the argument founded upon the words "in addition" was fairly met by the observation, that in other cases, in the first codicil, some of the legacies given thereby were expressed to be given *in lieu* of those given by the will: and the answer to the question, why the testatrix did not, in the case of a particular legatee, as in other cases, say that her legacy was in *addition* to that given by the will, was by way of retort, why did she not in that, as in the case of other legacies given in the same codicil,

say that substitution was intended, if such were her intention? See 4 Hare, 221, 233.

But although the legacies are in *different* instruments, if they are not given *simpliciter*, but the motive of the gift is expressed, and in such instruments the *same motive* is expressed, and the *same sum* is given, the Court considers these two coincidences as raising a presumption that the testator did not by a subsequent instrument mean another gift, but meant only a repetition of the former gift: *Hurst* v. *Beach*, 5 Madd. 358; *Benyon* v. *Benyon*, 17 Ves. 34.

But the Court raises this presumption only where the double coincidence occurs, of the *same motive*, and the *same sum* in both instruments. It will not raise it, if in either instrument there be *no motive*, or a *different* or *additional motive*, expressed, although the sums be the *same*. Thus, in *Roch* v. *Callen*, 6 Hare, 531, where a testatrix bequeathed an annuity to her "servant" E. H., and by a codicil three years afterwards, bequeathed an annuity of the same amount to her "servant" E. H., Vice-Chancellor *Wigram* held the latter annuity to be cumulative, as the word "servant" did not express the motive, but was only descriptive. So in *Ridges* v. *Morrison*, 1 Bro. C. C. 388, the testator by his will gave several legacies, and among the rest, to Nicholas and Mary Layton, the children of his nephew Isaac Layton, 500*l.* each; and by a codicil written under his will, he gave to T. Ashley, 20*l.*; and "to Nicholas Layton, that I put apprentice to a grocer, near Cripplegate, 500*l.*;" Lord *Thurlow* held that Nicholas Layton was entitled to both legacies. "Where," said his Lordship, "the *same* quantity is given, with any additional cause assigned for it, or any implication to show that the testator meant that the same thing, *primâ facie*, should accumulate, the Court has decided in favour of the accumulation. In the present case it happens that an additional cause or mark of favour has been mentioned in the codicil, which proves that the testator meant and intended an accumulative legacy. Considering the slight inferences made in former cases (and which, I must own, have tended to throw property into jeopardy and uncertainty), such an inference as arises in this case is sufficient to turn it the other way, and to induce the Court to say, that it operates as an accumulation. In the will, the legacy of 500*l.* is given to Nicholas Layton (the testator enumerating him among the other children of Isaac Layton), upon the general consideration of favour which the testator bore towards the family; the other legacy of 500*l.* in the codicil is given with this additional mode of description adjoined to it: 'To Nicholas Layton, the child whom I have put out an apprentice;' which circumstance

marks the legatee as a peculiar object of favour, and, consequently, such an inference of the testator's intention as to induce the Court to say it is an additional legacy." And see *Mackinnon* v. *Peach*, 2 Kee. 555. It ought, however, to be mentioned, that Lord *Thurlow*, in *Ridges* v. *Morrison*, though professing to adhere to the case of *Hooley* v. *Hatton*, yet says, that where the same quantity has been given, and *no additional reason* is assigned for a repetition of the gift, the Court has inferred the testator's intention to be the same, and has rejected the accumulation: 1 Bro. C. C. 393; and see *Moggridge* v. *Thackwell*, 1 Ves. Jun. 473, and the remarks of Sir *W. Grant*, in *Benyon* v. *Benyon*, 17 Ves. 42, upon what Lord *Thurlow* said in those cases, which has probably been misreported; for it has been clearly settled, as was laid down in the principal case, that the mere fact of the gift of equal legacies, by *different* instruments, will not indicate an intention against accumulation. See also *Lobley* v. *Stocks*, 19 Beav. 392.

Nor will the presumption that repetition only, and not accumulation was intended, arise, although the *same* motive be expressed in different instruments, if the *sums are different*. Thus, in *Hurst* v. *Beach*, 5 Madd. 352, the testatrix by her will, after giving several legacies, adds, "I also give and bequeath to John Bach (meaning John Beach), now living with me, the sum of 300*l.*; all which said legacies I direct and desire may be paid immediately after my decease, and bear legal interest from my death till paid." By a codicil, after giving several legacies of 500*l.* each, the testatrix adds, "To my man-servant, John Beach, a like legacy or sum of 500*l.*" The testatrix then gives a like sum of 500*l.* to her maid-servant; and all these legacies she directed to be paid at the end of six months after her decease. Sir *J. Leach*, M.R., held that John Beach was entitled to both legacies. "The presumption," said his Honor, "cannot be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different: and upon the face of these instruments the defendant is entitled to both sums." And see *Lord* v. *Sutcliffe*, 2 Sim. 273.

Where, in different testamentary instruments, the effect of the first gift would depend in some measure on the events which should happen amongst the legatees, repeated bequests have been construed as substitutionary, from changes among the legatees, or alterations in their position, which had occurred between the dates of the several instruments. Thus, in *Allen* v. *Callow*, 3 Ves. 289, the testatrix, by will, dated in April, 1774, gave 500*l.* in trust for E. B. for life, with remainder to her children living at her

death. E. B. died in July, 1782, leaving four children. In December, 1782, one child died. By a codicil of May, 1785, the testatrix gave to the three surviving children, by name, the sum of 500*l.* in certain specified proportions, and directed that the 500*l.* should be vested in the name of one of the trustees in the will. Lord *Alvanley*, after noticing that in one instance, where the testatrix intended a second legacy to be additional, she had so expressed herself in terms, drew his conclusion, that the 500*l.* given by the codicil was a substitution for that given by the will, in consequence of the altered state of the family. In *Osborne* v. *The Duke of Leeds*, 5 Ves. 369, the testator gave 10,000*l.* to a son, named, and 10,000*l.* each to after-born children. By a codicil he afterwards gave 10,000*l.* to a child by name, born after the date of his will, and a few weeks before the date of the codicil. Lord *Alvanley*, after adverting to the leaning of the Court against double portions, relied upon the birth of the child after the will as explanatory of the reason why the codicil was made. With reference to these cases it has been observed by Sir *J. Wigram*, V.-C., in *Lee* v. *Pain*, 4 Hare, 243, "that the disposition by the first instrument was in a sense contingent, or at least dependent for its results upon future events affecting the class of persons existing, or to exist, in whose favour the gift was made; and between the original and the later instrument, circumstances occurred which enabled the testator to provide with certainty for that which, at the time of making the will, was necessarily contingent. The Court thought the inference irresistible, that a testamentary disposition, adapted only to the altered circumstances of the case, must necessarily have been intended to supersede the earlier bequest."

Where a second instrument expressly refers to the first, although the legacies given in each to the same person may be of different amounts, it may appear, from intrinsic evidence, upon the true construction of the words in the second instrument, that the latter gift was intended to be substitutional: *The Mayor of London* v. *Russell*, Rep. t. Finch, 290; *Martin* v. *Drinkwater*, 2 Beav. 215; *Bristow* v. *Bristow*, 5 Beav. 289; *Currie* v. *Pye*, 17 Ves. 462.

So, where a codicil furnishes intrinsic evidence that the testator is thereby revising, explaining, and qualifying his will, legacies may be construed to be substitutional: *Moggridge* v. *Thackwell*, 1 Ves. Jun. 464; 3 Bro. C. C. 517; *Fraser* v. *Byng*, 1 Russ. & My. 90.

Where a later instrument, as to the legacies, appears to be a mere copy of the former, it will so far be held substitutional. Thus, in *Coote* v. *Boyd*, 2 Bro.

C. C. 521, Belt's edit., Sir Eyre Coote by his will had disposed of several real estates, and of his personal estate. Afterwards going to India, he made a codicil to his will, dated 9th October, 1780, beginning with the words, "This is a codicil to the will," &c.; by this codicil he ratified his will, and gave a legacy to his wife of 10,000*l.*; he gave several other legacies, and made his brother, the Dean of Kilfenora, residuary legatee. He afterwards went to a different part of India, and then made another codicil, in December, 1780, in nearly the same words with the former, and the residuary legatee the same: it contained only one alteration,—a legacy to a Miss Monkton. It was insisted by the legatees, that these were duplicated legacies. But Lord *Thurlow* held, that the last codicil alone should stand, it being evidently intended to be substituted for the first. "All the cases," said his Lordship, "were gone through in argument, from the civil, the canon, and our own law. I do not repeat them, because I refer entirely to the argument of Mr. Justice *Aston*, in *Hooley* v. *Hatton*, who went through the doctrine of them all with a particularity, method, and sufficiency, seldom to be met with; and from that argument, I take it, was the result, that when the same legacy is given in a will and a codicil, the Court generally takes it as accumulative, but that the Court has not considered the presumption as very strong, but slight circumstances have been held to control it. Where it is evident the testator meant to repeat the legacies, they are not duplicated. I think here the testator meant to leave but one codicil, and only to add the legacy to Miss Monkton. It would be extraordinary he should repeat exactly the same legacies to persons standing in so different degrees of relationship to him as the several legatees, and that the residuary clause should be exactly the same in both." And see *Barclay* v. *Wainwright*, 3 Ves. 462; *Attorney-General* v. *Harley*, 4 Madd. 263; *Hemming* v. *Gurrey*, 2 S. & S. 311; 1 Bligh, N. S. 479; *Gillespie* v. *Alexander*, 2 S. & S. 145; *Campbell* v. *Lord Radnor*, 1 Bro. C. C. 271; *Tuckey* v. *Henderson*, 33 Beav. 174; *Hinchcliffe* v. *Hinchcliffe*, 2 Drew. & Sm. 96; *Roxburgh* v. *Fuller*, 13 W. R. (M.R.) 39. And see *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636, some remarks in which cannot be reconciled with the more modern authorities.

The principle, however, of these cases does not appear to be applicable, where a sum is given by way of appointment by will, out of a particular fund, and a sum of similar amount is bequeathed to the same person by a codicil out of the general assets, for in such a case the gifts will be

cumulative: *Tuckey* v. *Henderson*, 33 Beav. 174.

In the class of cases within which *Coote* v. *Boyd* falls, all the legatees mentioned in the will, except such as afterwards died, or such servants as had quitted their service, were provided for in the codicil; it might, therefore, be argued, that it may have been intended to substitute the codicil for that integral part of the will by which the legacies are given. If, however, the codicil does not extend to all the legacies in the will, and no explanation can be offered why some are named in the codicil, and others omitted, the case will be different. See *Lee* v. *Pain*, 4 Hare, 201, 246.

As a general rule, where a testator executes at the *same time* two codicils, giving to the same person, or the same set of persons, legacies of precisely the same amount, the presumption is, and the transaction itself shows, that it was not his intention to give cumulative or different legacies, but that his object must have been to execute the instrument in duplicate, so that if one should be lost the other should be forthcoming: *Whyte* v. *Whyte*, 17 L. R. Eq. 50, 58.

If, however, the amount given to such person, or sets of persons, were different, the presumption might be that the testator intended the legacies to be cumulative: Ibid. 58.

It is observed in a note to 1 Russ. & My. 102, that if different instruments are *exactly* co-extensive in their provisions, and in other respects are so nearly identical as to satisfy the Judge that they could never be intended to exist together, probate will be granted only of the latest in date, and the others will be held to be virtually revoked: *Methuen* v. *Methuen*, 2 Phillim. 416. And parol evidence will be resorted to, if necessary, to assist in determining the intention: Ibid.

But where testamentary papers, very similar in form, and embracing the same general range of objects, still present such discrepancies that one cannot amount to more than a partial revocation or repetition of the rest, the Prerogative Court allows all of them to be proved, and leaves it to Courts of equity to exercise their own judgment on the question of addition or substitution, whenever those Courts are called upon to construe their effect for the purpose of determining the rights of legatees.

Thus, when a person had executed at *different times* two codicils to his will in precisely the same words and figures except as to dates and attestations, and both were admitted to probate, parol evidence was held to be admissible to show from the circumstances attending the execution, that the two codicils were in fact only one instrument, and accordingly

that a legatee therein named was entitled to one legacy only: *Hubbard* v. *Alexander*, 3 Ch. D. 738.

In a recent case in Ireland a learned judge, while approving of the rule, whereby when a testator by his will gives a benefit to a person, and by a codicil to his will gives a benefit to the same person, the presumption of the law is that he means to give twice, expresses a doubt whether that rule of law, which is so clearly applicable to a will and codicil, applies precisely to the case of a voluntary deed capable of being revoked by the will, and to a will subsequently executed: *Quin* v. *Armstrong*, 11 I. R. Eq. 168.

Legacies of quantity given by the same instrument.]—Where legacies of quantity in the *same* instrument, whether a will or a codicil, are given to the same person simpliciter, and are of *equal* amount, one only will be good, the repetition, according to the doctrine of the civil law, being considered (though strangely, in Mr. Justice *Aston's* opinion), to arise from forgetfulness; nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended that they should be cumulative. Thus, in *Greenwood* v. *Greenwood*, 1 Bro. C. C. 31, n., the testatrix gave "to her niece Mary Cook, the wife of John Cook, 500*l.*," and afterwards in the same will, amongst many other legacies, "to her cousin Mary Cook, 500*l.* for her own use and disposal, notwithstanding her coverture." Lord *Apsley* declared, that Mary Cook was entitled to one legacy only of 500*l.*, and that the same was for her separate use. In *Garth* v. *Meyrick*, 1 Bro. C. C. 30, the first bequest was, "I give to A. 1000*l.* Old South Sea Annuities, to be transferred into her own name; and then, towards the close of the will, "I give to A. 1000*l.* Old South Sea Annuities, as aforesaid;" it was endeavoured to support them as separate legacies, but A. was held only entitled to one. In *Holford* v. *Wood*, 4 Ves. 76, the testator, after disposing of copyholds, leaseholds, and giving a legacy, adds, "To Thomas Newman I give an annuity of 30*l.* for his life, payable quarterly at the usual quarter-days, the first payment to be made on such of the same days as shall first happen after my death;" and after giving some specific and pecuniary legacies and an annuity, the testator says, "I give to Thomas Newman, the butler, 30*l.* a year for his life." Lord *Alvanley*, M.R., held, that the second annuity of 30*l.* given to the defendant Thomas Newman, was not to be considered as accumulative, but as the same annuity of 30*l.* given to him in the prior part of the will. See, also, *Manning* v. *Thesiger*, 3 My. & K. 29; *Brine* v. *Ferrier*, 7 Sim. 549; *Early* v. *Benbow*, 2 Coll. 342;

Early v. *Middleton*, 14 Beav. 453.

Where, however, the legacies given by the *same* instrument are of *unequal* amount, and not merely, as might be inferred from Mr. Justice *Aston's* remarks, where a larger sum is given after a less, they will be considered accumulative. *Windham* v. *Windham*, Rep. t. Finch, 267 ; *Curry* v. *Pile*, 2 Bro. C.C. 622 ; *Baylee* v. *Quin*, 2 D. & War. 116 ; *Adnam* v. *Cole*, 6 Beav. 353 ; *Hartley* v. *Ostler*, 22 Beav. 449 ; *Yockney* v. *Hansard*, 3 Hare, 622 ; *Brennan* v. *Moran*, 6 Ir. Ch. Rep. 126.

Internal evidence of Intention.] —The intention of the testator, when it can be collected from the instrument containing two legacies, will, of course, override any presumption which might be raised in the absence of such intention : *Yockney* v. *Hansard*, 3 Hare, 620. And although legacies given by different instruments are equal, if they were intended by the testator to be cumulative (*Lobley* v. *Stocks*, 19 Beav. 392), or if though differing in amount the latter was intended to be substitutional (*Russell* v. *Dickson*, 4 H. L. C. 293 ; 4 Ir. Eq. Rep. 339), the intention will be carried into effect. See also *Whyte* v. *Whyte*, 17 L. R. Eq. 59.

It may here be observed, that if a testamentary paper, incomplete of itself (but being made before the 1st of January, 1838, and admitted to probate), contains internal evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been done by a previous complete will, effect will be given to the new disposition, as far as it goes, in substitution for the former ; but the former one will be treated as operative so far as no substituted disposition is provided in its place : *Kidd* v. *North*, 14 Sim. 463 ; *S. C.*, 2 Ph. 91 ; *Jackson* v. *Jackson*, 2 Cox, 35. But so far as the question depends upon the latter instrument being incomplete, it cannot arise upon any instrument made after the 1st of January, 1838.

If probate be granted in the Ecclesiastical Court to two writings, as a will and codicil, it will be conclusive to show that they must be considered as *distinct* instruments, although they are both written on the same paper : *Baillie* v. *Butterfield*, 1 Cox, 392 ; *Campbell* v. *Lord Radnor*, 1 Bro. C. C. 272; *Walsh* v. *Gladstone*, 1 Ph. 294; but see *Martin* v. *Drinkwater*, 2 Beav. 215. So, if two instruments have been admitted to probate as one testament, they must for all purposes be considered as one instrument only : *Heming* v. *Clutterbuck*, 1 Bligh, N. S. 491, 492 ; *Brine* v. *Ferrier*, 7 Sim. 549. In *The Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636, where a testatrix, at the commencement of her codicils, de-

clared that they should be part of her will, Lord *Hardwicke* held, that they were to receive the same construction as if they were incorporated in the will, and formed only one instrument. See *Brennan* v. *Moran*, 6 Ir. Ch. Rep. 126.

With regard to the present tendency of the decisions upon the doctrine of the repetition of legacies, it has been said, that "there is always a difficulty pressing upon the mind of the Judge in determining what the real meaning of the testator is, within the rule of law, and how far he can, consistently with settled principles, effectuate the intention. In later times, there certainly has been a disposition to get rid of this difficulty, and to hold legacies to be cumulative. The inclination of the Court has been rather to cut the knot than to untie it." Per Lord Chancellor *Sugden*, in *Russell* v. *Dickson*, 2 D. & War. 137; and see *Lee* v. *Pain*, 4 Hare, 218, 236.

Where a legacy is given by a codicil in substitution for a legacy given by a previous instrument, upon a revocation of the last legacy, the former will not be set up again. *Boulcott* v. *Boulcott*, 2 Drew. 25.

As to the admission of extrinsic evidence.]—Sir *John Leach*, M.R., in *Hurst* v. *Beach*, 5 Madd. 351, where a legacy of 300*l.* was given by the will, and a legacy of 500*l.* by the codicil, has very fully considered the question, how far parol evidence is admissible to prove whether a testator intended a legacy to be substitutional or accumulative. "Upon the question," said his Honor, "whether evidence is admissible to prove that the testatrix did not mean that the defendant should take both sums, there are no decisions in Courts of equity. There are *obiter dicta* for the admission of such testimony; but, in *Osborne* v. *The Duke of Leeds* (5 Ves. 369), the point was fully argued, and Lord *Alvanley* appears to have inclined against receiving it. It did not, however, become necessary there to decide the question. It is to be collected from the Digest, that it was admitted by the civil law.

"This Court has no original jurisdiction in testamentary matters; it acts with respect to them only upon the ground of administering a trust, and is bound to adopt, in questions of legacy, the principles and rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the answer that I have received is, that no decision has taken place there upon this question, and that no settled opinion is formed upon it.

"It remains then to be considered upon the principles of evidence which are received in our own law. Our primary principle is,

that evidence is not admissible to contradict a written instrument. In some cases Courts of equity raise a presumption against the apparent intention of a testamentary instrument. And there they will receive evidence to repel that presumption; for the effect of such testimony is not to show that the testator did not mean what he has said, but on the contrary, to prove that he did mean what he has expressed.

"Thus, where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him, and to repel the presumption that a portion is satisfied by a legacy.

"In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it.

"Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of 300*l.* to the defendant, and makes to him a further substantive gift of 500*l.* The evidence tendered is, that the testatrix did not mean this as a further gift of 500*l.*, but meant to substitute the 500*l.* in the place of the former 300*l.*

"I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument." See also *Guy* v. *Sharp*, 1 My. & K. 589, and *Hall* v. *Hill*, 1 D. & War. 94, 116; *Lee* v. *Pain*, 4 Hare, 216.

We may conclude, from these authorities, that where the Court itself raises the presumption against double legacies,—where, for instance, two legacies of equal amount are given by one instrument,—parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will; but where the Court does not raise the presumption,—where, for instance, legacies of equal amount are given *simpliciter* by different instruments,—parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will. See *Hall* v. *Hill*, 1 D. & War. 116.

Extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the Court to place itself in the position of the testator: *Martin* v. *Drinkwater*, 2 Beav. 215; *Guy* v. *Sharp*, 1 My. & K. 589.

How far a substitutional or additional Legacy is liable to the Incidents or Conditions of the original Legacy.]—As a general rule, where one legacy is given merely in substitution for another, it will, in the absence of any expression of a contrary intention on the part of the testator, be liable to the same incidents as the legacy for which it is substituted (*Cooper* v. *Day*, 3 Mer. 154; *Shaftesbury* v. *Marlborough*, 7 Sim. 237; *Bristow* v. *Bristow*, 5 Beav. 289; *Cookson* v. *Hancock*, 1 Keen, 817, 2 My. & Cr. 606; *Johnstone* v. *Lord Harrowby*, 1 De G. F. & Jo. 183, reversing *S. C.*, 1 Johns. 425; *Duffield* v. *Currie*, 29 Beav. 284); but that will not be the result where the second legacy is a distinct and substantive bequest: *Chatteris* v. *Young*, 2 Russ. 183; also *Leacroft* v. *Maynard*, 3 Bro. C. C. 233; 1 Ves. Jun. 279; *Crowder* v. *Clowes*, 2 Ves. Jun. 449, 450; *Alexander* v. *Alexander*, 5 Beav. 518; *Haley* v. *Bannister*, 23 Beav. 336; *King* v. *Tootel*, 25 Beav. 23.

An additional legacy, although not so expressed, will in general be held subject to the same incidents and conditions as the first legacy. Thus, if after a legacy given by will to a married woman to her separate use, an additional legacy is given to her by a codicil, she will take it to her separate use. *Day* v. *Croft*, 4 Beav. 561; and see *Warwick* v. *Hawkins*, 5 De G. & Sm. 481.

In no case, however, has it been held, that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift. "I quite concur," observes Sir *W. Page Wood*, V.-C., in what was said by the Lord Justice *Turner* in the case of *More's Trust* (10 Hare, 171), that where there is a gift by will to A. for life, and after his decease to B., and then another gift to A., in addition to what was before given, there is no authority for carrying on the series of limitations to the latter gift, so as to convert it into a gift to A. for life, and then to the party who was named in the former gift to take after A.'s death. It would be more plausible to say, that a life interest only was given to A. in the second case, but that would be inconsistent with the words of the will." *Mann* v. *Fuller*, Kay, 624, 626.

The cases, however, have not gone further than this, where the first gift is given absolutely to the party, or is made defeasible; the second gift has been held to be given upon similar terms; for example, if the former gift were absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same condition. *Per* Sir *W. Page Wood*, V.-C., 1 Kay, 626. See also *Overend* v. *Gurney*, 7 Sim. 128.

PYE, *Ex parte.*
DUBOST, *Ex parte.*

April 26th, 29th, May 27th, June 13th, 28th, 1811.

[REPORTED 18 VES. 140.]

SATISFACTION OF A LEGACY BY A PORTION.—ADEMPTION.]

As a general rule, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and, in consequence of the leaning against double portions, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part; and the rule is applicable where a person puts himself in loco parentis.

No such presumption arises in the case of a stranger, or of a natural child, where the donor has not put himself in loco parentis, if the subsequent advance is not proved to be for the very purpose of satisfying the legacy; and, therefore, the legatee will be entitled to both.

WILLIAM MOWBRAY, by his will, dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sum after-mentioned, among other legacies gave as follows:—"*I give and bequeath the sum of* 4000*l. sterling* to Louisa Hortensia Garos, *daughter of* John Louis Garos, formerly of Berwick-street, Westminster; the like sum of 4000*l.* to Emily Garos, her sister, and 4000*l.* to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them, I desire the whole 12,000*l.* may be paid to the surviving sister."

The testator also gave to John Louis Garos 600*l.*, and "to Marie Genevieve Garos, his wife, the sum of 2500*l.* sterling, for her own use, and over which her husband is not to have any power, he having lived abroad for many years, and she in this country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic. The petitioner Pye was the committee under the commission, and upon her death took out administration to her, and administration de bonis non to the testator.

The Master's report stated, from the examination of the petitioner Pye, that Louisa Hortensia, Emily, and Julia Garos, were the three natural daughters of the testator by Marie Genevieve Garos, the wife of John Louis Garos; and that, since the date of the will, Louisa Hortensia Garos married Christopher Dubost; and the testator *advanced as a marriage portion for her*, which by the settlement appeared to have been received by Christopher Dubost, the sum of 3000*l.*; and it being contended, *that the said sum of* 3000*l. ought to be considered as an advancement and in part satisfaction of the legacy of* 4000*l.* and the whole legacy being claimed on the part of Christopher Dubost and his wife (who were both represented to be residing abroad), the Master did not allow the claim.

As to the legacy of 2500*l.* to Marie Genevieve Garos, the report stated, from the same examination, that since the date and execution of the will the testator caused an annuity to be purchased in France, to which country she had retired for her life, and laid out in such purchase 1500*l.*; and, it being contended by the petitioner Pye, that the said sum of 1500*l.* ought to be deducted from the legacy of 2500*l.*, *as being an advancement and in part satisfaction*, and the whole legacy being claimed by the legatee, then resident abroad, the Master had not allowed such claim, but left it open to the party to prosecute, when in a situation to do so.

By a further report the Master found, as to the French annuity, that, by a letter written by the testator to Christopher Dubost in Paris, on the 25th of November, 1807, the testator authorised him to purchase in France an annuity of 100*l.*, for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for 1500*l.* on account of such purchase. And under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney authorising him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost, on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos (her late husband being then dead, and she of sound mind) a deed of gift of the said annuity; and the Master found, that by the law of France (*a*), if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done, while ignorant of such death, is valid. The Master therefore stated his opinion, that the annuity was no part of the personal estate of William Mowbray.

(*a*) By the Code Napoleon, Art. 2003, "Le mandat finit par la mort naturelle . . . soit du mandant, soit du mandataire." But an exception is introduced in the following article, Art. 2008, "Si le mandataire ignore la mort du mandant, ce qu'il a fait dans cette ignorance est valide."

The first petition prayed, that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared, that the said annuity is part of his personal estate.

The other petition, by Dubost and his wife, prayed a transfer of Three per Cent. Bank Annuities in satisfaction of 1000*l.* of the legacy; and that so much of the Bank Annuities as will be sufficient to raise 3177*l.* 3*s.* 6*d.*, the residue of the said legacy and interest, may be sold, &c.

An affidavit was offered by Dubost, that upon the

treaty of marriage, the testator assured him, that, independent of the 3000*l.*, he had already bequeathed her 4000*l.*, and Dubost might depend upon his not altering it. A letter was also produced to the testator from Dubost, previous to the marriage, stating that he would not believe the information he had received, that the testator, being asked whether he would remember the young ladies in his will, answered, "You cannot expect that;" that he had said to Mrs. Dubost, that he did not see why there should be a difference between the sisters; and, asking if, according to the custom in France, he would give, besides the portion, 100*l.* to be laid out in jewels, &c. This letter was found after the testator's death among his papers.

Sir *Arthur Piggott*, Mr. *Richards*, Mr. *Wingfield*, Mr. *Horne*, and Mr. *Wear*, for different parties, in support of the first petition.

The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him during his life to change his purpose, and to make some other provision for this lady by funds in this country, conceiving, perhaps, that she might return here. The authority given to purchase this annuity could not have been enforced against him during his life by a person claiming as a volunteer; nor can it be established against his estate after his death, the act which would have given the benefit of it against the personal representative not having been completed. Where a question is to be decided by foreign law, the first step is an inquiry by the Master to ascertain what is the law of that country.

With regard to the other petition, and the objection to the letter offered as evidence, the circumstances resemble those of *Shudal* v. *Jekyll* (*a*), before Lord *Hardwicke*, *Powell* v. *Cleaver* (*b*), before Lord *Thurlow*, and *Trimmer* v. *Bayne* (*c*), before your Lordship; and the conclusion is

(*a*) 2 Atk. 516.
(*b*) 2 Bro. C. C. 499.
(*c*) 7 Ves. 508.

that the evidence is admissible. Lord *Hardwicke's* opinion was, that this rule, as to satisfaction, is not confined to the case of a parent. It is true it does not apply to a mere stranger, standing in no relation, natural or civil, either as a legitimate, adopted, or natural child; but it applies to any person standing *in loco parentis* equally as to the parent. The presumption was repelled in *Shudal* v. *Jekyll* by the evidence, which was held to be admissible, and proved that the testator had no intention of limiting his bounty to the portion he had given on the plaintiff's marriage; declaring that he would leave her something by his will, but would not be put under any obligation to do it; the evidence therefore contradicting the supposed intention to substitute the portion for the legacy.

(*a*) 2 Bro. C. C. 499.

The case of *Powel* v. *Cleaver* (*a*) certainly had strong circumstances, admitting argument; and Lord *Thurlow*, finding the legatee a mere stranger to the testator, who, though undoubtedly he provided a portion for her on marriage, stood in no relation to her, and could not be considered as having taken upon him the character of parent, determined against her claim of a double provision.

(*b*) 7 Ves. 508.

Trimmer v. *Bayne* (*b*) was the case of a provision for a natural daughter, which has been considered as a solid distinction; and your Lordship decided that case with great attention, and upon a full review of the authorities. Upon the evidence, it is impossible to deny the intention to make a provision at least for an adopted child, whom the testator had educated; and that there was an ulterior purpose in his mind. This is the same species of case as *Shudal* v. *Jekyll* (*c*); in which the provision by the will, accompanied with the declared intention of the testator to do something more for his niece, justified Lord *Hardwicke's* decision; and the same principle that governed that case and *Trimmer* v. *Bayne*, though with a different effect, must be applied to this: the case of a person, treated by the testator as a child, adopted and educated by him, standing upon the evidence of this letter *in loco parentis* and *filiæ*, having, from the infancy of these

(*c*) 2 Atk. 516.

children, acted as their parent, and therefore as much within the rule as the actual relation of parent and child; and the circumstance, that the legacy is given over upon the contingency from one child to another, cannot prevent its application. The letter of Dubost, which is clearly evidence, is decisive. It is the letter of a person treating upon the subject of his proposed marriage with the testator, as her parent, and also as having made a provision for her by his will. The circumstance, that this letter, which came out of the testator's papers after his death, had been kept by him, the settlement following immediately upon it, is remarkable. The Master's report, therefore, is right; and the second petition must be dismissed.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the second petition (referring, in opposition to the other petition, to the present law of France, declaring, that if the mandatory is unacquainted with the death of the mandant, or any other cause, which put an end to the mandate, whatever he has done while he was so unacquainted, is valid).

It cannot be disputed, that the advance of a portion by a parent on the marriage of his child, is a satisfaction of a legacy, either the whole or part; and that, if the testator, though not the natural or legitimate father, has placed himself *in loco parentis*, the same consequence will follow. The difference consists in the application of that principle; and the question is, whether the testator gave this legacy as to his child; which must be made out, otherwise the presumption of satisfaction cannot arise. In no case has the Court proceeded on any other supposition than that the legacy was given to the legatee as a child. If a legacy was bequeathed to a child, with whom the testator had then no connection, but afterwards married the mother, took that child as his adopted child, and gave it a portion as such, the legacy not being given in the same character, the portion would not be a satisfaction; the clear conclusion from all the authorities being, that they must be given in the same character.

In this case the legacy clearly is not given to the legatee as the child of the testator; and no evidence can be received to show that it was given to her in that character, the will containing an express statement, by way of description certainly, that she is the child of another man. The objection to the letter as evidence is, that it is produced directly to contradict the will, which declares her to be the daughter of another. If, however, it can be received, the fair inference is, that she was to have both the legacy and the portion. It is a letter from the proposed husband, suggesting to the testator, that he ought, besides the portion, to give this lady a legacy, and representing, that he could not believe, as it was said, that he intended the contrary. The testator leaves the legacy standing, keeping the letter, which must have drawn to his attention, that, besides the portion, he had given her a legacy. The fair inference is, that the letter had its effect, inducing him to make no alteration in the will, but to leave the legacy standing. How is that to be otherwise accounted for? Can it be conceived that this testator was acquainted with these decisions, and thence collected, that, upon this doctrine of satisfaction, it was unnecessary for him to make the alteration? The case of *Grave* v. *Lord Salisbury* (*a*), the decision certainly turning upon particular circumstances, is material as showing Lord *Thurlow's* reluctance to exend this rule, of which he evidently disapproved.

(*a*) 1 Bro. C. C. 425.

The law does not recognise the relation of a natural child.

Lord Chancellor Eldon.—I recollect that Lord *Thurlow*, in that case, though the decision did not turn upon it, remarked, that, as the law will not acknowledge the relation of a natural child, the doctrine of this Court, on whatever principle founded, is, that if a portion is given to a child, by will, or a gift so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is *primâ facie* an ademption of the whole, or *pro tanto;* but if the legacy is given to a person standing in the relation of a natural child to the testator, and he afterwards gives that child a sum of

money on marriage, the law does not admit the conclusion *primâ facie* that the testator, at the time of making the will, recognised that relation. The natural child, therefore, is in so much better a situation, that, in his case, the advancement is not *primâ facie* an ademption, as it is in the case of a legitimate child; the effect of which is, that the presumption is to be formed consistently with the notion, that the testator has less affection for his legitimate child than even for a stranger, as Lord *Thurlow* used to express it.

His Lordship also made another observation, of great weight, that ought to check any disposition to carry this further; that, having raised the presumption from the fact, you beat it down by declarations, which, from the very nature of mankind, deserve little credit, viz., what a man has done, or will do, by his will; how much shall stand, and how much shall not: declarations generally intended to mislead; but the *primâ facie* presumption is established beyond controversy.

Admissibility of evidence to prove whether a person intended to put himself in loco parentis.

The question is certainly of great consequence, whether this class of cases does or does not require evidence that at the time the legacy was constituted, the legatee, not standing in the relation of child to the testator, was regarded by him quasi in that relation, conceiving the purpose of placing himself *in loco parentis;* and if it is necessary that such a relation must then exist, it is very difficult to conclude that this particular case falls under that description. His purpose, whatever was his opinion with regard to these children, seems to have been, that no one should consider him as standing in the place of father. His expressions seem particularly selected with the view to avoid the description of a portion, and to denote, that, not he, but some other person, stood in the situation of parent.

In *Shudal* v. *Jckyll* (*a*), and the subsequent case before Lord *Thurlow*, upon the same principle, holding, that, by such a declaration, that he might leave something, but would not specify what, or be bound, the legacy could not be partly cut down, a natural interpretation was, that

(*a*) 2 Atk. 516.

taking 500*l.* from the legacy, and leaving 500*l.*, he did leave something more beyond what he had advanced; but Lord *Hardwicke* correctly said he had no means of collecting what was that something more; and the will giving 1000*l.* was better evidence than any conjecture he could form. If this letter can be considered as fair evidence that he did not mean to disturb the will, and that this fortune, as it is called in the letter, should be an ademption of that fortune, the doctrine of *Shudal* v. *Jekyll* must be applied to this case. This is a very important question; and I wish to read the cases, particularly *Trimmer* v. *Bayne* (*a*), upon which occasion I gave the subject considerable attention.

(*a*) 7 Ves. 508.

The other question involves, not only the construction of the French law, and the point whether that has been sufficiently investigated, but farther *whether the power of attorney amounts here to a declaration of trust. It is clear that this Court will not assist a volunteer; yet if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agreement to transfer stock, this Court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more; and the Court will act upon it.*

Equity will not assist a volunteer; but if an act is completed, though voluntary, the Court will act upon it. It has been decided, that, upon an agreement to transfer stock, the Court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust, without more; and the Court will act upon it. See *Ellison* v. *Ellison*, vol. 1, p. 273, and note.

Lord Chancellor Eldon (June 13th).—These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court.

With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that; as, upon the documents (*b*) before me, it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems

(*b*) See 2 Spence Eq. Jur. 53, n. (*d*), where other documents not set

to me a sufficient declaration that he held this part of the estate in trust for the annuitant.

forth by the reporter, and which may materially have influenced the mind of Lord *Eldon* in coming to this conclusion, are given.

The other question is one of great difficulty; whether a sum of money, advanced upon the marriage of one of these young ladies, when a settlement was executed, is to be taken to be a satisfaction of a legacy, not given upon the face of the will as a portion, not given to a person stated upon the will to be an adopted child of the testator, or described merely by name, but given to an individual, a stranger, described in the will as the child of another person, who is designated as the father of that child. It not only does not appear that the testator represented himself as *in loco parentis*, but he has designated another individual as being the parent; and, therefore, according to Lord *Thurlow's* opinion, in *Grave* v. *Lord Salisbury* (*a*), the testator has expressed himself in terms anxiously calculated to conceal the fact, that he was the reputed father of that child, if he was so.

(*a*) 1 Bro. C. C. 425.

Without going through all the cases that were cited and those referred to in them, having compared the case in Atkyns (*b*) with manuscript notes of that case, and looked into some other cases, one in Ambler (*c*), and some earlier, I may state, as the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part; and in some cases it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and

(*b*) *Shudal* v. *Jekyll*, 2 Atk. 516.

(*c*) *Watson* v. *the Earl of Lincoln*, Amb. 325.

Legacy by a parent to a child, the purpose not stated, understood as a portion.

though at the time of making the will, he thought he could not discharge that debt with less than 10,000*l.*, yet by a change of his circumstances, and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of 5000*l.* (*a*).

(*a*) See, however, *Pym* v. *Lockyer*, 5 My. & Cr. 29, and *Kirk* v. *Eddowes*, 3 Hare, 509, which establish that a portion of less amount than the provision by will is a satisfaction pro tanto only, overruling, therefore, the cases alluded to by Lord *Eldon*.

The Court seems, in the older cases, to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child; and it has accordingly been urged in argument, but not supported by decision, except where accounted for by evidence of declarations, that the Courts have said they did not mean to confine this doctrine to persons standing in that actual relation; but, perhaps, it might apply to a person placing himself *in loco parentis*, undertaking the care of an orphan. But what is to be the evidence of that, whether written evidence in the will and settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it.

As to evidence of a person putting himself in loco parentis.

(*b*) 1 Bro. C. C. 425.

In *Grave* v. *Lord Salisbury* (*b*), the first case before Lord *Thurlow*, Lord Salisbury had several natural children, to whom he had given legacies by his will, making afterwards a provision for them during his life, not *ejusdem generis*; giving the living of Hatfield to one; a farm and stock to another; upon which the question arose. It was contended that this was a satisfaction; that he intended by the legacy to make a provision, or, in other words, to discharge the obligation he owed to that child; and he had the same intention, advancing the portion, and the farm and stock. Lord *Thurlow* felt the extreme hardship, as it is evidently, that, in the case of children, whose relation, as such, the law recognises, the doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to such a child; but, as the law does not recognise the relation between the putative father and illegitimate child, as imposing this debt of nature, the father in that case stands as a stranger; and no such presumption arises, in that case, where the sub-

Distinction between a legitimate and natural child, as to the presumed satisfaction of a legacy by a portion in the former case, not in the latter; which is considered the case of a stranger.

sequent advance is not proved to have been for the very purpose of satisfying the legacy, and therefore the legatee is entitled to both. Lord *Thurlow* directed a reference to the Master to inquire into the circumstances, who did not report the relation which the testator had to those children; and his Lordship, being pressed to send it back on that account, refused to do so; observing, that the object might have been to conceal the circumstance of that relation; and, therefore, the Court would not make the inquiry; but without deciding what would have been the case if that relation appeared, it was enough that it stood as the case of a stranger; and therefore the other provision was not a satisfaction.

In the subsequent case of *Powel* v. *Cleaver* (*a*), where the provision made was described as a portion, Lord *Thurlow* stated expressly, that, if the legacy is given, not as a portion, by a stranger, who advances money on the marriage of the legatee, denominating that advance a portion, that denomination will not have the same effect in the case of a stranger, as it would in the case of parent and child; and Lord *Thurlow* asserts that there is no authority contradicting that.

(*a*) 2 Bro. C. C. 499.

If that is right, it comes to this: that, where a father gives a legacy to a child, the legacy coming from a father to a child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy (*b*); but a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt: he must, therefore, be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence applying directly to the gift proposed by that will; and, recollecting how artificial the rules are, where a person has educated a child through life, considering himself as standing in the relation of putative father to

A legacy from a father to a child understood as a portion, though not so described.

(*b*) But pro tanto only if of less amount; *Pym* v. *Lockyer*, 5 M. & C. 29; *Kirk* v. *Eddowes*, 3 Hare, 509.

A legacy given by a stranger is understood as a bounty, unless it be proved to be meant as a portion.

that child, having a father acknowledged, describing that child as the child of a mother named, and a father named, and also making a provision for that father and mother, it would be too much, upon such a will to say, this is the case of a person meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract: in other words, meaning to put himself *in loco parentis* (*a*), in the situation of the person described as the lawful father of that child.

(*a*) This definition of a person putting himself in loco parentis is approved of and adopted by Lord Cottenham, in *Powys* v. *Mansfield*, 3 My. & Cr. 366, 367.

That brings the question to this—whether this advance of a portion of 3000*l.* is an ademption of the legacy between strangers, on the ground that this subsequent advance is treated as a portion or fortune? and whether the testator, having given that legacy of 4000*l.*, and afterwards giving to that legatee a portion on marriage, the mere circumstance of giving that as a portion or fortune is to be taken as evidence, that, when the will was made, it was meant as paying a debt of nature? or whether it was not to be understood, as in the first instance giving a bounty, and in the other making an addition to that bounty? In this case, as in *Shudal* v. *Jekyll*, more was intended to be given, but in the case of a stranger no authority says the advance of a less sum shall be an ademption of the whole. This letter, if it is to be admitted in evidence, shows how little such evidence can be trusted, as no one would have supposed, upon the correspondence, that the testator had such a will in his desk. Upon the authority of *Powel* v. *Cleaver*, unless you can show, that, at the time of making the will, the testator meant to give a portion as a parent, or as standing *in loco parentis*, and meant to satisfy that, in the whole or in part, by the subsequent advance, the Court is not authorised by the artificial rules of equity to hold it as a satisfaction.

I am not much impressed by the objection, that he had not altered his will. The answer is, that the subsequent advance operates a revocation, and, therefore, actual revocation was unnecessary; but it is too much to say, upon such circumstances as are before me, that this advance of 3000*l.* is an ademption of the legacy of 4000*l.* and the

contingent interest; and though I believe I am disappointing the actual intention, and that this lady will get more than was intended, I am bound by the rule of the Court to say, that this is not a satisfaction.

1811. *June 28th.*

Under this judgment the order was pronounced, dismissing the first petition, and directing a transfer and sale of the Bank Annuities according to the prayer of the other; upon which it was contended, that this should be considered as an appropriation of the stock to this legacy at the date of the Master's report; and the funds having since fallen, the legatee was entitled only to so much stock as would at that time have produced what remained due on account of the legacy.

No attention is paid by the Court to the rise or fall of stock.

The Lord Chancellor said:—The broad principle of the Court is, that no attention whatever is paid to the rise or fall of the stock; and upon that ground it is considered equal, whether the appropriation is in one way or another. The party takes the rise or fall as it happens; and therefore the petitioners are entitled to have the sum reported due to them now raised.

SIR JOHN TALBOT *v.* THE DUKE OF SHREWSBURY.

De Term. S. Mich. 1714.

[REPORTED PREC. CH. 394.]

SATISFACTION OF A DEBT BY A LEGACY.]—*A debtor, without taking notice of the debt, bequeaths a sum as great as, or greater than, the debt, to his creditor: this shall be a satisfaction; secus, if it were bequeathed on a contingency, or if it were less than the debt.*

IN this case it was said by Mr. *Vernon*, and agreed to by Sir *J. Trevor*, M.R., that if one being indebted to another in a sum of money, does, by his will, give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, that this shall, nevertheless, be in satisfaction of the debt, so as that he shall not have both the debt and the legacy; but if such a legacy (*a*) were given upon a contingency, which if it should not happen, the legacy would not take place, in that case, though the contingency does actually happen and the legacy thereby became due, yet it shall not go in satisfaction of the debt; because a debt which is certain, shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt, ought to be so in its creation, and at the very time it is given, which such contingent provision is not; and cited the case of one *Pollexfen* to be so adjudged by the Lord *Harcourt*, and affirmed on an appeal in the House of Lords. And as it is in the case of a will, so it will be likewise if the provision were by a deed; if the provision be absolute and certain, it shall go in satisfaction of the debt; but if it be uncertain and contingent, it can be no satisfaction, because it could not be so in its creation, and the happening of the contingency afterwards will not alter the nature of it.

(*a*) "Debt" in the text, evidently by mistake.

CHANCEY'S CASE (*a*).

(*a*) *Chancey* v. *Wootton*, and è contra, Reg. Lib. A. fol. 449 ; Sel. Ch. Ca. 44 ; 2 Eq. Ca. Ab. 354, pl. 18.

De Term. S. Hil. 1717. *Trin.* 1725.

[REPORTED 1 P. WMS. 408.]

SATISFACTION OF A DEBT BY A LEGACY.]—*Although it is a general rule, that if a legacy from a debtor to his creditor be equal to or greater than the debt, it will be presumed to be a satisfaction of it, slight evidence of the intention will take the case out of the rule. Thus where one being indebted to his servant for wages, in* 100*l.*, *had given her a bond for that sum, as due for wages, and afterwards, by will, gave her* 500*l.*, *for her long and faithful services, and directed that all his debts and legacies should be paid, it was held, that the legacy was not a satisfaction for the debt due on the bond.*

ONE being indebted for wages to a maid-servant, who had lived with him a considerable time, gave her a bond for 100*l.*, and in the condition of the bond, it appeared to be *for wages*. Afterwards, the testator by his will, among other things, gave a legacy of 500*l.* to this maid-servant ; and it was mentioned in the will to be given to her *for her long and faithful services ;* [and he directed that *all his debts and legacies should be paid* (*b*).]

(*b*) See the judgment of Lord *King*, post, 355.

The maid-servant having, on her master's death, possessed herself of divers goods that were his, the plaintiff Chancey, who was the executor, brought his bill against her for an account, but paid her the 100*l.* and interest secured to her by the bond.

For the defendant it was objected, that she should have both the money due on the bond and also the legacy ; for the legacy was a further reward for her services, and intended to be a gift *in toto :* whereas, if the bond were to be taken out of it, it would be only a gift of

400*l.*; and as to the old notion, that the testator must be just before he is bountiful, that was nothing where the testator had wherewithal to be both just and bountiful (*a*).

(*a*) Salk. 155.

Besides, that this was not insisted upon by the Bill; so that the defendant had no notice or warning, to prove that the testator intended to give her the full legacy of 500*l.* over and above the bond; which proof, though by parol only, had yet been frequently admitted.

Also, for that, it appeared, the executor himself had paid the bond, and taken a receipt for it.

Hil. Term, 1717.

Sir J. TREVOR, M. R.—It is sufficient that it appears the creditor has a greater legacy given her, and the plaintiff, the executor, prays relief, which is as much as if he had prayed that he might not be compelled to pay both the debt and legacy.

This is stronger than the usual case; for the bond is *for service,* and the 500*l.* legacy is *also for service;* so that it is a greater reward and satisfaction for the same thing. Neither is it material that the executor has paid it, for he was bound to pay the bond at law, and his only method is to stop it out of the legacy; but clearly, such a legacy is not a satisfaction for service done to the testator (*b*) after the making of the will.

(*b*) Vide Salk. 508; 2 P. Wms. 343; 3 P. Wms. 355.

Trin. Term, 1725.

LORD CHANCELLOR KING afterwards reversed this decree, upon which occasion his Lordship said, he was not for breaking in upon any general rule (*c*), though he did not see any great reason why, if one owed 100*l.* to A. by bond, and should afterwards give him a legacy of 500*l.* this legacy must go in satisfaction of the debt; for, if so, the whole 500*l.* would not be *given,* in regard 100*l.* of it would be *paid* towards a just debt, which the testator could not help paying; and therefore the whole 500*l.* would not be *given,* against the express declaration of the testator, who says he *gives* the same; and though it seemed to have obtained as a rule *that a man should be*

(*c*) See the rule stated in *Talbot* v. *Duke of Shrewsbury,* ante, p. 352.

just before he is bountiful, yet, when a man left such an estate and fund for his debts and legacies, as that he might thereout be both just and bountiful, and especially when there seemed to be not only *an intention*, but also *express words* to that purpose; in such case, his Lordship did not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides.

And it was said at the bar, by Mr. *Talbot*, to have been a strange resolution, that if I owe a man 100*l.* and give him a 100*l.* legacy, then I give him nothing, but only pay him what I am bound to do; but if the legacy be twenty shillings less, viz., 99*l.*, here it is a good gift and legacy, exclusive of the debt.

However, the Court said, they were not by this resolution overturning the general rule; but that this case was attended with particular circumstances varying it from the common case, viz., that the testator, by the express words of his will, had devised "*that all his debts and legacies should be paid;*" and this 100*l.* bond being *then a debt*, and the 500*l.* being a *legacy*, it was as strong as if he had directed that both the bond and the legacy should be paid; that, when the testator gave a bond for the 100*l.* arrear of wages, it was the same thing as paying it; and as if he had actually paid it, and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 100*l.* and made the defendant refund; so neither should the bond, in this case, be satisfied by the bequest of the legacy.

His lordship also observed, that the executor (the plaintiff, Mr. Chancey) did not himself take this 500*l.* legacy to be a satisfaction for the bond, as appeared by his having voluntarily paid the 100*l.* to the defendant, and that his lordship was of the same opinion.

So the decree at the Rolls was reversed, and the respondent (the maid-servant) had both her debt and legacy.

Satisfaction (the doctrine of which is discussed in the cases to which this note is appended) may be defined to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee. See Lord *Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 95.

With regard to those cases where the intention is expressly declared, it is unnecessary to say anything; for it is clear, that, if any person expressly declares that a subsequent gift is to be in satisfaction of a prior demand, the donee cannot claim both. See *Hardingham* v. *Thomas*, 2 Drew. 353.

Those cases, however, where from the mere fact that the parties stand in a certain relation to each other, the presumption arises, that a subsequent donation is intended to be in satisfaction of a prior claim, are well worth examining. They may be divided into three classes.

1st. The satisfaction of legacies by portions, which is commonly called the ademption of legacies; 2nd, the satisfaction of portions by legacies; and, 3rd, the satisfaction of debts by legacies. Since, however, the doctrine of satisfaction is not applied in the same manner to each of these classes of cases, they may more conveniently be considered separately.

1st. *As to the satisfaction or ademption of a legacy by a portion.*]—The rule is well laid down by Lord *Eldon*, in the principal case of *Ex parte Pye*, "that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and, by a sort of artificial rule—upon an artificial notion, and a sort of feeling upon what is called a leaning against double portions—if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part." Lord *Eldon*, however, in that case, in accordance with what was then the general opinion (1 Rop. on Legacies, 366, 4th edit.), seems to have thought that the gift of a portion of less amount than a legacy, might be a total ademption of it; but in the very important case of *Pym* v. *Lockyer*, 5 My. & Cr. 29, decided by Lord *Cottenham*, after an elaborate examination of all the authorities, it was determined that such a portion would be merely an ademption of the legacy *pro tanto*. See also *Kirk* v. *Eddowes*, 3 Hare, 509; *Montague* v. *Montague*, 15 Beav. 565; *Hopwood* v. *Hopwood*, 7 Ho. Lo. Ca. 728.

An advancement may be made to a child as a portion, at other times than that of marriage, and the presumption against double portions will then arise. For in-

stance, if a subsequent gift be described in a writing as a portion, or if an advancement be made not evidenced by writing, evidence, as will hereafter be more fully shown, is admissible to show the nature of the transaction; but the Court will not add up small sums which a parent may give to a child, to show they were intended as a portion. See *Suisse* v. *Lowther*, 2 Hare, 434; *Scholfield* v. *Heap*, 27 Beav. 93; *Nevin* v. *Drysdale*, 4 L. R. Eq. 517.

Moreover, although the older cases appear to confine the presumption to cases where the advancement has been made as a portion, or on some occasion calling for it, it is laid down in a recent case, that for the purpose of raising the presumption against double portions, it is not incumbent upon the person who alleges a satisfaction to show anything more than that the testator, having given a legacy of a certain amount, afterwards in his lifetime gave the legatee a sum of money —the nature of the two gifts not being so different as to rebut the presumption. See *Leighton* v. *Leighton*, 18 L. R. Eq. 458, 468; *Kirk* v. *Eddowes*, 3 Hare, 509.

A legacy by a parent or a person in loco parentis is not satisfied by occasional small gifts in the testator's lifetime: *Watson* v. *Watson*, 33 Beav. 574; *In re Peacock's Estate*, 14 L. R. Eq. 236, 240; but see *Ferris* v. *Goodburn*, 27 L. J. (Ch.) N. S. 574, and a sum of money given by a father to his daughter for a wedding outfit and a wedding trip has been held not to be an ademption of a legacy: *Ravenscroft* v. *Jones*, 32 Beav. 669; 33 L. J. Ch. (N. S.) 482; 4 De G. Jo. & S. 224.

As to what is an advancement by portion within the meaning of section 5 of the Statute of Distributions (22 & 23 Car. 2, c. 10), see *Taylor* v. *Taylor*, 20 L. R. Eq. 155; *Boyd* v. *Boyd*, 4 L. R. Eq. 305; *Edwards* v. *Freeman*, 2 P. Wms. 435.

The rule or presumption against double portions is equally applicable to cases where a person has placed himself *in loco parentis*: *Booker* v. *Allen*, 2 Russ. & My. 270; *Powys* v. *Mansfield*, 3 My. & Cr. 359; *Watson* v. *Watson*, 33 Beav. 574.

And so strong is the leaning or presumption against double portions, that it will not, as observed by Lord *Eldon*, in *Ex parte Pye*, *Ex parte Dubost*, be repelled, "though there may be slight circumstances of difference between the advance and the portion." Thus, the presumption will not be repelled by the circumstance of the portion or legacy being payable at different times (*Hartopp* v. *Hartopp*, 17 Ves. 184); nor by the circumstance that the limitations of the portion under the will are very different from the limitations in the settlement. See *Trimmer* v. *Bayne*, 7 Ves. 508;

Monck v. *Monck*, 1 Ball & B. 298; *Sheffield* v. *Coventry*, 2 Russ. & My. 317; *Platt* v. *Platt*, 3 Sim. 503; *Days* v. *Boucher*, 3 Y. & C. Exch. Ca. 411; *Powys* v. *Mansfield*, 3 My. & Cr. 359, 374. In *Lord Durham* v. *Wharton*, 3 C. & F. 146, 10 Bligh, N. S. 526, L. being seised of real estates (devised to him by his brother, charged with 5,000*l.* for his daughter—afterwards Mrs. W.,—the interest to be raised for her maintenance, if L. should so direct), by his will, in 1788 bequeathed 10,000*l.* to trustees, one half to be paid at the end of three years, and the other half at the end of six years after his death, with 4*l.* per cent. interest from his decease, in trust for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and, in default of appointment, for *all* the children equally; the shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage; and if his daughter should have no child, or her sons should die under twenty-one, and her daughters under twenty-one and unmarried, the 10,000*l.* was to fall into the residue of his personal estate; and he declared that the sum of 10,000*l.* was over and above the 5,000*l.* devised to her by the will of his brother. On the marriage of the daughter, in 1790, L. agreed to give 15,000*l.* to his daughter as a marriage portion, to be paid to the intended husband upon his securing by settlement, according to his covenant, pin-money and a jointure for his wife, *and portions* for the *younger children* of the marriage, and interest in the meantime; and then declared that the 15,000*l.* was in full satisfaction and discharge of all and every sum and sums of money which the daughter could claim under her uncle's will. The settlement was executed, and the 15,000*l.* paid to the husband. L. died in 1794. It was held in the House of Lords, reversing the decisions of Sir *L. Shadwell*, V.-C., and Lord *Brougham*, C. (reported 5 Sim. 297, 3 My. & K. 427), that the legacy of 10,000*l.* was adeemed by the portion advanced by L. on the marriage of his daughter.

It has been observed by Lord *St. Leonards*, in his important Treatise on the Law of Property, that there could be no fair doubt of the intention in this case to adeem the legacy under the father's will; but the difficulties in law were of great weight. The 15,000*l.* was paid to the husband, and, in truth, was not settled at all on the children, although, in consideration of it, pin-money and a jointure, and portions for the *younger* children, were provided; and even the trusts in the will of the 10,000*l.* for the children, and the trusts in the settlement to raise portions for the *younger* children, were dissimilar. These difficulties were

overcome, and the substance of the case was regarded. The daughter was *entitled* to 5000*l.*, and the father had by his will provided an additional 10,000*l.*; he therefore intended her portion to be 15,000*l.* Upon her marriage he accordingly advanced 15,000*l.* for her portion, declaring it to be in satisfaction of the debt of 5000*l.* This certainly did not prevent the advancement from operating also as an ademption of the 10,000*l.* legacy under the father's will. "It would be found difficult," he adds, "to reconcile the decisions on this head previously to the decision in the Lords, and I do not think that the latter has been always kept in view by the Courts since it was pronounced. *It is, of course, a binding authority, and, as the principles upon which it was decided are plain, and highly favourable to the real intention in such cases, it ought to be strictly followed. Having now a clear rule, we ought not lightly to depart from it.*" Sugd. Prop. 128. And see *Montefiore* v. *Guadalla*, 1 De G. F. & Jo. 93; *Phillips* v. *Phillips*, 34 Beav. 19; *Dawson* v. *Dawson*, 4 L. R. Eq. 504; *Stevenson* v. *Masson*, 17 L. R. Eq. 78.

The result will be the same if, after a parent has given a legacy to a daughter absolutely, he afterwards on her marriage settles a sum of money upon her, and the children of the marriage; "because," as observed by Lord *Romilly*, M. R., "the law very properly, and in accordance with the ordinary usage of mankind, considers that, on the marriage of a child, the settlement for that child and the children of the marriage is a settlement for the benefit of the child of the settlor. The consequence is, that in all cases of ademption, a bequest of a sum of money to a child absolutely, is adeemed by the settlement of that or a larger amount on the marriage of that child; if a smaller amount, it is an ademption *pro tanto:*" *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 92.

Upon the same principle a bequest to a daughter for life, with remainder to her children, will be adeemed by gift to the daughter and her husband. See *Kirk* v. *Eddowes*, 3 Hare, 509. There it was held that the gift by a father of a promissory note to his daughter Mrs. Kirk, and her husband, was an ademption *pro tanto* of a legacy bequeathed by the father in his will to his daughter for her separate use for life, with remainder to her children, as she should appoint, and in default of appointment to them equally; the Vice-Chancellor *Wigram* observing: "I do not mean to decide that a legacy to A. can be adeemed by a mere advance to another person than A. That might be a simple revocation, and not ademption; nor do I mean to decide, that, if in this case the bequest had

been made to Mrs. Kirk for life, remainder to children living at the time, and named in the will, the bequest to the children could have been affected by the advance in question. I give no opinion upon that case. But here I find a legacy to Mrs. Kirk for her separate use, with remainder to her children *as a class;* that, I think, is in the nature of a portion to the daughter herself." See also *Carver* v. *Bowles*, 2 Russ. & My. 301; *Delacour* v. *Freeman*, 2 Ir. Ch. Rep. 633, 640.

A gift, however, of a sum of money to the husband of a daughter by her father simpliciter, after the marriage, and not in consequence of any promise made previous to the marriage taking place, will not be an ademption of a legacy given by the father to his daughter: *Ravenscroft* v. *Jones*, 32 Beav. 669, 670; 4 De G. J. & S. 224; and see *M'Clure* v. *Evans*, 29 Beav. 422; but see *Ferris* v. *Goodburn*, 27 L. J. Ch. N. S. 574.

There is no presumption of law that the payment of a sum of money to a child (even by a father) before the date of the will, is to go against a legacy to that child: per *Wickens*, V.-C., in *Taylor* v. *Cartwright*, 14 L. R. Eq. 176; *In re Peacock's Estate*, 14 L. R. Eq. 236.

But if there be a contract by the child that it shall do so, the contract may be valid. Thus, in *Upton* v. *Prince*, Ca. t. Talb. 71, a father having two sons, A. and B., advanced them 1500*l.* a-piece, and took from each of them receipts in the following words: "Received of my father William Prince the sum of 1500*l.*, which I do hereby acknowledge to be on account and in part of what he has given, or shall in or by his last will give unto me his son." The father afterwards made his will, whereby, after reciting that he had advanced to his children A., C., and D., the sum of 1500*l.* a-piece, he thereby in like manner bequeathed unto his three other children B., F., and G. the several sums of 1500*l.* a-piece, and then gave the residue equally amongst all his children. It was held by Lord Chancellor *Talbot* that the 1500*l.* received by B. in his father's lifetime was a satisfaction for what his father gave him by his will, and that he should not have another 1500*l.*

But it seems that a gift by the will of a father to a child for life *with remainder to the issue* of such child, would not be adeemed by an advance to the child made long before the will, although the testator, when he made the advance, verbally intimated that his intention was that it should have that effect: *Taylor* v. *Cartwright*, 14 L. R. Eq. 167, 176.

It may be here mentioned, that a legacy which has been adeemed by a settlement or advancement, will not be revived or set up by a codicil made after such settlement or advancement, although it con-

firms the will and all the bequests therein contained. "It is very true," says Lord *Cottenham*, in *Powys* v. *Mansfield*, 3 My. & Cr. 376, "that a codicil, republishing a will, makes the will speak as from its own date, for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time, and, at the time, the legacy revoked, adeemed, or satisfied, formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied. The cases are consistent with this, as *Drinkwater* v. *Falconer* (2 Ves. 623); *Monck* v. *Monck* (1 Ball & B. 298); *Booker* v. *Allen* (2 Russ. & My. 270); and the case of *Roome* v. *Roome* (3 Atk. 181), is not an authority against these decisions, because the codicil was not considered in that case as reviving an adeemed legacy, it having been decided that there was no ademption." Nor is the codicil, in such a case, any evidence or additional proof that no ademption was intended. See *Powys* v. *Mansfield*, 3 My. & Cr. 376; *Roome* v. *Roome*, 3 Atk. 181; *Montague* v. *Montague*, 15 Beav. 565, 571.

The presumption, however, of satisfaction being intended, may be repelled by the intrinsic evidence furnished by the different nature of the gifts; where, for instance, the testamentary portion and subsequent advancement are not *ejusdem generis*. See *Holmes* v. *Holmes*, 1 Bro. C. C. 555, where a legacy to a son of 500*l.* was held not to be adeemed by a subsequent gift of one half of the testator's stock in trade, valued at 1500*l.*; and see *Davys* v. *Boucher*, 3 Y. & C. Exch. Ca. 411; but see the remarks of Lord *Cottenham* on *Holmes* v. *Holmes*, in *Pym* v. *Lockyer*, 5 My. & Cr. 48. And a legacy of a sum of money will not be adeemed by an allowance of an annuity: *Watson* v. *Watson*, 33 Beav. 574. So, also, where the testamentary portion is certain, and the subsequent advancement depends upon a contingency, the presumption of satisfaction will be repelled: *Spinks* v. *Robins*, 2 Atk. 493; *Crompton* v. *Sale*, 2 P. Ws. 553.

But where the advancement was voidable only upon a remote contingency, and which was considered by the party putting himself *in loco parentis* and by all the other parties as equal to an absolute estate, Lord *Cottenham* held, that the presumption against double portions arose: *Powys* v. *Mansfield*, 3 My. & Cr. 359, 374.

It was formerly held, that where the bequest was of an uncertain amount, as a bequest of a residue or part of a residue, the presump-

tion would not arise, as the idea of a portion *ex vi termini* was a definite sum : *Freemantle* v. *Bankes,* 5 Ves. 85. And see *Farnham* v. *Phillips,* 2 Atk. 215 ; *Smith* v. *Strong,* 4 Bro. C. C. 493 ; *Watson* v. *The Earl of Lincoln,* Amb. 327 ; *Davys* v. *Boucher,* 3 Y. & C. Exch. Ca. 397. But it has since been decided that a portion, by settlement or otherwise, will be a satisfaction according to the amount, either in full or *pro tanto,* of a previous bequest of a residue : *Scholfield* v. *Heap,* 27 Beav. 93 ; *Beckton* v. *Barton,* 27 Beav. 99 ; *Montefiore* v. *Guadalla,* 1 De G. F. & Jo. 93 ; and see *Lady Thynne* v. *The Earl of Glengall,* 2 Ho. Lo. Ca. 131 ; *Meinertzhagen* v. *Walters,* 20 W. R. (V.-C. B.) 505 ; Ib. (L. J.) 918 ; 7 L. R. Ch. App. 670 ; *In re Peacock's Estate,* 14 L. R. Eq. 236 ; *Stevenson* v. *Masson,* 17 L. R. Eq. 84 ; *Keays* v. *Gilmore,* 8 I. R. Eq. 290.

Although in the case of an ordinary legacy to a child being adeemed, all the residuary legatees, whether children or strangers, take the benefit of the ademption, (*Kirk* v. *Eddowes,* 3 Hare, 509) ; nevertheless, in the case of a residuary bequest to children and a stranger, in the event of a share of one of the children being adeemed by an advance, such benefit will be confined to the children. Thus, a person to whom a testator has left a share of his residue, will not be entitled to have the residue augmented by bringing into account advances made to children, and which are taken by them in part satisfaction of their share of the residue. See *Meinertzhagen* v. *Walters,* 7 L. R. Ch. App. 670. There a testator directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares as tenants in common. Advances were made by the testator to some of his children, also gifts to his wife after the date of the will. It was held by the Lords Justices, affirming the decision of *Bacon,* V.-C., reported 20 W. R. (V.-C. B.) 505, that the advances to the children could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue. "In the ordinary case of a legacy," said *Mellish,* L. J., "where a legacy has been left to a child, and then a gift has been made which amounts to an ademption of that legacy, there certainly appears to be no possible way of holding it to be an ademption so as to carry out the general rule against double portions, except by holding that whoever has the residue benefits by it ; because, by the necessity of the case, the persons who have the residue must benefit by the fact of the previous

legacy not being paid from any cause whatever. But when we come to apply the rule as to a share of the residue, it appears to me that it is perfectly easy to carry out what I consider the real principle of the rule, namely, equality between the children, without allowing the stranger to take any benefit."

Although a legacy given to a child is limited over upon a contingency, it may be adeemed by a subsequent advancement to the child alone, so as to deprive the person entitled under the limitation over of all benefit. Thus, in *Twining* v. *Powell*, 2 Coll. 262, a testatrix *in loco parentis* to Lydia Mosse, bequeathed to her as her adopted child 10,000*l.* in money, with a limitation over to a charity in case Lydia Mosse died without children. The testatrix afterwards transferred 12,000*l.* Consols into the joint names of herself and Lydia Mosse. It was held by the Vice-Chancellor *Knight Bruce*, not only that the legacy was adeemed as to Lydia Mosse, but was also extinguished as to the charity. "The claim of the Attorney-General," said his Honor, "in respect of the 10,000*l.* is one that created some difficulty in my mind. As to Miss Mosse, that legacy was adeemed or satisfied, and I think that Miss Mosse, surviving the testatrix, was intended by her to become, and accordingly is, absolutely entitled to the stock by means of which it was adeemed or satisfied. The question is, whether the stock, being exempt from any provision in favour of charity, and Miss Mosse being barred of any interest or claim under the will in respect of the 10,000*l.*, there is still an effectual testamentary provision in favour of charity as to that sum, in the possible event of her dying without leaving a child, as I think there would have been had there been no ademption—no satisfaction. This question, I repeat, has appeared to me one of some embarrassment; but I have come to the conclusion, that the testatrix cannot be held to have intended that in the event of the legacy of 10,000*l.* being in her lifetime adeemed or satisfied as to Miss Mosse by the testatrix (who, it is plain, had placed herself before the will, and considered herself, at the date of the will, *in loco parentis* towards Miss Mosse) it should not be held extinguished for every purpose, and should not, therefore, be considered as falling absolutely into the residue. I think that I decide in conformity with the intention of the testatrix, and am not contravening any rule of law, in saying that the legacy of 10,000*l.*, as a legacy, is extinguished, and has fallen into the residue."

Where a legacy was held *pro tanto* satisfied by a gift of stock, it was held that the value of the stock must be ascertained as at the time of the gift: *Watson* v. *Watson*, 33 Beav. 574.

2nd. *As to the satisfaction of a portion by a legacy.*]—Upon this subject the case of *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516, is a leading authority, and the rule is, that wherever a legacy given by a parent, or a person standing *in loco parentis*, is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, then from the strong inclination of Courts of equity against double portions, a presumption arises that the legacy was intended by the testator as a complete satisfaction (*Bruen* v. *Bruen*, 2 Vern. 439; *Moulson* v. *Moulson*, 1 Bro. C. C. 82; *Copley* v. *Copley*, 1 P. Wms. 147; *Ackworth* v. *Ackworth*, 1 Bro. C. C. 307, n.; *Byde* v. *Byde*, 1 Bro. C. C. 308, n.; *S. C.*, 2 Eden, 19; 1 Cox, 44; *Duke of Somerset* v. *Duchess of Somerset*, 1 Bro. C. C. 309, n.; *Finch* v. *Finch*, 1 Ves. jun. 534; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Sparkes* v. *Cator*, 3 Ves. 530; *Pole* v. *Lord Somers*, 6 Ves. 309; *Bengough* v. *Walker*, 15 Ves. 507; and see *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Ferris* v. *Goodburn*, 27 L. J. N. S. (Ch.) 574); if the legacy is not so great as the portion or provision, a presumption arises that it was intended as a satisfaction *pro tanto* (*Warren* v. *Warren*, 1 Bro. C. C. 305; 1 Cox, 41); and the bequest of the whole or part of a residue will, according to its amount, be presumed either a satisfaction of a portion in full, or *pro tanto*. See *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Ca. 131. In that case a father having, upon the marriage of one of his two daughters, agreed to give her a portion of 100,000*l.* 3*l.* per cent. Consols, transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death, the latter stock to be held by them in trust for the daughter's separate use for life, and after her death for the children *of the marriage, as the husband and she* should jointly appoint. The father afterwards, by his will, gave to *two of the trustees* a moiety *of the residue of his personal estate*, in trust for his daughter's separate use for life, remainder *for her children* generally, as she should by deed or will appoint; it was held in the House of Lords, affirming the decision of Lord *Langdale*, M. R. (reported 1 Kee. 769), that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond notwithstanding the difference of the trusts; and it being found to be for the benefit of the daughter and her children, if she should have any, to take under the will, she was bound to elect so to take; and see *Richman* v. *Morgan*, 1 Bro. C. C. 63; 2 Bro. C. C. 394; *Bengough* v. *Walker*, 15 Ves. 507; *Campbell* v. *Campbell*, 1 L. R. Eq. 383.

A provision by will, may satisfy one part of a covenant without satisfying other parts of it; for instance, if a father on the marriage of his daughter, should settle 10,000*l.* on her for life, remainder to the children of the marriage, a bequest of 10,000*l.* to that daughter would satisfy her life interest in the 10,000*l.*, but would not satisfy or touch the interests of her children, per Lord *Romilly*, M. R. in *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 95; *Bethell* v. *Abraham*, 3 Ch. D. 590 n.; 22 W. R. 745.

So a provision for a son by will may be held a satisfaction for the interest he may take under a covenant by his father on his marriage, and he will consequently be put to his election, although the provision in the will may not be held a satisfaction to the wife and children for what they take under the covenant: *McCarogher* v. *Whieldon*, 3 L. R. Eq. 236.

So also if in such a case the bequest had been to the children of the marriage, omitting the parent, that may be a satisfaction to them, but is no satisfaction of the covenant to the parent: *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 92. See also *Mayd* v. *Field*, 3 Ch. D. 587. There Caroline White (being under her own marriage settlement entitled to property to her separate use absolutely) in the marriage settlement of her daughter, dated the 3rd of August, 1858, covenanted with the trustees thereof, that her heirs, executors, or administrators, should within six calendar months after her decease, pay to them the sum of 1,000*l.* with interest as therein mentioned, and should stand possessed thereof, upon trust for her daughter for her separate use for life without power of anticipation, *with remainder to her husband for life*, remainder to the children of the marriage as the husband and wife jointly, or the survivor of them, should by deed or will appoint, or in default of appointment, to the children equally. Caroline White, by her will, dated the 30th December, 1864, expressed to be made in exercise of a power given by her own marriage settlement, gave the residue of her estate to her executors therein named upon trust, as to 1,000*l.*, part thereof, for her daughter for her separate *use, and after her decease* to such of the children of such daughter as she should by deed or will appoint, and in default of appointment to the children equally. It was argued that the bequest of the 1,000*l.* by the will was no satisfaction of the covenant to pay 1,000*l.*, inasmuch as the limitations under the settlement of the 3rd of August, 1858, and the will differed materially, for under the settlement the husband took a life estate, which he did not take under the will. It was held, however, by Sir *G. Jessel*, M. R., that so far as the

daughter and her children were concerned, the bequest by the will was a satisfaction of the covenant. "As I understand," said his lordship, "the doctrine of satisfaction, an addition to a provision for a child of the child, especially where the child is a daughter, is treated by our Courts as an amplification of the trust for the child itself, and a slight difference between the trusts will not prevent the provision being within the rule against double portions. Here the difference is slight; but there is a life estate given to the husband in the settlement, and there is no such gift in the testamentary appointment. Then, what is to be done as to the testamentary appointment? It is impossible to deprive the trustees of their right as creditors under the covenant; and consequently the question is, how far is the testamentary appointment satisfied by the provisions of the settlement? The answer is, to the extent to which the daughter and her children take under the settlement; the result is, that there will be nothing coming to the daughter nor anything to her children under the provisions of the will, unless the daughter's husband survive her. To that extent, therefore, the gift by the will is not duplicated in favour of the daughter and her children." See also *Campbell* v. *Campbell*, 1 L. R. Eq. 383.

Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone, the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will: *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 92.

And since Courts of equity lean strongly against double portions, as in the preceding class of cases, considerable differences only between the settlement and the will are considered sufficient to repel the presumption of satisfaction; slight variations, for instance, between the settlement and the will, as to the times of the payment of the portion or legacy, or between the limitations in the settlement and the will, are not sufficient for that purpose. See *Sparkes* v. *Cator*, 3 Ves. 530; *Weall* v. *Rice*, 2 Russ. & My. 251; *Earl of Glengall* v. *Barnard*, 1 Kee. 769; *S. C.*, nom. *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Ca. 131.

The presumption, however, of satisfaction being intended, may, as in the former class of cases, be repelled by intrinsic evidence, showing the intention of the parent in favour of double portions (*Lethbridge* v. *Thurlow*, 15 Beav. 334), which may also be sufficiently indicated from the different nature of the gifts. For instance, where the portion is vested and the legacy is contingent, the presumption will be repelled: for it would

be hard to say, that a mere contingency should take away a portion absolutely vested (*Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 Bro. C. C. 352. And see *Pierce* v. *Locke*, 2 Ir. Ch. Rep. 205, 215); or where the husband and children of the marriage take an interest under the settlement, but nothing under the will: *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 71.

The presumption against double portions may also be repelled by a charge of debts before the gift in the will, under which charge a sum covenanted to be paid in a previous settlement might be included. *Ib.* 71, 86, 88.

And according to recent authorities, it appears, that the presumption against double portions will be more easily repelled, in the present class of cases, where the settlement precedes the will, than in the former class of cases, where the will precedes the settlement. Thus, in *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 71, the father of the intended wife (Lady John Chichester), on her marriage in 1844, covenanted with trustees to pay them 10,000*l.* three months after their demand in writing, and in the meantime, to pay interest on the principal sum by half-yearly payments. The trusts of the 10,000*l.* were, during the joint lives of the husband and wife, to pay the wife 200*l.*, part of the income, as pin-money,. and the residue to the husband, to pay the whole income to the survivor of the husband and wife for life, and after the decease of the survivor, the fund to be in trust for the issue of the marriage, as the husband and wife, or the survivor, should appoint, and in default of appointment, to the children of the marriage who should attain twenty-one or marry, and in default of children attaining a vested interest, for the wife if she survived her husband, but if she died in his lifetime, as she should appoint by will, and in default of appointment in trust for her next of kin. The father, by his will, dated the 3rd of December, 1859, gave his residuary real and personal estate to trustees in trust to convert it into money, *to pay thereout his debts* and legacies, and stand possessed of the residue as to one moiety upon trust to pay the income to his daughter, Lady Chichester, for life for her separate use, and after her death, then if she died in her husband's lifetime, upon trust for such persons *other than her husband*, as she should by will appoint, but if she survived him, for such persons as she should by deed or will appoint, and in default of appointment, upon precisely similar trusts for his daughter, Mrs. Paul, with an ultimate limitation to his nephew. And as to the other moiety upon precisely similar trusts, except that the disposition in favour of Mrs. Paul preceded those in

favour of Lady Chichester. The 10,000*l.* was not paid by the testator in his lifetime. It was held by the House of Lords (reversing the decision of the Lords Justices, dissentiente Lord Justice *Turner*, reported 2 De G. Jo. & Sm. 336, nom. *Coventry* v. *Chichester*, which affirmed the decision of Sir *W. Page Wood*, V.-C., reported 2 Hem. & Mill. 149), that the great difference between the limitations of the 10,000*l.* in the settlement and in the will, and the direction in the will for payment of debts (which would include the debt under the covenant) were sufficient to overcome any presumption against double portions. "In the first place," said Lord *Cranworth*, "the rule against double portions, is but a rule of presumption, and there is much less difficulty in supposing that it was not intended to prevail where the person to whose dispositions it is to be applied, had not the power to enforce it without the consent of others, than in a case where the whole was under his absolute control. When the will precedes the settlement it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to *be* in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption. Add to which, the necessity for making such a declaration in express terms would be much more obvious to a testator making a will whereby he desired to affect rights already acquired, than to a settlor making an absolute provision by deed for one who had acquired no previous rights whatever. It has been truly said, that no positive rule has been, or can be laid down, as to what is sufficient to rebut the *primâ facie* presumption against double portions. That is a matter which, from the nature of things, must be left, in each particular case, to the judgment of the tribunal which has to decide it. But one great question always has been, whether that which has been given by the latter, is given to be enjoyed in the same, or nearly the same, manner as that which is given by the former instrument. When a parent has by his will given a portion to his daughter absolutely, and has, by a settlement on her marriage, after the date of his will, secured a sum of like amount for the benefit of her and of her husband and issue, the mere circumstance that she would have taken under the will an absolute interest, whereas, under the deed, she takes only a life interest, raises no difficulty. The parent may reasonably suppose the two gifts to be the same.

If the daughter had received the sum under the will, she would probably have settled it in the way in which, by the hypothesis, it was settled in her parent's lifetime. It would not occur to the parent to think that the interest taken by her was substantially different in the one case and in the other. But there must be some limit in such cases, and more especially where, as in the case now before the House, the settlement precedes the will; and looking at the two instruments now before us, I have come to the same conclusion as my noble and learned friend on the Woolsack, namely, that the differences between the gift by the will and the benefits secured by the covenant are so great as to prevent the application of the general rule. In the first place, what is here given is a moiety of the residue of the testator's real and personal estate, after payment of debts and legacies. I do not doubt that a share of residue may be treated as a portion within the rule against double portions; but the residue cannot be ascertained till after the debts are paid. Here the testator was a man of great wealth, and does not seem to have had any debt except that arising on the covenant on his daughter's marriage. It is natural to suppose, that if he meant the residue to be ascertained, as if no such covenant had been entered into, he would have adverted to that in his will. He would have naturally expressed what we are called on to presume; that the share of residue that was given to his daughter Lady John Chichester, was to be accepted by her in lieu of what she was entitled to under his covenant.

"But even if that difficulty could be overcome, the enjoyment of the residue was to be in a mode so entirely different from that secured by the covenant, as to exclude, without express declaration, the notion that the one could have been intended as a substitute for the other. Under the covenant the husband has a life interest in the 10,000*l.*, subject to his wife's pin-money; he has no interest whatever in the residue under the will. Under the covenant, the children of the marriage, if there had been any, would have been entitled. There is no mention of children in the will. In default of children, Lady John Chichester, if she should die in her husband's lifetime, has, by the covenant, an absolute power of appointment by will over the 10,000*l.*; but by the testator's will she is precluded from giving anything to her husband. There are other minor differences; but those which I have pointed out are sufficient to show, not only that the limitations in the two instruments are substantially different, but that the testator was anxious to make them so.

"Now, the rule of the Court on which the respondents rely is founded on the assumption, that, in making the second instrument, the maker of it supposes himself to be substantially satisfying the obligations of the first. It is impossible to put such a construction on this will. No doubt it was open to the testator to impose on his daughter, by express terms, the duty of accepting the moiety of the residue, guarded, as it is, with respect to her disposal of it, in full satisfaction of her claims under the settlement; but he has not done this, and I can see no reason for presuming any such intention which has not been expressed. I am, therefore, of opinion that the decree ought to be reversed, and the case sent back to the Court of Chancery, with a declaration that the gift of the moiety of the residue was not intended to be in substitution of the rights acquired under the covenant." See the remarks on this case in *Dawson* v. *Dawson*, 4 L. R. Eq. 504; see also *M'Carogher* v. *Whieldon*, 3 L. R. Eq. 236; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Paget* v. *Grenfell*, 6 L. R. Eq. 7; *Cooper* v. *Macdonald*, 16 L. R. Eq. 258; *Keays* v. *Gilmore*, 8 I. R. Eq. 290.

So, also, where the gift by the will and the portion are not ejusdem generis, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land: *Bellasis* v. *Uthwatt*, 1 Atk. 428; *Goodfellow* v. *Burchett*, 2 Vern. 298; *Ray* v. *Stanhope*, 2 Ch. Rep. 159; *Savile* v. *Savile*, 2 Atk. 458; *Grave* v. *Earl of Salisbury*, 1 Bro. C. C. 425. However, in *Bengough* v. *Walker*, 15 Ves. 507, it was held by Sir *W. Grant*, M. R., that a bequest by a testator to his son of a share in powder works, to be made up in value to 10,000*l.* charged with an annuity for the life of another person, was a satisfaction of a portion of 2000*l.* to which the son was entitled under the testator's marriage settlement.

Sometimes a settlement contains a declaration that an advancement by the parent, *in his lifetime*, shall be considered in part or full satisfaction of the portion, unless the contrary is expressly declared by some writing. In such cases a question may arise whether a legacy by will shall be considered as an advancement in the lifetime of the parent. It has been lately decided that in such case a legacy will not be held a satisfaction of the portion (*Cooper* v. *Cooper*, 8 L. R. Ch. App. 813; *Douglas* v. *Willis*, 7 Hare, 310); à fortiori, the share of a parent's property under his intestacy will not be considered as an advancement in his lifetime: *Twisden* v. *Twisden*, 9 Ves. 413.

Where, however, the declaration in the settlement is more extensive, as where it was provided that if the father should during his life-

time, *or at the time* of his death, give portions or provisions in advancement on marriage or *otherwise* (*Richman* v. *Morgan*, 1 Bro. C. C. 63; *S. C.* 2 Bro. C. C. 394, nom. *Rickman* v. *Morgan*); or should bestow a portion on marriage, *or otherwise provide* for (*Leake* v. *Leake*, 10 Ves. 477); or settle, give, or advance on marriage, *or otherwise* (*Onslow* v. *Michell*, 18 Ves. 490, *Golding* v. *Haverfield*, 13 Price, 593), a bequest may amount to an advancement within the meaning of the settlement.

Where a father, having power to appoint to a child out of a portion fund, himself advances the money, the presumption is that he does so for the benefit of the children interested in the portion fund, and not for his own benefit or for that of the estate: *Ford* v. *Tynte*, 2 H. & M. 324; *Lee* v. *Head*, 1 K. & J. 620; *Noblett* v. *Litchfield*, 7 Ir. Ch. 575.

This presumption, however, may be rebutted by evidence of a different intention, as, for example, that the advance was made in substitution for an appointment out of the portion fund for the purpose of giving a sum in cash in lieu of a mere charge: *Ford* v. *Tynte*, 2 H. & M. 324.

All the contemporary circumstances are admissible in evidence of such intention, but subsequent declarations are not admissible: *Ford* v. *Tynte*, 2 H. & M. 324.

Although according to the law of Scotland the presumption of satisfaction of a portion by a legacy from a father to his child does not arise, it will do so, although the deed by which the portion is covenanted to be paid is Scotch, if the will by which the legacy is given is that of a domiciled Englishman. See *Campbell* v. *Campbell*, 1 L. R. Eq. 383. There by a settlement made in the Scotch form upon the marriage of his daughter with a domiciled Scotsman, A., a domiciled Englishman, covenanted to pay the trustees 4000*l.* as a provision for the benefit of his daughter and her husband and the younger children of the marriage. The 4000*l.* was not paid by A. during his lifetime, but by his will made after the death of his daughter, A. gave 16,000*l.* between the younger children of the marriage. It was held by Sir *W. Page Wood*, V.-C., that the will being an English disposition, the English doctrine of presumption against double portions was applicable, and that the provisions made by the testator's will in favour of his grandchildren operated as a satisfaction of the provisions made for them by the settlement.

Election in cases of satisfaction.] —Where, as in the former class of cases, the first provision is by a will, it being a voluntary and revocable instrument, a subsequent advance will be an ademption, either wholly or in part,

without reference to the wishes of the person advanced; if, however, as in the latter class of cases, the first provision is by settlement or other contract, a subsequent legacy, considered as an advancement, will raise a case of election, —that is to say, the legatee may, at his option, take either the first or last provision. See 2 Ves. jun. 465, n. (*a*); *Copley* v. *Copley*, 1 P. Wms. 147; *Finch* v. *Finch*, 1 Ves. jun. 534; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Pole* v. *Lord Somers*, 6 Ves. 309.

The distinction between ademption and satisfaction lies in this: in *ademption* the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case, the law uses the word *ademption*, because the bequest or devise contained in the will is thereby *adeemed*, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the *same objects*, and he either states, or the law raises the presumption, that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will. See *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 90.

The doctrine of election is worked out in this manner. Where a person takes a bequest under a will, which is held to be a satisfaction for a sum of money payable under a settlement, he must elect between the bequest and the gift. If he elects to take under the will, inasmuch as the provision by the will is a substitution for the provision by the settlement, the covenant is superseded, and is not to be performed at all. If, on the other hand, he elects to take under the settlement, he must, to the extent of what he takes thereunder, give up what is bequeathed to him by the will, in order to compensate those who are disappointed by his election. Suppose A. covenanted on the marriage of his daughter to pay her 100,000*l.* for life, with remainder to her children by that marriage, and afterwards by his will gave that daughter all his residuary estate (amounting, say, to 250,000*l.*) for life, with remainder to her children by *that and any other marriage*, and that the daughter had one child by her first, and two children by a second marriage, at the death of A. Now, in this case, it would obviously be the interest of the testator's daughter

to elect to take under the will, and she would therefore, for her life, be entitled to the interest of the 250,000*l.* It would as obviously be the interest of the child by the first marriage, to elect to take under the settlement. In this case, upon her mother's death, she would be entitled to have 100,000*l.* paid to her under the covenant, leaving 150,000*l.* remaining out of the residue of 250,000*l.* The children by the second marriage would first be entitled thereout to 100,000*l.* between them, in compensation for the sum taken by the child of the first marriage under the covenant, and the remaining 50,000*l.* would then become divisible under the will between the three sisters. *Ib.* 93, 94.

In a somewhat singular case the election by a son to take a share to which he was absolutely entitled under his father's will, in lieu of a life interest in a similar share, under a covenant by his father in a marriage settlement, had the effect of determining his life interest under the settlement. See *M'Carogher* v. *Whieldon*, 3 L. R. Eq. 236. There a father, in the *settlement* made upon the marriage of his son, *covenanted*, by will, or otherwise in his lifetime, to give or assure one-fifth part of the real and personal estate to which he might be entitled at or immediately before his death (subject to the payment thereout of one-fifth of his debts, funeral and testamentary expenses, and legacies) to trustees upon trust to pay the income to the son until (among other things) some event should occur whereby the income would (if the same were thereby to be made payable to the son absolutely) become vested in some other person or persons; and then upon trusts for the benefit of *the son's wife and the issue of the marriage*, with a discretionary trust for the benefit of the son after his wife's death. By his *will*, the father directed his debts to be paid by his executors, and charged them, as far as the law permitted, on his real and personal estate and he gave his real and personal estate to trustees in trust *for all and every his children* who should be living at the time of his death. The father died leaving five children. It was held by Lord *Romilly*, M. R., that the gift in the will did not operate as a satisfaction of the covenant in the settlement so far as the wife and children of the son were concerned; that the trustees were entitled to one-fifth part of the testator's real and personal estate, after payment of his debts, legacies, and funeral and testamentary expenses; that the gift in the will did operate as a satisfaction of all the interests of the son under the settlement, and that the son must therefore elect between his life interest under the settlement and the one-fifth of the residue which would remain after satisfaction of

the covenant. And the son electing to take under the will his Lordship also held, that such election determined his life interest under the settlement, and that the income became payable to his wife. See *Lewis* v. *Lewis*, 11 I. R. Eq. 110.

As to election by a married woman, see *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Ca. 118; and as to the doctrine generally, see ante, vol. i., pp. 377, 928.

As to the admission of extrinsic evidence.] — Although extrinsic evidence cannot be admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed, it seems to be clear that, where a transaction takes place, *not evidenced by writing*, which, if so evidenced, would raise a presumption that satisfaction of a former gift by will was intended, parol evidence is admissible to prove what the transaction really was. Thus, in *Hoskins* v. *Hoskins*, Prec. Ch. 263, the father, after giving 750*l.* to his son by will, purchased a cornetcy for him for 650*l.* Evidence was admitted to show that this was intended as a satisfaction *pro tanto*.

This subject was much discussed by the Vice-Chancellor *Wigram*, in *Kirk* v. *Eddowes*, 3 Hare, 509. There, a father by will gave 3000*l.* to the separate use of his daughter for life, with remainder to her children, and after the date of the will, he gave to his daughter and her husband a promissory note for 500*l.* then due to him. Parol evidence was tendered to show that, after the date of the will, the testator was requested by his daughter to confer some benefit on her husband, and that thereupon the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3000*l.*; and that the testator was advised by his solicitor, that it was not necessary to alter his will to give it that effect: it was held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to and independent of the will, of which subsequent transaction there was no evidence in writing. His Honor, after noticing the rule of law against admitting parol evidence to add to or explain a written instrument, says, "In this case, the advance of the 500*l.* was after the date of the will. This, the second transaction, however, is not evidenced by any writing: and the technical rule to which I have referred, against admitting evidence to prove what was the intention of the parties to that transaction, does not therefore apply. The question is, whether any other rule applies which shall exclude the evidence. In order fully to try this question, I will first suppose the 3000*l.* to have been given absolutely to Mrs. Kirk for her separate use. The

defendant's evidence was not objected to, nor could it have been successfully objected to, so far as it went to show the gift of the note, its amount, and the other circumstances attending it, with the exception of the testator's declarations accompanying the gift; for the Court, which has to decide whether the transaction has effected a partial ademption of the legacy, must know what the transaction was; but the declarations of the testator, accompanying the transactions, were objected to. Why should those accompanying declarations not be admissible? They are of the essence of the transaction, and the truth of the transaction itself cannot be known to the Court without them. The rule which would exclude the evidence, if the intention of the parties had been expressed in writing, does not apply. I assume that, if the intention of the parties, as proved by the evidence, had been in writing, it could not be contended, on the part of Mrs. Kirk, to whom the legacy was given for her separate use absolutely, that a payment to her husband of the amount of her legacy, at her instance and at her request, would not have precluded her from claiming it under her father's will; or, in other words, that the advance made under such circumstances would not have adeemed the legacy. If that be not so, the argument must be, that an advance made by a testator to one of his legatees, under an agreement in writing that the legatee shall accept the advance in full satisfaction of his legacy, would leave the legatee at liberty to claim the legacy, notwithstanding the agreement; and if such an argument be not admissible, the declarations of the testator must be admissible in the case I am now supposing, unless there be some rule of law which hinders a transaction, like that which the defendant relies upon, from being valid, unless it be evidenced by writing. This, however, cannot be successfully contended for. The evidence does not touch the will; it proves only, that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the Court to decide, whether the legacy given by the will is not thereby adeemed. Ademption of the legacy, and not revocation of the will, is the consequence for which the defendant contends—a distinction which is marked by Lord *Hardwicke*, in the case of *Rosewell* v. *Bennet* (3 Atk. 77). The defendant does not say the will is revoked; he says, the legatee has received his legacy by anticipation. In principle, therefore, I cannot see my way to reject the evidence in question. How, then, does the case stand upon authority? The cases of *Monck* v. *Lord Monck* (1 Ball & B. 298); *Rosewell* v. *Bennet* (3 Atk. 77);

Thelluson v. *Woodford* (4 Madd. 420); *Bell* v. *Coleman* (5 Madd. 22); *Biggleston* v. *Grubb* (2 Atk. 48); *Hoskins* v. *Hoskins* (Prec. Ch. 263); *Chapman* v. *Salt* (2 Vern. 646); *Powell* v. *Cleaver* (2 Bro. C. C. 499); *Grave* v. *Lord Salisbury* (1 Bro. C. C. 425); *Ex parte Dubost* (18 Ves. 140); *Shudal* v. *Jekyll* (2 Atk. 516), are all authorities in favour of admitting the evidence. In *Hall* v. *Hill* (1 D. & War. 118), the Lord Chancellor of Ireland refers, with marked approbation, to the cases of *Rosewell* v. *Bennet*, *Biggleston* v. *Grubb*, and *Monck* v. *Lord Monck*, upon this point. I am aware that an argument may be raised as to how far the admission of the evidence, in the cases I have cited, or the greater part of them, may be referred to the principle to which I have before adverted—that of applying it to a presumption first raised by the Court. Such an argument, however, will be found, upon examination, not to be sustainable; for if the law would in those cases have raised the presumption, the evidence which was objected to was unnecessary, there being no evidence to countervail the presumption. But the evidence, though objected to in some of the cases, was received, and therefore must have been read, to prove what the transaction was. And it is remarkable that, in *Thelluson* v. *Woodford*, although the exception to the Master's report raised the question, whether the evidence was admissible, the eminent counsel who argued against the ademption barely threw out a question, whether the evidence was admissible, without arguing against its admissibility; and Sir *John Leach* said, 'This is not a case of implication, but of express declaration.' Admitting, therefore, in the fullest manner, that parol evidence is inadmissible to prove that a will or other written instrument was intended to have an effect not expressed in it, still, with the opinion of the Lord Chancellor of Ireland, so recently expressed, upon the point, and the other authorities I have referred to, supporting the opinion which I individually entertain, that the evidence is admissible, I shall receive it.

"The subject has been very elaborately considered by Mr. Roper (Tr. on Leg., vol. i., p. 341 et seq.). I cannot but think the learned writer has not sufficiently kept in mind the distinction between ademption and revocation, nor between the cases in which the intention of the parties has been reduced into writing, and those in which the Court has had to ascertain, by parol evidence only, what the parties had done. It was said that there was a distinction in this case, inasmuch as the advance was made, not, as in the cases cited, to the legatee herself, but to the husband of the legatee. That circumstance might be material upon the question of implied

ademption; but it cannot affect the question of admitting or rejecting the evidence to prove what the transaction was. In more than one of the cases cited, the same circumstance occurred." See *Twining* v. *Powell*, 2 Coll. 263.

Where, however, *there are two written instruments*, and from the relationship between the author of the instruments and the party claiming under them (as in the actual or assumed relation of parent and child), the law raises the presumption that a gift contained in the second instrument is intended to be in satisfaction of a gift by an instrument of earlier date, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift: and where evidence is admissible for that purpose, counter evidence is also admissible. See *Debeze* v. *Mann*, 2 Bro. C. C. 165, 519; *Ellison* v. *Cookson*, 3 Bro. C. C. 61; *Trimmer* v. *Bayne*, 7 Ves. 508, 615; *Curtin* v. *Evans*, 9 I. R. Eq. 553.

But in such cases, it is well observed by Sir *J. Wigram*, V.-C., "the evidence is not admitted on either side, for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded:" 3 Hare, 517. See *Palmer* v. *Newell*, 20 Beav. 39.

There is, however, a dictum of Sir *J. Leach*, in the case of *Weall* v. *Rice*, 2 Russ. & My. 251, 263, which seems inconsistent with the law upon this subject, as it is at present understood: "The rule of this Court," said his Honor, "is, as ought to be, that if a father makes a provision for a child by settlement on marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford *intrinsic evidence* in favour of a double provision. But in either case, *extrinsic evidence is admissible of the real intention of the testator*. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question for himself." In this case the settlement was first and the will last. And see *Lloyd* v. *Hervey*, 2 Russ. &

My. 310, 316, and Lord *Langdale's* remark in *Lord Glengal* v. *Barnard*, 1 Kee. 769. In the case of *Booker* v. *Allen*, 2 Russ. & My. 370, where the will was before the settlement, Sir *J. Leach* admitted parol evidence to prove that the testator who had put himself *in loco parentis* towards the donee, intended the provision made by the settlement to be in lieu of a legacy given by the will; and held that the gift by the settlement was a satisfaction of the legacy, though the two provisions differed so much from each other, that they could not be considered substantially the same.

It is, however, submitted that the parol evidence in *Booker* v. *Allen* ought not to have been admitted, as it was in contradiction to a written instrument. See *Hall* v. *Hill*, C. & L. 120; 1 D. & War. 94.

Where a person is considered to have placed himself in loco parentis.]—Where a person who has made two gifts to another, in such manner as, according to the rules laid down in considering the two classes of cases before discussed, would, in case he stood towards the donee in the relation of parent, raise the presumption that the latter gift was intended to be a satisfaction of the former, the question often arises, and it is one by no means always easy of solution, whether the donor, although not standing to the donee in that relation, has not, by his conduct, placed himself in it, or, as it is usually termed, put himself *in loco parentis;* in which case, as before observed, the presumption will arise equally as in the case of a parent.

In the case of *Powys* v. *Mansfield*, 3 My. & Ca. 359, Lord *Cottenham* enters most elaborately into this somewhat obscure question—what is sufficient to put a person *in loco parentis?* Sir *L. Shadwell*, V.-C., in that case (reported 6 Sim. 528), had held, that no person can be deemed to stand *in loco parentis* to a child whose father is living, and who resides with and is maintained by his father according to his means. Lord *Cottenham*, however, reversed the decision of the Vice-Chancellor. "No doubt," observed his Lordship, "the authorities leave in some obscurity the question as to what is considered as meant by the expression universally adopted, of one *in loco parentis*. Lord *Eldon*, however, in *Ex parte Pye*, has given to it a definition which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all that is necessary to work out and carry into effect the object and the meaning of the rule. Lord *Eldon* says, it is a person '*meaning to put himself in loco parentis; in the situation of the person described as the lawful father of the child.*' But this definition must, I conceive, be

considered as applicable to those parental offices and duties to which the subject in question has reference, namely, *to the office and duty of the parent to make provision for the child.* The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child: and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer any intention in such person to assume also the duty of *providing* for the child. The relative situation of the friend and of the father may make this unnecessary, and the other benefits most essential."

From Lord *Cottenham*'s judgment, therefore, we may conclude, that the question, whether a person has or not put himself *in loco parentis*, must be decided with reference to his *meaning* to put himself in that position, by assuming the office and duty of the parent to make *provision* for the child, and that parol evidence is admissible to prove that a person means to put himself *in loco parentis*, and upon proof of his *meaning* to do so, parol evidence of his acts and declarations is admissible also to rebut and to then strengthen the presumption of satisfaction. See *Fowkes* v. *Pascoe*, 10 L. R. Ch. App. 343.

Any relation, or even a mere stranger in no way related to another person, may be held to have meant to put himself *in loco parentis* towards him; but mere relationship, however near, is not of itself sufficient to show that a person means to put himself *in loco parentis* towards another. Thus, neither a great uncle, uncle, grandfather, or putative father, is from his mere relationship, to be considered as *in loco parentis*, unless it can be shown that he meant to put himself *in loco parentis* with reference to the parent's office and duty of making a provision for his child: *Shudal* v. *Jekyll*, 2 Atk. 516, 518; *Powel* v. *Cleaver*, 2 Bro. C. C. 517, 518; *Roome* v. *Roome*, 3 Atk. 183; *Perry* v. *Whitehead*, 6 Ves. 547; *Grave* v. *Salisbury*, 1 Bro. C. C. 425; *Ellis* v. *Ellis*, 1 S. & L. 1; *Twining* v. *Powell*, 2 Coll. 262; and *Lyddon* v. *Ellison*, 19 Beav. 565, 572; *Curtin* v. *Evans*, 9 I. R. Eq. 553.

Whether a gift made by one settlement is satisfied by a gift made by a subsequent settlement.]—It seems that where a parent, or person *in loco parentis*, makes a provision by a settlement for his children equal to or greater than a provision contained in a former settlement, it may be considered as a satisfaction; as, for instance, where, by a will executed contemporaneously with the second settlement, he declares that a provision contained in it is to be taken as a satisfaction: *Davis* v. *Chambers*, 7 De G. Mac. & G. 386; 3 Jur. N. S. 297.

But no presumption will arise where there are those distinctions between the nature of the two gifts, which the Court has relied upon in cases of satisfaction upon will, to show that the presumption does not arise: see *Palmer* v. *Newell*, 20 Beav. 32, 40, where Sir *John Romilly*, M. R., was of opinion that the presumption less readily arises in the instance of gifts by two deeds, than in cases where the second gift is by a will, in which latter case a testator is supposed to be disposing of the whole of his property, and distributing it amongst the different objects of his bounty. *Ib.* 40. This case, on appeal, was affirmed by the Lords Justices: 8 De G. Mac. & G. 74.

When satisfaction or ademption will take place of a legacy given by a person not being in the natural or assumed relation of parent towards the legatee.]—Where a person, not being in the natural or assumed relation of parent towards the legatee, gives a legacy for a *particular purpose*, and afterwards advances money for the *same purpose*, a presumption arises that it was intended as, and it will accordingly be held to be, an ademption of it. "Suppose," asked Lord *Manners*, "A. bequeathed to his brother 5,000*l.* to buy a house in Merrion-square; and that afterwards A. bought one, which he gave to his brother, are there two houses to be bought?" *Monck* v. *Monck*, 1 Ball & B. 303; see also *Rosewell* v. *Bennet*, 3 Atk. 77, and the observations of Lord *Cottenham*, 2 My. & Cr. 377. From the cases of *Debeze* v. *Mann*, 2 Bro. C. C. 166, 519, 521, and *Trimmer* v. *Bayne*, 7 Ves. 516, it appears that parol evidence is admissible to rebut or strengthen the presumption.

Where, however, the purpose for which a legacy is given by such person does not correspond with the purpose for which the advancement is made, the legacy, as is laid down by Lord *Eldon*, in *Ex parte Pye*, will not be adeemed (*Debeze* v. *Mann*, 2 Bro. C. C. 165, 519; *Robinson* v. *Whitley*, 9 Ves. 577; *Roome* v. *Roome*, 3 Atk. 181); nor where the legacy and advancement are given upon different contingencies: *Spinks* v. *Robins*, 2 Atk. 491.

In the recent case of *Pankhurst* v. *Howell*, 6 L. R. Ch. App. 136, a testator, by his will, dated the 17th of December, 1862, gave to his wife a legacy of 200*l.*, to be paid within ten days after his decease. On the 28th of November, 1867, during his last illness, he, at the request of his wife, who did not know the contents of his will, gave her a cheque for 200*l.* that she might have a sum of money which she could control immediately on his death without the interference of the executors. She had the cheque cashed on the same day, and gave the proceeds to a friend to keep for her. The

testator died on the 8th of December, 1867. It was held by Lord Justice *James*, affirming the decision of Lord *Romilly*, M. R., that the legacy of 200*l.* was not adeemed or satisfied by the gift of the 200*l.* "The rule," said his Lordship, "is, that where the testator stands neither in the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose, and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to ademption. . . . . Here the legacy does not appear to me to have been given for a particular purpose within the meaning of the rule."

3rd. *With respect to the satisfaction of a debt by a legacy.*]—The general rule as laid down in *Talbot* v. *Duke of Shrewsbury*, is "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy." See also *Brown* v. *Dawson*, Prec. Ch. 240; *Fowler* v. *Fowler*, 3 P. Wms. 353; *Richardson* v. *Greece*, 3 Atk. 68; *Gaynon* v. *Wood*, 1 Dick. 331; *Bensusan* v. *Nehemias*, 4 De Gex & Sm. 381; *Shadbolt* v. *Vanderplank*, 29 Beav. 405; *Atkinson* v. *Littlewood*, 18 L. R. Eq. 595.

This rule or presumption is founded upon the maxim *Debitor non presumitur donare*. It has also been urged, in support of this presumed satisfaction, that a man ought to be just before he is bountiful; but this observation has been well answered by Lord Chancellor *King* in *Chancey's Case*, that, when a man had left such an estate and fund for his debts and legacies, as that he might thereout be both just and bountiful, he did not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid likewise: *Fowler* v. *Fowler*, 3 P. Wms. 354.

The rule as to the presumption of the satisfaction of a debt by a legacy is founded upon reasoning alike artificial and unsatisfactory, and it has consequently met with the censure of the most eminent judges, who, although they would not break the rule, have at the same time said they would not go one jot further, and have always endeavoured to lay hold of trifling circumstances in order to take cases out of it: *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Ca. 153; *Richardson* v. *Greece*, 3 Atk. 65.

There is, in fact, in this class

of cases a leaning *against*, as in the two former classes of cases a leaning in *favour* of, the presumption of satisfaction. Thus, where the legacy is of less amount than the debt, the presumption is, that it was not intended to be given in lieu of it; it will, therefore, not be considered a satisfaction, even *pro tanto*, as in the two former classes of cases of satisfaction: *Cranmer's Case*, 2 Salk. 508; *Atkinson* v. *Webb*, 2 Vern. 478; *Eastwood* v. *Vinke*, 2 P. Wms. 614, 617; *Minuel* v. *Sarazine*, Mos. 295; *Graham* v. *Graham*, 1 Ves. 263. A legacy, however, by a debtor to a creditor has been held to be *pro tanto* a discharge of debt where it appeared that a testatrix had made a proposal to that effect to her creditor, and that he had not objected to the arrangement: *Hammond* v. *Smith*, 33 Beav. 452.

So, also, the presumption of satisfaction being intended, will be repelled where the legacy, though in amount equal to or greater than the debt, is payable at different times, so as not to be equally advantageous to the legatee as the payment of the debt (*Atkinson* v. *Webb*, Prec. Ch. 236; *Nicholls* v. *Judson*, 2 Atk. 300; *Hales* v. *Darell*, 3 Beav. 324, 332; *Charlton* v. *West*, 30 Beav. 124, 127; *Fairer* v. *Park*, 3 Ch. D. 309); and perhaps even where the legacy is payable to different trustees: *Pinchin* v. *Simms*, 30 Beav. 119, 120; and see *Mathews* v. *Mathews*, 2 Ves. 635, where Sir *Thomas Clarke*, M. R., observes, that the Court dislikes the rule so much as to lay hold of any minute circumstance to take a case out of it; as, that the thing given in satisfaction should be as certain as to the duration and commencement of it as the debt, otherwise, though a sum ten times larger be given by the will, it would not be held a satisfaction. "I myself," said his Honor, "remember a case, before the Lord Chancellor (*Hardwicke*), where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed, or was likely to owe; yet, because made payable in a month after her own death, so that the servant might not outlive the month, although great odds the other way, the Court laid hold of that." See also, *Clarke* v. *Sewell*, 3 Atk. 96; *Haynes* v. *Mico*, 1 Bro. C. C. 129; *Jeacock* v. *Falkener*, 1 Bro. C. C. 295; *S. C.* 1 Cox, 37; *Adams* v. *Lavender*, 1 M'Cl. & Y., Exch., 41; *Hales* v. *Darell*, 3 Beav. 324, and cases there cited.

The presumption will also be repelled where the legacy and debt are of a different nature, either with reference to the subjects themselves, or with respect to the interest given: see *Eastwood* v. *Vinke*, 2 P. Wms. 614, where it was held, that as money and lands were things of a dif-

ferent nature, the one should not be taken in satisfaction of the other. See also *Forsight* v. *Grant*, 1 Ves. jun. 298; *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Byde* v. *Byde*, 1 Cox, 49; *Bartlett* v. *Gillard*, 3 Russ. 149; *Fourdrin* v. *Gowdey*, 3 My. & K. 409; *Rowe* v. *Rowe*, 2 De G. & Sm. 294; *Edmunds* v. *Low*, 3 K. & J. 318; *Fairer* v. *Park*, 3 Ch. D. 309. So, also, where the interest given is of a different nature or not co-extensive with the debt. Thus, a gift of a residue of real and personal estate for life was held not to be a satisfaction for a sum of money to be laid out in lands and conveyed to a person in fee: *Alleyn* v. *Alleyn*, 2 Ves. 37.

So, also, where there is a particular motive assigned for the gift, it will not be presumed to be a satisfaction for a debt: *Mathews* v. *Mathews*, 2 Ves. 635; *Charlton* v. *West*, 30 Beav. 124, 127.

The presumption will not be raised where the debt of the testator was contracted *subsequently* to the making of the will; for he could have had no intention of making any satisfaction for that which was not in existence: *Cranmer's case*, 2 Salk. 508; *Thomas* v. *Bennet*, 2 P. Wms. 343; *Plunkett* v. *Lewis*, 3 Hare, 330.

Where the legacy is contingent or uncertain, whether it be given upon the happening of a contingency, as in *Crompton* v. *Sale*, 2 P. Wms. 553, or is in itself of an uncertain or fluctuating nature, as a gift of the whole or a part of the testator's residuary estate, even though it should prove greater in amount than the debt, it will not be held to be a satisfaction of it: *Devese* v. *Pontet*, 1 Cox, 188; *Barret* v. *Beckford*, 1 Ves. 519; *Lady Thynne* v. *The Earl of Glengall*, 2 H. L. Ca. 154.

The result will be the same, if the debt itself is contingent or uncertain, as a debt upon an open and running account,—for it might not be known to the testator, whether he owed any money to the legatee or not; and therefore, it could not reasonably be held that he intended a legacy to be in satisfaction of a debt which he did not know that he owed, any more than a legacy could be held a satisfaction of a debt contracted after the making of the will: *Rawlins* v. *Powell*, 1 P. Wms. 297; and in *Carr* v. *Eastabrooke*, 3 Ves. 561, Lord *Alvanley*, M. R., held that a legacy was not a satisfaction for a negotiable bill of exchange, on the ground that it was not to be presumed that the testator could know whether the legatee had not, the moment she received the bill, indorsed it over to another person, in which case no debt would be due to the legatee.

But the presumption that a debt is intended to be satisfied by a legacy will not be rebutted

by the circumstance that the debt is liable to variation in amount; where, for instance, the debt was in respect of deposits made with the testator, the creditor drawing on him from time to time in respect of such deposits: *Edmunds* v. *Low*, 3 K. & J. 318. So in *Smith* v. *Smith*, 3 Giff. 263, where a testator who had advanced moneys to his son, and paid large sums on his account, bequeathed to him a legacy without making mention of the debt, it was held by Sir *John Stuart*, V.-C., that the loan and unascertained balance must be set off against the legacy.

Upon the same principle it was also held in the same case that the assignees of a firm indebted to the testator were not entitled to receive a legacy bequeathed by the testator to a member of the firm. *Ib.* 270.

Where a debt by the marriage of the creditor becomes payable to her husband, the presumption of satisfaction by a legacy to a larger amount having been bequeathed to her by the debtor will not be rebutted as being intended for a person to whom the debt was not due, because the legacy, subject to the wife's equity to a settlement, would be payable to the husband. See *Edmunds* v. *Low*, 3 K. & J. 318. The remark, however, of his Honor that as the legacy in that case was only 100*l.* the wife had no equity to a settlement, is not in accordance with the authorities. See ante, vol. i., p. 511.

Where as in *Chancey's Case*, selected as a leading authority upon this subject, there is an express direction in the will for payment of *debts and legacies*, the Court will infer that it was the intention of the testator that both the debt and the legacy should be paid to the creditor: *Richardson* v. *Greese*, 3 Atk. 65; *Field* v. *Mostin*, Dick. 543; *Hales* v. *Darell*, 3 Beav. 324, 332; *Jefferies* v. *Michell*, 20 Beav. 15; *Hassell* v. *Hawkins*, 4 Drew. 468. See also *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 71.

But a direction to pay debts *alone* has been held by Sir *W. Page Wood*, V.-C., not to be sufficient to rebut the presumpton of satisfaction (*Edmunds* v. *Low*, 3 K. & J. 318, 321). Sir *J. Lewis Knight Bruce*, V.-C., has held that it may be looked upon as an ingredient coupled with other circumstances to have that effect: *Rowe* v. *Rowe*, 2 De G. & Sm. 297, 298. Other judges, however, have held that a charge of debts standing alone, is of equal force on the question of rebutting the presumption of satisfaction as if it were accompanied by a charge of legacies: *Hales* v. *Darell*, 3 Beav. 324; *Jefferies* v. *Michell*, 20 Beav. 15; *Cole* v. *Willard*, 25 Beav. 568, 573; *Pinchin* v. *Simms*, 30 Beav. 119; *Charlton* v. *West*, *Ib.* 124.

See also *Lord Chichester* v. *Coventry*, 2 L. R. Ho. Lo. 71, and the remarks thereon in *Dawson v. Dawson*, 4 L. R. Eq. 504.

A question has been raised whether a testator in a charge of "debts," includes his liability on a bond or covenant to pay a sum of money after his decease. In the case of *Wathen* v. *Smith*, 4 Madd. 325, a husband covenanted on marriage to pay to his wife 1000*l.* six months after his death. By his will he gave her 1000*l.*, payable three months after his decease, and after giving certain specific legacies, he directed his residue to be applied in payment of *all* his just *debts and legacies*. Sir *John Leach*, V.-C., held that the legacy must be considered as a performance of the covenant. "Undoubtedly," observed his Honor, "these are questions of intention; but the intention to perform the covenant is to be presumed, unless there be special circumstances to repel that presumption. In *Chancey's Case*, it was held that the direction in the will, that the testator's just debts should be paid, repelled the presumption that a legacy to the creditor was intended as a satisfaction of the debt. I think *Chancey's Case* does not apply here; and that this provision for the wife by the settlement is not a debt within the sense in which the testator must be understood to use the word 'debts' in his will."

In the case, however, of *Cole* v. *Willard*, 25 Beav. 568, the authority of *Wathen* v. *Smith* is impugned. There the testator, on his marriage, covenanted that his representatives should, within three months after his decease, pay 2000*l.* to trustees, to be held for his wife for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year payable quarterly, and other benefits. It was held by Sir *John Romilly*, M. R., that the provision for the wife under the settlement, was not satisfied by the provision made for her by the will. "I do not," said his Honor, "concur with Sir *John Leach* in his observation in *Wathen* v. *Smith*, that the testator must not be understood to include, under the word 'debt,' his liability on bond or covenant made on his marriage, although to be discharged after his decease." His Honor, however, decided the case upon the ground that the two provisions were not identical.

Where a parent gives a legacy to a child to whom he is indebted.] —It appears that a legacy given by the will of a parent to a child, is not upon any different footing from that of a legacy by any other person as a satisfaction of a *debt not being a portion;* therefore, where a father owes a mere debt to a child, a subsequent legacy will not, in the absence of inten-

tion, express or implied, be considered as a satisfaction of the debt, unless it be either equal to, or greater than, the debt in amount, and the presumption of satisfaction be not repelled by any of those slight circumstances which will take a bequest of such amount to a stranger out of the general rule: *Tolson* v. *Collins*, 4 Ves. 483; *Stocken* v. *Stocken*, 4 Sim. 152.

The same remarks apply to a legacy to a wife to whom the husband is indebted: *Fowler* v. *Fowler*, 3 P. Wms. 353; *Cole* v. *Willard*, 25 Beav. 568; *Atkinson* v. *Littlewood*, 18 L. R. Eq. 595, overruling *Wathen* v. *Smith*, 4 Madd. 325.

And the rule is equally applicable where the debt due is in the shape of an annuity, and an annuity is subsequently given by the will of the debtor to the annuitant. See *Atkinson* v. *Littlewood*, 18 L. R. Eq. 595. There a husband, by a deed of separation, covenanted with the sureties of the deed to pay them an annual sum of 52*l.* during the life of his (the covenantor's) wife, to be paid to her on four special quarterly days for her separate use, without power of anticipation. The husband, by will, subsequently gave certain specific property to trustees, to pay out of the rents an annuity of 52*l.* to his wife generally, on the same special quarterly days. It was held by Sir *R. Malins*, V.-C., that in the absence of any direction in the will to pay debts and legacies, and there being no expression of a contrary intention, the general rule must prevail, according to which a presumption arises that the annuity given by the will was intended as a substitution and satisfaction for the first, and that the wife, therefore, was obliged to elect and take under the will or as a creditor under the deed. But see *Bartlett* v. *Gillard*, 3 Russ. 149.

Where a parent in his lifetime advances a child to whom he is indebted.]—Where, moreover, a parent is indebted to a child, and in his lifetime makes an advancement to the child upon marriage, or some other occasion, of a portion equal to or exceeding the debt, it will *primâ facie* be considered a satisfaction; and it is immaterial whether the portion be given in consideration of natural love or affection, or whether property be settled by the other party in consideration of it, or whether, in the case of a portion to a daughter, the husband be ignorant of the debt. See *Wood* v. *Briant*, 2 Atk. 521; *Seed* v. *Bradford*, 1 Ves. 500; *Chave* v. *Farrant*, 18 Ves. 8.

In *Plunkett* v. *Lewis*, 3 Hare, 316, these authorities were reviewed and recognised by Sir *J. Wigram*, V.-C. There, a trust fund to which a father was entitled for life, and his son and

daughter in remainder, was sold, and the proceeds, amounting to 11,445*l.*, were received by the father. Subsequently, on the marriage of the daughter, the father settled 16,000*l.* in ready money, and 20,000*l.* payable six months after his decease, besides lands. It was held by Sir *James Wigram*, V.-C., that the claim of the daughter against the father, in respect of her share of the proceeds of the trust fund, must be presumed to be satisfied by the settlement. See also *Hardingham* v. *Thomas*, 2 Drew. 353.

In the same case, his Honor held advances made by the father to his son simpliciter, not to be a purchase or satisfaction of the claim of the son to the proceeds of a trust fund belonging to the son, possessed by the father *after* such advances. See 3 Hare, 330.

The presumption of satisfaction can only arise where the person making the payment is himself the party bound to pay, or is the owner of the estate charged with the payment: *Samuel* v. *Ward*, 22 Beav. 347; and see *Douglas* v. *Willes*, 7 Hare, 328.

A debt due to a man will not be satisfied by a legacy to his wife: *Hall* v. *Hill*, 1 D. & War. 94, 1 C. & L. 120. And a debt due under a covenant to the trustees of a settlement will not be satisfied by a legacy to the cestui que trusts: *Smith* v. *Smith*, 3 Giff. 263.

Extrinsic evidence.]—Where the presumption arises merely from the fact of a legacy to a creditor being equal to or greater than the amount of the debt, it would appear, upon principle, that evidence ought to be admitted to rebut the presumption; and if so, evidence may, on the other hand, be admitted to fortify it: *Plunkett* v. *Lewis*, 3 Hare, 361. However, in *Fowler* v. *Fowler*, 3 P. Wms. 353, Lord *Talbot* refused to admit parol evidence; and this case appears to be approved of by Sir *Edward Sugden*, in *Hall* v. *Hill*. See 1 D. & W. 121, 1 C. & L. 147. It is, however, submitted, that the evidence ought to have been admitted in that case, since, as the case is reported, it would merely have been admitted for the purpose of rebutting a presumption of law, not to contradict the intention of the testator as appearing by the will. If, indeed, Lord *Talbot* considered that the intention of the testator appeared on the face of the will, the evidence was rightly rejected.

In *Wallace* v. *Pomfret*, 11 Ves. 542, Sir *Samuel Romilly*, rightly admitting that evidence might be received to rebut the presumption of the satisfaction of a debt by a legacy, where there was no expression in the will showing the intention, rightly argued also, that there was no instance of admitting evidence where the testator has shown his intention by words; Lord *Eldon*, nevertheless, admit-

ted evidence to beat down, not a mere presumption of law, "but," as he says, "the fair inference from the written context." This decision, however, is contrary to principle, and has been strongly disapproved of in *Hall* v. *Hill*, 1 D. & War. 122, 1 C. & L. 147; in which case, as the presumption of satisfaction did not arise on the face of the will, Lord Chancellor *Sugden* refused to admit parol evidence of the testator's declaration, showing that he intended the legacy as a satisfaction.

WILCOCKS *v.* WILCOCKS.

De Term S. Trinitatis, 1706.

[REPORTED 2 VERN. 558.]

PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.]—*A. covenants, on his marriage, to purchase lands of* 200*l. a year, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail. He purchases lands of that value, but makes no settlement; and on his death the lands descend on the eldest son. On a bill by the eldest son for a specific performance of the covenant, it was held that the lands descended were a satisfaction of the covenant.* *S. C.* 1 Eq. Ca. Ab. 26, pl. 5.

THE plaintiff's father, upon his marriage, covenanted to purchase lands of 200*l.* per annum, and to settle the same upon himself for life, and on his wife for her jointure, and to the first and other sons in tail, remainder to the daughters.

The father, who was a freeman of the city of London, died intestate, having purchased lands of the value of 200*l.* per annum, but made no settlement thereof, but permitted them to descend upon the plaintiff, his eldest son, who now brought a bill founded on his father's marriage articles, to have 200*l.* per annum purchased out of the personal estate, and settled to the uses in the marriage articles.

LORD KEEPER COWPER.—The lands descended, being of 200*l.* per annum and upwards, ought to be deemed a satisfaction of the covenant, and decreed it accordingly (*a*); and that the personal estate should be divided and distributed amongst the *three* children according to the custom of the city of London, and the statute for settling intestate's estates.

(*a*) See *Herne* v. *Herne*, 2 Vern. 555.

One of the daughters having attained the age of *seven-*

teen years, made her will, and devised her personal estate.

PER CUR.—The will is good as to the share that belonged to her by the statute; but as to her orphanage share (*a*), she dying unmarried before *twenty-one*, it survives to the other orphans by the custom, and her will could not take place upon her orphanage part.

(*a*) A child entitled to an orphanage share of his father's personal estate, dying under *twenty-one*, and unmarried, cannot devise it by his will; for, by the custom, it survives to the other children; but he might (previous to 1 Vict. c. 26, which renders the wills of all persons under twenty-one invalid), have bequeathed his share under the Statute of Distributions.

BLANDY *v.* WIDMORE.

De Term. S. Trin. 1716.

[REPORTED 1 P. WMS. 323.]

PERFORMANCE OF A COVENANT TO LEAVE A SUM OF MONEY BY ALLOWING A SUM TO DEVOLVE BY INTESTACY.]—*Covenant by a man, previous to marriage, to leave his intended wife* 620*l.* *The marriage takes place, and he dies intestate; the wife's share comes to above* 620*l.*: *this is a satisfaction.*

S. C., 2 Vern. 709.

UPON the marriage of A. with B., there were articles reciting, that, in consideration of the marriage, and of the portion, it was agreed that if B., the wife, should survive A., her intended husband, A. should *leave* B. 620*l.*; and accordingly A. covenanted with B.'s trustees, that his executors, within three months after his decease, should pay B. 620*l.* if she should survive him.

A. died intestate and without issue; upon which B. the wife, by the Statute of Distributions (*a*); became entitled to a moiety of the personal estate, which was much more than 620*l.*; and the question was, whether the distributive share belonging to B., being more than 620*l.*, should go in satisfaction of it.

(*a*) 22 & 23 Car. 2, c. 10.

Serjeant *Hooper*.—This 620*l.* is a debt, and debts must be first paid, after which the distribution is to be made; and if the intestate had made a will, probably he would have given to his wife something additional to this 620*l.* Now, what the statute gives is not his gift, and, being not his gift, is not to be taken as his payment; or, supposing it to be his gift, still it cannot be said to be his payment.

LORD CHANCELLOR COWPER.—I will take this covenant *not to be broken*, for the agreement is to *leave* the widow 620*l.* Now the intestate in this case has left his widow 620*l.* and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore, let her take it, but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant; so that she shall not come in first as a creditor for the 620*l.*, and then for a moiety of the surplus.

And Mr. *Vernon* said, it had been decreed in the case of *Wilcocks* v. *Wilcocks* (*a*), Trin. 1706, that if a man covenants to settle an estate of 100*l.* per annum on his eldest son, and he leaves lands of the value of 100*l.* per annum to descend upon his son, this shall be a satisfaction of the covenant to settle; and that this last was a stronger case, it being the case of an heir, who is favoured in equity; also the case of *Phiney* v. *Phiney* (*b*) was cited.

(*a*) 2 Vern. 558, ante, 389.

(*b*) 2 Vern. 638.

(*c*) 2 Vern. 709.

Whereupon the decree (*c*) made by Sir *John Trevor*, Master of the Rolls, was now affirmed by Lord Chancellor *Cowper* (*d*).

(*d*) And again affirmed upon a rehearing. Reg. Lib. A. 1715, fol. 372.

Wilcocks v. *Wilcocks* was decided in accordance with the rule of equity, that, where a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention. In that case, it will be observed that a person covenanted to *purchase and to settle* lands of a certain value, and afterwards purchased lands of equal, or greater value, which descended upon his heir, and they were deemed a performance of the covenant.

The result will be the same where a person, having no real estate, covenants to *convey and settle*, and he afterwards purchases but does not convey or settle, real estate: *Deacon* v. *Smith*, 3 Atk. 323; and see *Wellesley* v. *Wellesley*, 4 My. & Cr. 561; *Ex parte Poole*, De Gex Bankruptcy Ca. 581.

Where the lands purchased are of less value than the lands covenanted to be purchased or conveyed and settled, they will be

considered as purchased in part performance of the covenant: *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 211; *Lechmere* v. *Lechmere*, Ca. t. Talb. 80; *Sowden* v. *Sowden*, 1 Bro. C. C. 582; 3 P. Wms. 228, n.; *Gardner* v. *Marquis of Townshend*, G. Coop. 303; and see 4 Ves. 116, 117; 10 Ves. 9, 516.

Even if the heir be not a person interested in the performance of the covenant, the land will be bound in his hands by it (*Garthshore* v. *Charlie*, 10 Ves. 9); and it is immaterial whether the estates are to be purchased within a limited time, and the purchase is not made until after such time has expired, or at different times, and in small parcels; or whether it is to be made with the consent of trustees, and such consent has not been applied for; see *Deacon* v. *Smith*, 3 Atk. 329.

The doctrine upon this subject was much discussed in the leading case of *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 227, Ca. t. Talb. 80. There Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out, within one year after the marriage, 6,000*l.*, her portion, and 24,000*l.* (amounting in the whole to 30,000*l.*), in the purchase of freehold lands in possession, in the south part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth, to be settled on Lord Lechmere for life, remainder, for so much as would amount to 800*l.* a year, to Lady Lechmere, for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere, his heirs, and assigns, for ever; and Lord Lechmere also covenanted, that, until the 30,000*l.* should be laid out in lands, interest should be paid to the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere was seised of some lands in fee at the time of his marriage, and after his marriage purchased some estates in fee of about 500*l.* per annum, and some estates for lives, and other reversionary estates in fee expectant on lives, and contracted for the purchase of some estates in fee in possession, and on the 18th of June, 1727, died intestate, without issue, and without having made a settlement of any estate. None of the purchases or contracts were made by Lord Lechmere *with the consent of the trustees*. Upon a bill being filed by Mr. Lechmere, the heir of Lord Lechmere, for specific performance of the covenant, and to have the 30,000*l.* laid out as therein agreed, it was held by Sir *Joseph Jekyll*, M. R., that he was entitled to specific performance, and that none of the land which was permitted to descend to the heir was to be taken in satisfaction or part performance of the covenant. However, on appeal, Lord *Talbot*, C., reversed his Honor's decree as to the free-

hold lands purchased in fee simple in possession after the covenant, though with but part of the 30,000*l.*, and left to descend, and these were ordered by the Lord Chancellor to go as a satisfaction *pro tanto*, or, more correctly speaking, they were to be considered as bought in part performance of the covenant. "As to questions of satisfaction," observed his Lordship (see Sugd. V. & P. Append. 1117, 11th edit.), "where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere, *I do not consider him as a creditor, but as standing in the place of his ancestor*, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain; for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchase made after the articles; for, as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple in possession, &c.), though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected, that the articles say the land shall be conveyed immediately. It is not

necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out 30,000*l.* in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance; and that seems to me rather his intention than to enlarge his real estate. The case of *Wilcocks* v. *Wilcocks* (2 Vern. 558), though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200*l.* per annum was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction; and in this particular I differ from the Master of the Rolls.* There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part satisfaction of the 30,000*l.* to be laid out in land under the articles, and the residue of the 30,000*l.* must be made good out of the personal estate." See also *Barham* v. *Earl of Clarendon*, 10 Hare, 126.

The doctrine has also been extended to a case where the covenant was to pay money to trustees, to be laid out by them in a purchase of land. See *Sowdon* v. *Sowdon*, 3 P. Wms. 227, reported in a note of Mr. Cox; *S. C.*, 1 Bro. C. C. 582, 1 Cox, 165. In that case, by marriage settlement, reciting that R. S. had actually paid to the trustees a sum of 1500*l.*, and had also agreed to pay them

a further sum of 500*l.* at least upon the trusts after mentioned, he the said R. S. covenanted with the trustees that he would, within six months, pay the said further sum of 500*l.* at the least, which said sums of 1500*l.* and 500*l.* were to be applied in the manner thereinafter mentioned. And it was thereby declared, that the said sums of money were so paid, and to be paid, upon trust that *the said trustees should, as soon as conveniently might be, with the consent of the said R. S.*, lay out and invest the same, either together or in parcels, and together, with or without any further sum to be advanced by the said R. S., in the purchase of freehold lands in the county of Devon; and that such lands, when purchased, should be conveyed to the trustees to the uses of the marriage, as therein mentioned. Notwithstanding the recital in the settlement, R. S. did not pay the 1500*l.*, which, together with the 500*l.*, remained unpaid at his death. Soon after the marriage he purchased an estate in the county of Devon for 2150*l.*, which was conveyed to him in fee, but he never made any settlement of this estate, and died intestate. There was no evidence in the cause, upon which the Court thought any reliance could be had; but it was argued, that this case might be distinguished from the others, inasmuch as, in this case, the husband covenanted *to pay the money to the trustees*, of which covenant he scarcely could mean a performance, when he made a purchase *himself*. However, Sir *L. Kenyon*, M. R., declared, that if this case had been *res integra*, he should have thought the distinction worthy of great consideration, but he thought this case within the principle established by *Lechmere* v. *Earl of Carlisle*, that, where a man covenants to do an act, and he does that which may *pro tanto* be converted to a completion of his covenant, he shall be presumed to have done it with such intention: and declared the estate to be subject to the trusts of the settlement. See also *Trench* v. *Harrison*, 17 Sim. 111.

The expenditure, however, by a tenant for life in building on lands vested in trustees will not be taken to be in part satisfaction of a covenant by him to pay a sum of money to the trustees, which they had power to invest in the purchase of lands to be held upon the same trusts: *Horlock* v. *Smith*, 17 Beav. 572. And see *Wills* v. *Gresham*, 2 Drew. 258, 271, affirmed 3 Eq. R. 116; *Robinson* v. *Sykes*, 2 Jur. N. S. 895; *Mathias* v. *Mathias*, 3 Sm. & G. 552; 3 Jur. N. S. 429.

The principle upon which *Wilcocks* v. *Wilcocks* and *Lechmere* v. *Lechmere* were decided, has been held to apply equally to the case where the obligation to purchase lands arose from an Act of Par-

liament. See *Tubbs* v. *Broadwood*, 2 Russ. & My. 487.

Where a person upon his marriage covenanted with trustees to settle an estate upon his wife, but he failed to do so, and subsequently exchanged the estate for another and the sum of 1050*l.*, it was held that the estate taken in exchange, and the sum of 1050*l.* ought to be taken in substitution for the estate covenanted to be settled, and that the 1050*l.* was a specialty debt under the covenant: *Powdrell* v. *Jones*, 2 Sm. & Giff. 335.

And it is no objection to a purchase being considered as a part performance that it is optional to settle lands *or* a rent-charge, unless the intention to settle a rent-charge be shown. See *Deacon* v. *Smith*, 3 Atk. 323, 328, in which case Lord *Hardwicke* also held, that the assignment of a mortgage upon the estate, by the covenantor, was no objection; "for," he observed, "it was only continuing, in effect, the same mortgage upon the estate, because he wanted to take up money to complete the purchase."

But where the covenant points to a *future* purchase of lands, it cannot be presumed that lands, of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in performance of it: *Lechmere* v. *Lechmere*, Ca. t. Talb. 80. And see *Davys* v. *Howard*, 5 Bro. P. C. 552.

Nor can it be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance. Thus, leaseholds for lives or terms of years, although with a covenant to purchase the fee, or estates in reversion expectant upon lives, unless, perhaps, the lives fall in during the life of the covenantor, will not be taken in performance of a covenant to purchase fee simple lands in possession. See *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 227; *Lechmere* v. *Lechmere*, Ca. t. Talb. 80; *Deacon* v. *Smith*, 3 Atk. 323; *Whorwood* v. *Whorwood*, 1 Ves. 540; *Lewis* v. *Hill*, 1 Ves. 274.

So, in *Pinnell* v. *Hallett*, Amb. 106, where a person covenanted to purchase and settle *lands* of inheritance on his wife for life, without *impeachment of waste*, with remainder to the issue of the marriage, and he afterwards purchased the moiety of a house and a copyhold estate, the question arose, whether these estates, or either of them, were applicable in part satisfaction of the covenant; and Lord *Hardwicke* was clearly of opinion, that the moiety of the house was not, because it was not the kind of estate intended by the articles; and that the copyhold estate was not applicable, because the wife was to take the estates settled for life, *without impeachment of waste*. Besides, the copyhold estate appeared to be of the

nature of *Borough English*, and therefore could not be taken as part satisfaction to an eldest son, which by its nature went to the youngest.

Where, however, there was a covenant generally to purchase lands, the purchase of copyhold estate was held a part performance: *Wilkes* v. *Wilkes*, 5 Vin. Abr. 293, fol. 39; but see *Whorwood* v. *Whorwood*, 1 Ves. 540.

As a covenant is construed most strongly against the covenantor, a covenant by him to secure a jointure "out of estates he should thereafter acquire," will be a charge upon an estate which he had at that time already *contracted* to purchase: *Warde* v. *Warde*, 16 Beav. 103.

A covenant to purchase lands is a mere specialty debt, and will not create a specific lien upon lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles, and will not affect a purchaser or mortgagee without notice; "for if the covenantor," as observed by Lord *Hardwicke*, "had sold them or mortgaged them, it would have been evidence of a different intention, and would therefore have taken off all evidence of his intention to bind them by the articles: *Deacon* v. *Smith*, 3 Atk. 327; see *Countess of Mornington* v. *Keane*, 2 De G. & Jo. 292; 27 L. J. N. S. (Ch.) 7. And other specialty creditors cannot complain that the presumption arises, that lands were purchased in performance of a covenant; for it is in the power of an owner of an estate to prefer one specialty creditor to another, for none of them have any specific lien on it: *Deacon* v. *Smith*, 3 Atk. 327.

Notwithstanding the observation made by Lord *Hardwicke* in *Deacon* v. *Smith*, it has been held that where a person who has purchased lands in satisfaction of the covenant has mortgaged them to a mortgagee who had no notice of the covenant, the equity of redemption will be liable to the covenant. See *Ex parte Poole*, 11 Jur. 1005, 1 De Gex, 581; from the judgment in which case it may be inferred that the mortgagee's title depended entirely upon his being a purchaser *pro tanto* without notice.

Where the presumption arises that lands were bought with the intention of performing a covenant, in the absence of fraud, the price paid for them will be considered their value. See *Tyrconnel* v. *Duke of Ancaster*, Amb. 239, and note; *Pinnell* v. *Hallett*, Amb. 106; *Wace* v. *Bickerton*, 3 De G. & Sm. 751; *Horlock* v. *Smith*, 17 Beav. 572.

Where trustees, under an obligation to lay out money in land, have trust funds in their hands, any purchase by them will, more readily than in ordinary cases, be

taken to have been made in fulfilment of their obligation : *Mathias* v. *Mathias,* 3 Sm. & Giff. 552 ; 3 Jur. N. S. 429. And where trust monies have been improperly invested by trustees, it will be followed into the land : *Phayre* v. *Perce,* 3 Dow. 116 ; Sugd. Prop. 160.

The same result follows where a person under an obligation to settle all his personal estate, purchases land with borrowed money, for upon his death all his personal estate which can be treated as having been employed in the purchase of the land, in paying off the borrowed money, or in lasting improvements, will be a charge upon the land in the hands of the heir for the benefit of the cestui que trust : *Lewis* v. *Madocks,* 8 Ves. 150 ; 17 Ves. 48 ; *Denton* v. *Davies,* 18 Ves. 499.

So, where trustees of a settlement, having a power to invest money with the consent of the husband and wife, the husband, being authorised by the trustees, and with the consent of his wife, purchased property not authorised by the settlement, it was held that *as between the husband and the trustees,* he must be considered to have purchased the estate for them : *French* v. *Harrison,* 17 Sim. 111 ; *Sealey* v. *Stawell,* 2 I. R. Eq. 326.

Where trust money was laid out in the purchase of land, pursuant to the trusts of a settlement, and the husband advanced a further sum of 500*l.*, and the estate was conveyed to the trustees, without any notice being taken of the fact that part of the purchase money had been advanced by the husband, it was held by Lord *Langdale,* M.R., that the husband had devoted the 500*l.* to the trusts of the settlement, as an advancement to the parties entitled under it. "In a case like this," said his Lordship, "where the father of a family makes a purchase for the purposes of his marriage settlement, I should require very strong evidence to show that he did not intend it for the benefit of all parties entitled under it." *Ouseley* v. *Anstruther,* 10 Beav. 461.

Covenant to leave a sum of money.]—Upon a principle analogous to that upon which the former class of cases proceed, it has long since been settled, upon the authority of *Blandy* v. *Widmore,* that, if a person covenants to *leave,* or that his executor shall *pay,* to another, a sum of money, or part of his personal estate, if he dies intestate, and such person becomes entitled to a portion of his personal property, of equal or greater amount, under the statute, such distributive share will be a performance of the covenant, and he cannot claim both : *Lee* v. *D'Aranda,* 1 Ves. 1 ; see also *Thacker* v. *Key,* 8 L. R. Eq. 408.

If the distributive share, as for

instance, in the case of a widow, be less than the sum which the husband covenants to leave, it will be taken to be a part performance (*Garthshore* v. *Chalie*, 10 Ves. 14, 16); and it does not depend upon the accident of the wife taking out administration or not (*Garthshore* v. *Chalie*, 10 Ves. 11, 12); and the Court will not look upon the slight difference between *leaving* and *paying*; or whether payment is to be within three months or six months after the covenantor's death, as the year allowed to executors and administrators to retain property in their hands is for convenience merely, and does not prevent vesting; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party; notwithstanding there had not been a lapse of twelve months: *Garthshore* v. *Chalie*, 10 Ves. 13; *Lang* v. *Lang*, 8 Sim. 465.

So, likewise, where the covenant is to pay to trustees, the distributive share of the wife will be taken in performance of the covenant. Thus, in *Lee* v. *D'Aranda*, 3 Atk. 419; *S. C.* 1 Ves. 1, L., by articles previous to his marriage with M. C., covenanted that he would in his lifetime, by will, or by some sufficient assurance, grant to M. C., or E. D. her mother, or her executors or administrators, in trust for M. C., for her separate use, 1,000*l.*, to be paid to M. C. after his decease, if she should survive him; and, in case he should not, by will or otherwise, assure to M. C. the sum of 1000*l.*, his executors should, within six months after his decease, pay her that sum for her own use. L. died intestate; and, upon the question being raised, whether she should have the 1000*l.* and her distributive share also, Lord *Hardwicke* decreed, that she was not entitled to the 1000*l.* as a debt due on the articles, and also to a distributive share, in case it should amount to more than 1000*l.*

A general covenant by a husband to pay or assign a moiety of real and personal estate to his widow, will be in part performed by the devolution of one-third of the personalty of the widow. Thus, in *Garthshore* v. *Chalie*, 10 Ves. 1, there was a covenant in a marriage settlement by the husband, in the event of his death, leaving his wife surviving, and children, within six months after his decease to convey, pay, and assign one full clear moiety of all such real and personal estate as he should be seised and possessed of, or entitled to, to her at his decease. Lord *Eldon*, upon the principle of part performance, held the widow not entitled, in addition to the moiety under the covenant, to a third of the residue of the personal estate by the intestacy of her husband, or, in other words, that her distributive share under the Statute of Distributions, was to be taken in

part performance of her husband's covenant.

But it seems that a gift by will, either of a sum of money or a residue, or part of a residue, will not *per se*, be considered a performance of a covenant to leave a widow a certain sum; for a gift by will *primâ facie* imports bounty, and admits a presumption of an intention in the testator to augment the provision under the covenant, and not to satisfy or perform it. See and consider *Haynes* v. *Mico*, 1 Bro. C. C. 129; *Devese* v. *Pontet*, 1 Cox, 188; Prec. Ch. 240, n., Finch's edition.

The last-mentioned cases, however, are clearly distinguishable from *Goldsmid* v. *Goldsmid*, 1 Swanst. 211, where, although the testator made a will, the principle of the decisions in cases of intestacy was applicable. In that case G. having, by marriage articles, covenanted that, if he died in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3000*l.*, by his will gave all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them should appear right." On G.'s death, during the life of his wife, the executors having died or renounced, his property became divisible according to the Statute of Distributions. It was held, by Sir *Thomas Plumer*, M. R., that the widow's distributive share, exceeding 3000*l.*, was a performance of the covenant in the marriage articles. "The rule," observed his Honor, "is clearly this: that the distributive share of the widow, in the case of absolute intestacy, is considered as a performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. I state that the question is at rest; because I consider that rule conclusively established by the case of *Blandy* v. *Widmore*, in which the judgment of Sir *John Trevor* was affirmed, and, on a re-hearing, reaffirmed by Lord *Cowper*. More than a century has since elapsed, and the subject has been frequently under the review of the most distinguished Judges,—of Lord *Hardwicke*, Lord *Thurlow*, Lord *Alvanley*, and the present Lord Chancellor; and I am warranted by the expressions of his Lordship in *Garthshore* v. *Chalie* (10 Ves. 1), when I say that case is unshaken. The rule was recognised by Lord *Hardwicke*, in *Lee* v. *D'Aranda* (1 Ves. 1, 3 Atk. 419), and again in *Barrett* v. *Beckford* (Prec. Ch. 48, Finch's edit.); and though the subsequent authorities of *Haynes* v. *Mico*, and *Devese* v. *Pontet*, have decided that, in the case of testacy, what was given should not operate as performance or satisfaction of what was due, those decisions,

grounded upon particular circumstances, are so far from impeaching the rule, that they expressly recognise it. The only question now is, whether a distinction can be made in the present case, the widow taking her distributive share under not an absolute, but a quasi intestacy where the purpose of the testator being disappointed, a virtual intestacy ensues, and the statute is the guide of distribution. . . . . Considering the question of performance of the contract, on what principle can it be contended, that the share taken under a quasi intestacy, is not a performance, which the same share taken under absolute intestacy indisputably is? In this case, as well as in the other, the widow takes *pleno jure*, herself being administratrix, and precisely the same sum. Every rule and principle established in the former cases, applies equally when the widow, in that character, receives a proportion of the assets by operation of law, exceeding the amount which she was entitled to receive under her marriage contract. To determine that this is not a performance of the contract, when, in the case of absolute intestacy, I should be bound to determine it to be performance, would be to proceed on those nice distinctions so strongly reprobated by Lord *Eldon* (10 Ves. 12, 15), and Lord *Hardwicke* (3 Atk. 422), and which, to adopt the expression of the latter, 'would never stand with the reason of mankind.' In substance the widow obtains all for which she contracted; and I am therefore bound to say, that she is entitled to her distributive share, but not in addition to her provision under the marriage contract."

But where the covenant is not to pay a gross sum, but the interest of a sum of money for life, or a mere life annuity, the principle upon which *Blandy* v. *Widmore* was decided will not apply. Thus in *Couch* v. *Stratton*, 4 Ves. 391, where a covenant by a husband to pay the interest of a sum of money to his widow, for life, was held not to be satisfied by her distributive share under his intestacy. See also *Young* v. *Young*, 5 I. R. Eq. 615: *Salisbury* v. *Salisbury*, 6 Hare, 526; *Wood* v. *Wood*, 7 Beav. 183.

Nor will the rule laid down in *Blandy* v. *Widmore* be applicable where the husband covenants to pay a sum in his *lifetime;* for in that case there is a breach of covenant before his death, and a *debt* is due to his wife. In *Oliver* v. *Brickland*, or *Oliver* v. *Brighouse* (1 Ves. 1, cited; 3 Atk. 420, 422), the husband covenanted to pay a sum within two years after marriage, and if he died, his executors should pay it. He lived after the two years and died intestate, leaving a larger sum than what he covenanted to pay to devolve upon his widow, as her distributive share; but Sir *Joseph Jekyll*,

M. R., held, that it was not to be taken in performance of the covenant. See *Garthshore* v. *Chalie*, 10 Ves. 12, where Lord *Eldon* approves of this case; and *Lang* v. *Lang*, 8 Sim. 451.

But where a covenant is entire, although the provision for the wife be such, that, if part of it, standing alone, might be considered as performed by the distributive share of the husband's personalty devolving upon her on his intestacy, if another part of it could not be considered as so performed, the Court will not, since the covenant is entire, divide it by holding one part performed, and the other part not performed. Thus, in *Couch* v. *Stratton*, 4 Ves. 391, a man, in his marriage settlement, covenanted, within three calendar months after his decease, to pay to the trustees 6000*l.*, with lawful interest from the day of his death, in trust, if the wife should survive him, and there should be no issue (which event happened), to pay 1500*l.* and the interest thereof (part of the 6000*l.* and interest) to his wife, her executors, administrators, and assigns, and to pay the interest of the remaining 4500*l.* to her for her life. Upon the death of her husband intestate it was held, by Lord *Rosslyn*, that, as the share of the widow, under the Statute of Distributions, was not a performance of the covenant as to the interest of the 4500*l.* for her life, it could not be considered as a performance of that part of the covenant under which, in the event which happened, she was entitled to 1500*l.* absolutely.

The two classes of cases which have been considered in this note show the importance of distinguishing between cases of performance, to which those cases belong, and cases of *satisfaction*; that is to say, cases of the satisfaction of debts by legacies. This has been well shown by Mr. Cox, in his learned note to *Blandy* v. *Widmore*, 1 P. Wms. 324. "In the cases on the subject of satisfaction," he observes, "in which the contracting party is supposed to have done some other thing in lieu of the thing contracted for, and which therefore depend more particularly on the implied intention of the party, several rules of presumption have been adopted which do not seem to apply to the cases of performance. (Vide *Eastwood* v. *Vinke*, 2 P. Wms. 616.) In cases of satisfaction the presumption will not hold where the thing substituted is less beneficial (either in amount or certainty, or time of enjoyment, or otherwise), than the thing contracted for, since *satisfaction* implies the doing of something *equivalent*, and the presumption is so much weakened where the thing *substituted* is not equivalent to the thing *contracted for*, and a *part satisfaction* will not be intended; whereas in cases where the *thing done* can be considered as *a part performance* of the *thing contracted*

for it shall be so taken." And see *Devese* v. *Pontet*, Prec. Ch. 240, n., and the remarks on that case, and on the distinction between cases of performance and satisfaction, in *Goldsmid* v. *Goldsmid*, 1 Swanst. 220, 221.

As to covenants to give a child about to marry an equal share with the others, see Peachy on Settlements, 556; *Bell* v. *Clarke*, 25 Beav. 437; *Graham* v. *Wickham*, 31 Beav. 447; *Davenport* v. *Hinchliffe*, 1 J. & H. 713; *Scriven* v. *Sandon*, 2 J. & H. 743.

WAKE *v.* CONYERS.

May 19; *June* 16, 1759.

[REPORTED 1 EDEN, 331.]

BOUNDARIES.]—*All cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or there might have been a multiplicity of suits.* 2 Cox. 360, Hill's MSS.

The Court has no power as of course to issue commissions to fix the boundaries of legal estates. Some equity must be superinduced by the acts of the parties, as some particular circumstances of fraud; or confusion, where one party has ploughed too near the other, or the like.

Bill to ascertain the boundaries of two manors dismissed, there being no dispute as to the soil.

THE defendants, John Conyers, Esq., as tenant for life, his wife Lady Henrietta, as entitled after his death to her jointure, and his son, an infant, as tenant in tail, were entitled to the manor of Epping, and also to the freehold of certain lands next adjoining to it, lying in the manor of Waltham; the boundary lines of the two manors passing through Mr. Conyers' park. He had cut down certain trees, which, it was alleged by the bill, were standing on the line, and were boundary marks.

The present bill was filed by Sir William Wake, as prochein amy to his three infant sons, who were tenants in tail successively of the manor of Waltham, praying that the boundary of the manor of Waltham, so far as the same abuts on the manor of Epping, might be fixed and set out, and that a commission might issue for that purpose; and that the defendant John Conyers might set up new boundary marks in the room of those which he had cut down and destroyed.

Mr. Conyers by his answer admitted the cutting down of certain trees, but denied that they were boundary marks; though he submitted to have the boundaries ascertained and settled, and that marks might be set up to perpetuate such boundaries.

May 19, 1759. On the opening, the Lord Keeper (*Henley*) objected to the nature of the suit, as being merely to settle the boundaries of the manor. He said he did not think the Court had jurisdiction, and desired it to stand over, for counsel to consider whether there was sufficient equity for the Court to entertain the bill.

June 16, 1759. It came on again this day.

The Attorney-General (Sir *Charles Pratt*), *Wilbraham*, and *Browning*, for the plaintiffs.—This is not merely a bill of peace; though, as far as the jurisdiction of the Court is concerned, it is usual and proper to establish peace and good neighbourhood. But it is a case peculiarly coming under the most favourable jurisdiction of this Court; which is to give a remedy where there is none at law. The law is defective. The boundary cannot be set out. It can only be tried by action of trespass or ejectment, which can do no more than settle the local trespasses; while a boundary line extending a mile or two, may be disputed inch by inch.

There is no objection to this bill, as being merely a bill to settle boundaries. Bills to settle boundaries have been entertained in this Court from very ancient times: Tothill, 126, 127; so early as the reign of James the First, Id. 84, 210; *Bowman* v. *Yeat*, cit. 1 Ch. Ca. 146; there was a rent charge, and the grantee did not know where to distrain, on account of the confusion of boundaries: a commission was ordered. So, *Harding* v. *Countess of Suffolk*, 1 Ch. Rep. 63; *Cocks* v. *Foley*, 1 Vern. 359. In the case of *The Duke of Dorset* v. *Serjeant Girdler*, Prec. Ch. 531, a demurrer to a bill, to perpetuate testimony on the ground of a menace being used to disturb the plaintiff in a sole fishery, was overruled; and on this ground, because he could not proceed at law. So in this case,

what is prayed by the bill cannot be done at law: the defendant has destroyed the last remaining boundary marks, and by his answer consents that they may be set out. The only difference between this and the common case is, that there is no dispute about the soil, which is confessedly Mr. Conyers'; and it may be asked upon that, cui bono to fix the line? The answer to that is the manorial rights; a manor has a seignory; lands escheat; the lord has a right to treasure-trove, to deodands, to the game. The only difference, then, is the value. In a hundred years' time, the boundaries will be confounded and lost unless this commission be granted.

Perrot and *Hoskins*, for the defendants.—This bill, under pretence of establishing boundaries, is, in fact, to settle manorial rights. It is said, that every question for the settling of boundaries is a proper subject for the jurisdiction of this Court. That is, however, not the case. Those cases which have been cited, in which a man, having joint occupation, has confounded the boundaries, have turned upon the fraud which has been relieved against. A similar principle has given the Court jurisdiction in the cases of rent-charge. As to the loss of evidence, if any injury arises to the plaintiffs from that, it will be from their own laches, in not making perambulations. This does not come under the common case of issues, where enjoyment is decreed accordingly. It is an incorporeal hereditament, and that cannot be done.

Lord Keeper Henley(*a*)—This bill is merely for ascertaining the boundaries of these two manors, and is intended to bind the inheritance of the parties for ever. It struck me as new, upon the opening. I have been, ever since I sat here, extremely jealous of the jurisdiction of this Court over legal inheritances. I was, therefore, desirous that some precedent should be produced, to show me that this Court could entertain a bill of this nature, to settle the boundaries of an incorporeal inheritance; but none such has been produced. There have, since I sat

(*a*) Afterwards Lord Chancellor and Earl of Northington.

here, been several [Bills] to fix boundaries where a right to the freehold of the soil has been incidental. But I have seen such frightful consequences arising from them, that I think these suits are very far from deserving encouragement. They originally came into this Court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they apprehended, and which they were brought to prevent, had actually been tried at law.

Hitherto these disputes have been only between persons of great fortune. But the consequences have been, that the parties have been eager to come into this Court, without any attention being paid to see whether the prayer of the bill applies properly to the jurisdiction. An issue is directed, and after going down to the Assizes at a very great expense, and a verdict being found for one party, the other is dissatisfied, and a new trial is directed. I was extremely unwilling to grant the last new trial, in the case of *The Earl of Darlington* v. *Bowes* (1 Eden, 270); but on inquiring of the bar whether there was any instance of a decree made upon one verdict only, none could be produced; and if there were any, they were so few, that they could not be remembered. I therefore thought myself bound by the current of opinions to grant it. But I am determined, if any such case should ever come before me again, to consider it in a different light, and to have the matter more fully inquired into, and prevent, if possible, an expense, which is a reproach to the law.

All the cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or where there might have been a multiplicity of suits.

The Court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of legal estates, *unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud, or confusion, where one party has*

ploughed too near the other, or the like; nor has this Court a power to issue such commissions of course, as here prayed.

In this case, it is said there is no legal remedy, and therefore there must be an equitable one; but this does not follow unless there is an equitable right. If there is a legal right, there must be a legal remedy; and if there is no legal right, there can, in this case, be no equitable one.

It is said, that, in some future time, there may be a casual right, such as escheat, treasure trove, &c.; but am I to countenance such a suit as this before there is any such right, merely because it may happen, though, when it does happen, it may perhaps be such a right as the parties will not think it worth their while to contend for?

If I were to make this a precedent, it would be, in effect, to issue commissions to settle boundaries all over the kingdom; for if of manors, why not of honours, of hundreds, and all other inferior denominations of districts? I shall always, while I have the honour to sit here, be very attentive to prevent the subject from great waste of expense about matters by no means adequate to it. Should I entertain such a bill as this, I should put it in the power of every opulent lord of a manor to distress, if not ruin, not only a poor man, but even a man of moderate fortune, whose estate happens to border upon his; for these suits are often attended with 2000*l.* or 3000*l.* expense—a dishonour to justice.

In order to give this Court jurisdiction, there must appear some equitable circumstances in the case. I know of no boundary marks to a manor in another's soil. The trees were Mr. Conyers' own: he had a right to cut them down; and if the plaintiffs are afraid of losing, in the course of time, the evidence of the boundaries of their manors, they may preserve it by perambulations as often as they please; but I cannot fix the limits of a legal right (if any), unless the jurisdiction of this Court is superinduced by some equitable circumstances, which it is not in this case.

Another consideration is, that the plaintiffs are infants and so is one of the defendants; and shall I send the infant plaintiffs beforehand, when they know not the value of their estate, to bind the inheritance *quia timent*, under the protection of the father, who is not privy in estate to them? I am well satisfied that this bill ought to be dismissed.

Although the jurisdiction of the Court to issue a commission to ascertain boundaries is very ancient (*Mullineux* v. *Mullineux*, *Peckering* v. *Kempton*, Toth. 39; *Spyer* v. *Spyer*, Nels. 14; *Botcler* v. *Spelman*, Rep. t. Finch, 96; *Wintle* v. *Carpenter*, Rep. t. Finch, 462; *Glynn* v. *Scawen*, Rep. t. Finch, 239), its origin is by no means free from doubt.

The Lord Keeper, in the principal case, was of opinion, that suits to determine boundaries originally came into the Court of Chancery under the equity of preventing multiplicity of suits; but Sir *W. Grant*, M. R., in a case where it became necessary to inquire by what principles the Court is guided in granting a commission of this description, observes, that "there are two writs in the register (since abolished, see 3 & 4 Will. 4, c. 27, s. 36), concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery took its commencement. The first is the writ *de rationalibus divisis* (Reg. Brev. 157, b.); the other, the writ *de perambulatione faciendâ* (Reg. Brev. Ib.). Both Lord *Northington* and Lord *Thurlow*, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that *consent* was the ground on which it had been at first exercised. The next step would probably be, to grant the commission on the application of one party who showed an *equitable* ground for obtaining it; such as, that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise on such an equitable ground, no objection has ever been made:" *Speer* v. *Crawter*, 2 Mer. 416.

It is not, however, improbable, that equity, which has borrowed so largely from the civil law, may have assumed jurisdiction to settle boundaries from the proceeding in that law known as *actio finium regundorum:* see Dig. lib. X., tit. 1, l. 1; Domat, b. II., tit. 6, s. 1, 2. Doubtful, however, as the origin of the jurisdiction may be, it is certain that it has been viewed with extreme jealousy by modern

equity judges, who have always been desirous that the rights of parties should, where practicable, be tried and determined in the ordinary legal mode. In short, although the Court, in some cases, has granted commissions or directed issues on no other apparent ground than that the boundaries, even of manors, were in controversy, it is now clear that a confusion of boundaries furnishes *per se*, no ground for the interposition of the Court; the rule now acted upon is that laid down by the Lord Keeper in the principal case, "*that the Court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties:*" see *Speer* v. *Crawter*, 2 Mer. 418; *O'Hara* v. *Strange*, 11 Ir. Eq. Rep. 262; *Ireland* v. *Wilson*, 1 Ir. Ch. Rep. 623.

In *Atkins* v. *Hatton*, 2 Anst. 386, the rector of a parish filed a bill for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. Some confusion, it seems, had arisen from the negligence of both parties in not keeping their rights distinct. The bill, however, so far as it related to the commission to set out the boundaries, was dismissed with costs. "The plaintiff," observed *Macdonald*, C. B., "here calls upon the Court to grant a commission to ascertain the bounds of the parish, upon the presumption that all the land which would be found within those boundaries would be titheable to him. That is, indeed, a *primâ facie* inference, but by no means conclusive; and there is no instance of the Court ever granting a commission in order to attain a remote consequential advantage. It is a jurisdiction which Courts of equity have always been very cautious of exercising. . . . . A commission is also prayed to set out the glebe land. It appears that the plaintiff has a full equivalent for every piece of glebe that ever belonged to the rectory; so that, if the exact metes and bounds are unknown, he has already the full effect of a commission: if they are known, and any part not delivered up to him, his remedy is at common law; he has made no case for our interference."

In *St. Luke's* v. *St. Leonard's*, 2 Anst. 395, cited, a bill was filed by the parish of St. Luke's to avoid confusion in making their rates, and prayed a commission to fix their boundaries for that purpose. A number of houses had been built upon land formerly waste, and it was doubtful to which parish each part of the waste belonged. Lord *Thurlow* refused to interfere, and observed, that the greatest inconvenience might arise from doing so; for if that commission were granted, and the bounds set out by the commissioners, any other parties, on a different ground of dispute, might equally well claim another commission; these

other commissioners might make a different return, and so, in place of settling differences, endless confusion would be created. In the note of this case in Brown's Chancery Cases (vol. i., p. 41), Lord *Thurlow* is reported to have said, that if he should entertain a bill, and direct an issue in such a case as this, he did not see what case would be peculiar to the Courts of law. He did not know how to extract a rule from the *Mayor of York* v. *Pilkington* (2 Atk. 302). Where there was a common right to be tried, such a proceeding was to be understood: the boundary between the two jurisdictions was apparent. That is the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one; but in this case, he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom, on account of the poor-laws. He apprehended these issues had usually been directed by consent of the parties: *S. C.*, 2 Dick. 550, nom. *Waring* v. *Hotham*.

In *Miller* v. *Warmington*, 1 J. & W. 484, a termor having, by himself or his under-tenants, suffered the boundaries between the demised premises and contiguous lands of his own to become confused, he was held not entitled, after the expiration of the term, to a commission to ascertain them, in opposition to the assignee of the lessor, who then, and had since, continued in the possession of both, it not being shown that such possession was improperly obtained. So, in *Speer* v. *Crawter*, 2 Mer. 417, Sir *W. Grant*, M. R., refused to issue a commission to ascertain the boundaries of manors, observing, "In *Wake* v. *Conyers*, Lord *Northington* held, that it was in the case of manors that the exercise of the jurisdiction which (he says) 'had been assumed of late,' was peculiarly objectionable. He refused either to grant a commission or to direct an issue. So did Lord *Thurlow*, in the case of two parishes, *St. Luke's* v. *St. Leonard's* (2 Anst. 386—395). In the same case, of *Wake* v. *Conyers*, Lord *Northington* says, that, in his apprehension, this Court has simply no jurisdiction to settle the boundaries even of *land*, unless some equity is superinduced by the acts of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes *per se* no ground for the interposition of the Court."

In the recent case of *Lascelles* v. *Butt*, 2 Ch. D. 588, the doctrines laid down in the principal case were treated as obsolete by counsel for the plaintiff, who argued that since the passing of the Judicature Act the Court would not listen to arguments founded on antiquated rules about the

limits of the former Court of Chancery. *Bacon*, V.-C., however, said, "When it is objected that certain rules by which the Court was guided in former days have become obsolete, I do not know that those rules are not as worthy of observation as ever they were, and the Court is not as much bound to follow them as it ever was. Certainly the question raised by those rules will have to be considered before any decision as to disputed boundaries can be arrived at by the Court."

What is a sufficient Ground for issuing a Commission or directing an Issue.]—If the confusion of boundaries has been occasioned, not by the negligence of both, but by the fraud of one of the parties, where, for instance, he has been gradually encroaching, by ploughing or digging too near to the other, with the intention of obliterating the boundaries, a Court of equity has interfered: *Wintle* v. *Carpenter*, Rep. t. Finch, 462; *Marquis of Bute* v. *Glamorganshire Canal Company*, 1 Ph. 681. This was, according to the opinion of Lord Chief Baron *Macdonald*, the ground of the decision of the House of Lords in *Rouse* v. *Barker* (4 Bro. P. C. 660, Toml. edit.). See *Atkins* v. *Hatton*, Anst. 396.

Where such a relation exists between two parties, as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, and restored specifically, he will, even in the absence of fraud on his part, be compelled to substitute land of equal value, the land or its value being ascertained by commission. "It has been long settled," observes Lord *Eldon*, "and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property, during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. This is, therefore, a common equity, that a tenant, having put his landlord's property and his own together, for his own convenience, in order to make the most of it during his tenancy, is bound, at the end of the term, to render up specifically, the landlord's land, and if he cannot, that a commission shall issue from a Court of equity, to inquire what were the lands of the landlord, the Court taking care, to the intent that the tenant may discharge his obligation to do what is right as to the possession in the meantime; and if the tenant has so confounded the boundaries, subdividing the land by hedges and stones, and destroying the metes and bounds, so that the landlord's land cannot be ascertained, the Court will inquire what was the

value of the landlord's estate, valued fairly, but to the utmost, as against that tenant, who has himself destroyed the possibility of the landlord's having his own: " *Attorney-General* v. *Fullerton*, 2 V. & B. 264. And see *Glynn* v. *Seawen*, Rep. t. Finch, 239; *Wintle* v. *Carpenter*, Rep. t. Finch, 462; *Aston* v. *Lord Exeter*, 6 Ves. 293; *Duke of Leeds* v. *Earl of Strafford*, 4 Ves. 180; *Grierson* v. *Eyre*, 9 Ves. 345; *Godfrey* v. *Littel*, 1 Russ. & My. 59, 2 Russ. & My. 630; *Brown* v. *Wales*, 15 L. R. Eq. 142.

And it seems that the same result would follow, if the confusion of the boundaries was occasioned by a tenant for life (*Attorney-General* v. *Stephens*, 6 De G. Mac. & G. 133); or where confusion of the boundaries of manors was occasioned by the acts or neglect of a tenant or lessee of one of the manors being the owner of the other. See *Speer* v. *Crawter*, 2 Mer. 415, 418; *Clayton* v. *Cookes*, 2 Atk. 449.

So, where several lands allotted to the holders of certain offices, were for a long series of years in the possession of a single individual, in consequence of his holding all the offices, a confusion of boundaries taking place in consequence thereof seems to have been considered to be a good ground for proceedings in equity, though it was not necessary to determine the point: *Kennedy* v. *Trott*, 6 Moo. P. C. C. 467.

And it seems where a confusion of lands was occasioned by a devisor, if they came into the hands of parties whose duty it was to ascertain the boundaries, a person entitled to part of such lands might come into equity to establish his claim. Thus in *Hicks* v. *Hastings*, 3 K. & J. 701, a testatrix by her will appointed the manor of Watton (over which she had an equitable power of appointment) to uses, under which the plaintiff became entitled as tenant in tail in possession, and devised her residuary real estate to trustees upon trust to sell. The trustees sold (amongst other things) a field, part of which was shown by the abstract to be parcel of the manor, and procured the legal estate in the whole to be conveyed to the purchaser. It was held by Sir *W. Page Wood*, V.-C., that, notwithstanding the fault of the confusion lay with the party through whom the plaintiff claimed, the plaintiff was not precluded from establishing in the Court a claim to a portion of the land and to a proportional part of the rents from the time when he became of age. And an inquiry was directed, in what part of the field the plaintiff's portion was situated. "This," said his Honor, "is not the ordinary case of confusion of boundaries. The testatrix, having a certain number of acres of land which is partly freehold and partly leasehold, devises the freehold part to the plaintiff, and the

leasehold part to trustees for sale. The trustees undertake to discharge that trust and proceed to sell. It then became the duty of the trustees to see that the leasehold part, and no more, was comprised in the conveyance to the purchaser, and the duty of the purchaser to do the like. It is true that the testatrix was the party to blame for the confusion of the freehold land improperly sold by the trustees with the leasehold; but in reference to that argument, *Clarke* v. *Yonge*, 5 Beav. 523, appears to me to have a material bearing."

A Court of equity would grant relief not only against a party guilty of neglect or fraud in causing a confusion of boundaries, but also against all those who claimed under him, either as volunteers or purchasers, with notice: See *Attorney-General* v. *Stephens*, 6 De G. Mac. & G. 134; *Hicks* v. *Hastings*, 3 K. & J. 701; *Brown* v. *Wales*, 15 L. R. Eq. 142.

The Court, in cases relating to confusion of boundaries, proceeded upon the same principle as it did where an agent or bailiff, or any other person who was under an obligation, express or implied, to keep his own property separate from the property of another, mixed them together, for under such circumstances he would have the onus thrown upon him of distinguishing his own property; and if he were unable to do so, the other person would be entitled to the whole of the property. See *Lupton* v. *White*, 15 Ves. 432; in which case the defendants were under the obligation of keeping distinct accounts of the ore produced by two different mines, to the produce of one of which the plaintiffs were entitled. The defendants having mixed it, were held liable to be charged with the whole net produce, except what they should prove to have been taken from their own mine. And see *Panton* v. *Panton*, cited 8 Ves. 440; *Chedworth* v. *Edwards*, 8 Ves. 46; *Cook* v. *Addison*, 7 L. R. Eq. 466.

In addition to the grounds of equitable relief in order to sustain a bill for a commission to ascertain boundaries, the plaintiff must have shown that some portion of the lands, the boundaries of which were alleged to have been confused, was in the possession of the defendant (*Attorney-General* v. *Stephens*, 6 De G. Mac. & G. 111, 149, overruling *S. C.*, 1 K. & J. 724); he must also have established, by the admission of the defendant, or by evidence, a clear title to some land in the possession of the defendant: *Godfrey* v. *Littel*, 1 Russ. & My. 59, 2 Russ. & My. 630. In the *Bishop of Ely* v. *Kenrick*, Bunb. 332, it is laid down, that the Court will not entertain jurisdiction, except on the admission of the plaintiff's title to some of the lands, by the party against whom the relief is

sought. If, however, that were the case, there could be no such remedy as a commission to ascertain boundaries; for the defendant would in every case take especial care to deny the plaintiff's title, and so deprive him of his remedy. It was held, therefore, both by Sir *J. Leach*, M. R., and by Lord *Brougham*, in *Godfrey* v. *Littel* (1 Russ. & My. 59, 2 Russ. & My. 630), that the plaintiff might establish his title by evidence. "The position," observed Lord *Brougham*, "laid down in Bunbury is indeed contradicted by the other cases; and in *Wake* v. *Conyers*, Lord *Northington*, though strongly disposed to dismiss the bill, and though he talks of the frightful consequences arising from such commissions, preferred accomplishing his object by taking another ground for the dismissal of the bill, namely, that the manorial rights claimed by the plaintiffs were incorporeal hereditaments, and that the defendants were entitled to the soil and freehold in the estates in question. This, therefore, proves that Lord *Northington* not only did not acquiesce in the principle attempted to be established in Bunbury, but that he wholly repudiated the authority of that case:" 2 Russ. & My. 633.

Where the quantity of the land of the plaintiff, in the possession of the defendant, was doubtful upon the evidence, the Court would direct an inquiry (*Hicks* v. *Hastings*, 3 K. & J. 701), a commission, or an issue, as would best answer the justice of the case: *Godfrey* v. *Littel*, 1 Russ. & My. 59, 2 Russ. & My. 630.

It must have been shown clearly, that, without the assistance of the Court, the boundaries could not be found: *Miller* v. *Warmington*, 1 J. & W. 491.

Another and a very old ground for equity interposing in cases of this kind, which is mentioned in the principal case, was to prevent multiplicity of suits: see *Bouverie* v. *Prentice*, 1 Bro. C. C. 200; *Mayor of York* v. *Pilkington*, 1 Atk. 282, 284; and see *Whaley* v. *Dawson*, 2 S. & L. 370, 371; *Meadows* v. *Patherick*, Rep. t. Finch, 154; *The Commissioners of Sewers of the City of London* v. *Glasse*, 41 L. J. Ch. N. S. 409.

The doctrine laid down in the principal case has been reviewed and approved of in the important case of the *Marquis of Bute* v. *The Glamorganshire Canal Company*, 1 Ph. 681, where a commission to ascertain boundaries was prayed for, and the bill, amongst other things, alleged that the defendants had gradually encroached upon the plaintiff's land, filling up the ditch or the greater part of it, and obliterating the boundary, and that the occupiers were fifty in number, and that it would be impracticable to proceed at law. It was objected, that it was only a dispute between two contiguous proprietors as to

their actual boundaries, and that the remedy was at law, and that there was no ground for equitable interference. But the Lord Chancellor held otherwise. "The rule," observed his Lordship, "as I apprehend, is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for a commission: there must be some equity arising out of the conduct or acts of the party against whom the commission is prayed, or the bill must be brought for the purpose of preventing a multiplicity of suits. In the case of *Wake* v. *Conyers* (1 Eden, 331), referred to by the defendants, it is stated by the Lord Keeper (*Northington*), that the Court will entertain such a bill, 'where there might have been a multiplicity of suits, or where the confusion has been created by the act of the parties, as where a party has ploughed too near another, or the like.' I think the allegations in this bill present a case, which, if substantiated by evidence, would entitle the plaintiff to a commission; the bill states a system of gradual encroachment on the part of the defendants, the filling up of the ditch, and obliterating the boundaries; and further, the necessity, if this Court should not interfere, of bringing a great number of actions against different parties, in order to fix the boundaries and establish the plaintiff's right."

Where charity lands have been occupied with other lands, and the tenant cannot ascertain what part of the lands belong to the charity, a commission may be issued by the Court of Chancery to ascertain what land belongs to the charity, and what does not; and if the charity land cannot be ascertained, so as to be restored specifically, land of equal value must be substituted in its place. *Attorney-General* v. *Bowyer*, 5 Ves. 300; *Attorney-General* v. *Fullarton*, 2 V. & B. 263, 266; and see *Keresby* v. *Farrer*, 2 Vern. 414; and see Stat. 2 & 3 Will. 4, c. 80, to authorise the identifying of land and other possessions of certain ecclesiastical and collegiate corporations.

It seems that the Court of equity in England had jurisdiction to issue a commission to ascertain boundaries in our colonies: see *Tulloch* v. *Hartley*, 1 Y. & C. C. C. 114: where the Vice-Chancellor *Knight Bruce* entertained a bill to settle the boundaries of real estates in Jamaica. *Penn* v. *Lord Baltimore*, 1 Ves. 444; *Pike* v. *Hoare*, 2 Eden. 182, and *Bayley* v. *Edwards*, 2 Swanst. 703, were cited, but his Honor gave judgment, without mentioning any doubt as to the jurisdiction.

A somewhat similar class of cases may be here mentioned, in which the owner of a rent will be entitled to relief in equity, "on the usage of payment," where, in consequence of the confusion of

boundaries or otherwise, the particular lands on which the rent is a charge, cannot be fixed on, as a fund for the legal remedy by distress. See *Duke of Leeds* v. *Powell*, 1 Ves. 171, 172; *North* v. *Earl and Countess of Strafford*, 3 P. Wms. 148; *Bouverie* v. *Prentice*, 1 Bro. C. C. 200; *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. C. C. 518, and cases there cited, overruling *S. C.*, 2 Bro. C. C. 338. And see the cases cited by Sir *R. T. Kindersley*, V.-C., in *Mayor of Basingstoke* v. *Lord Bolton*, 1 Drew. 289.

But the Court will not grant a commission unless the plaintiff can fix upon some house or parcel of land and say that it was part of the land sought to be charged (*Mayor of Basingstoke* v. *Lord Bolton*, 3 Drew. 50, 63); and the Court will not interfere in the case of heriots payable by custom out of the chattels of a deceased tenant by his executor, as against his heir, in the absence of his personal representatives. *Ib.*

See 18 & 19 Vict. c. 124, s. 33, as to the power of the Board of Charity Commissioners to ascertain lands charged with a rent for the benefit of a charity, not exceeding 10*l.*

AGAR *v.* FAIRFAX.
AGAR *v.* HOLDSWORTH.

Rolls, Nov. 29th, 30th, 1808. *On appeal, Nov. 13th,* 1809; *May 28th, 30th, Dec. 11th,*1810; *March 15th,* 1811.

[REPORTED 17 VES. 533.]

PARTITION.]—*Decree for partition among several joint proprietors; and no objection from a covenant not to inclose without general consent, rights of common, and the inequality and uncertainty of the shares in proportion to other estates.*

The decree directed a reference to the Master, to inquire whether the plaintiff and defendants, or any or which, are entitled; and in what shares, according to the respective values of the other estates; and then a commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interests; and no previous or subsequent costs; by analogy to the proceeding at law.

THE bill stated that Lord Fairfax and other persons were, in 1716, seised in fee of the manor of Bilbrough, in the county of the city of York, and of the greatest part of the lands in the said manor, and also of the whole of the piece of land in the said manor called Bilbrough Moor, then uninclosed; and by indentures of bargain and sale and release, dated the 14th of July, 1716, Lord Fairfax and the other persons so seised sold and conveyed all the said manor, lands, and Bilbrough Moor, and other estates in the county of the city of York, to the use of Robert Fairfax and John Hardwicke and their heirs.

By indentures of lease and release, dated the 7th and 8th of September, 1716, reciting that part of the pur-

chase money paid for the premises, conveyed by the former deeds, was advanced to Robert Fairfax by Thomas March, under an agreement whereby he was to become the sole purchaser of the lands and hereditaments therein mentioned, Fairfax and Hardwicke conveyed to Thomas March and Arthur March the several lands, particularly described, situate in Bilbrough, and also all the said Thomas March's part and share of and in the moor or common called Bilbrough Moor, and of and in the soil, freehold, and inheritance of the same; which part or share, it was thereby declared, Thomas March had purchased of Robert Fairfax, together with the farms and lands thereby granted and released; and that the said moor was to be estimated and allotted between the said Robert Fairfax and the said Thomas March, and the other purchasers under Robert Fairfax and John Hardwicke; viz., Charles Redman, Bernard Banks, Matthew Smith, and Nathaniel Hird, in proportion to the several farms and lands in Bilbrough aforesaid by them respectively purchased, and the valuation of the same, whenever the said moor or common called Bilbrough Moor should happen to be inclosed in time to come; but reserving to Fairfax and Hardwicke, their heirs and assigns, all the back lanes and the High Street, and a small waste thereupon in Bilbrough aforesaid, with liberty to them to inclose the same, subject, nevertheless (both before and after such inclosure), to such ways, &c., in and through the same, to be made by the said Thomas March, his heirs and assigns, as had been anciently and customarily used and enjoyed by the tenants, owners, or occupiers of the farms, lands, and premises thereby released to March and his heirs; to hold to Thomas and Arthur March, their heirs and assigns for ever.

The bill further stated that Redman, Banks, Smith, and Hird, respectively, purchased under Fairfax and Hardwicke divers farms and lands in Bilbrough, and also several parts or shares of Bibrough Moor, and of and in the soil, freehold, and inheritance thereof, in proportion to the several farms and lands in Bilbrough aforesaid by

them respectively purchased, and what should be the value thereof respectively, when the said piece of land called Bilbrough Moor should be divided or inclosed, in the same manner as the share of Thomas March in the said moor was to be estimated and allotted; and the said messuages, farms, lands, and premises, and the said parts or shares of Bilbrough Moor, were conveyed to Redman, Banks, Smith, and Hird, and their respective heirs and assigns, in fee simple; and Fairfax and Hardwicke retained the remaining part of the said lands in Bilbrough, and a part or share of Bilbrough Moor, and of and in the freehold and inheritance thereof, in proportion to the farms and lands in Bilbrough aforesaid retained by them, and what should be the value thereof at the time when the said piece of land called Bilbrough Moor should be divided or inclosed, in the same manner as the share of the said Thomas March in Bilbrough Moor was to be estimated and allotted.

Arthur March, who was a trustee for Thomas March, died in his lifetime; and Robert Fairfax died in the lifetime of Hardwicke; and by divers mesne conveyances, &c., the whole of the said premises, conveyed to Fairfax and Hardwicke, and Bilbrough Moor, became vested in the plaintiff, and such of the defendants to the original bill as therein named, in the manner, shares, and proportions therein stated; and they and no other person, were seised in fee of the whole of Bilbrough Moor, and the freehold and inheritance thereof, as tenants in common, which had been used and enjoyed by them, and those under whom they derive title, as common pasture for horses, &c.

The bill prayed an account of the lands in Bilbrough, conveyed to Thomas and Arthur March, and those purchased by Redman and the other persons from Fairfax and Hardwicke, and of the lands retained by them; that the value of the said lands may be ascertained; and that a commission may be directed to issue, to ascertain the value of the said several lands, and the parts or shares of the plaintiff and the other persons named in Bilbrough

Moor; and also to allot in severalty, make partition of, and divide Bilbrough Moor into six several parts or shares, in proportion to the amount of the true and just value of the several farms and lands in Bilbrough, so conveyed and purchased or retained; and that all the said shares of Bilbrough Moor, when so allotted, may be inclosed and held in severalty by the plaintiff and the other persons entitled, &c.

The answer stated, that in each of the derivative conveyances to the joint or sub-purchasers under Fairfax, are contained covenants against inclosures of the moor without consent: viz., covenants by Robert Fairfax and John Hardwicke respectively, with each of the sub-purchasers, that neither he nor his heirs and assigns should or would inclose, or cause to be inclosed, any part of the said moor, other than the back lanes and small waste, as therein mentioned, without the consent of the said Thomas March, &c., his heirs or assigns; and Thomas March and the other sub-purchasers entered into similar covenants with Fairfax and Hardwicke not to inclose without the consent of them and their heirs. The answers also stated the persons in whom the estates so conveyed to Fairfax and Hardwicke were vested; and that those persons and their tenants, not exclusively, but together with others, had enjoyed and exercised the herbage and other rights and privileges in and upon Bilbrough Moor; and that the several rights, shares, and interests of the persons entitled were uncertain, and in no wise ascertained; and the defendants submitted, that such partition as was sought by the bill ought not now to take place: particularly as such rights and interests, and the other rights and interests in and to the said moor, were uncertain and indeterminate, and the parties concerned were not agreed, and had not consented to having an inclosure or partition thereof; and submitted that the case now before the Court was not proper for a partition and inclosure by a Court of equity, but by Act of Parliament only, where facilities and benefits might be secured and objections and inconveniences obviated; the former of which could not

be extended, and the latter removed, if the present attempt to obtain a partition and inclosure in this Court should succeed.

Mr. *Richards* and Mr. *Bell*, for the plaintiff.

Sir *Samuel Romilly* and Mr. *Hall*, for the defendants. —A bill for a partition under these circumstances is without precedent. Partition is of common right between parceners, joint tenants, and tenants in common; but it could not be compelled either at law or in equity, except amongst parceners, before the statute of Henry VIII.(*a*), which gave it to joint tenants and tenants in common of estates of inheritance; and in the following year(*b*) it was extended to particular estates. It cannot be applied to interests of any description beyond those defined limits, comprising persons with characters ascertained, and rights perfectly clear. These persons are represented as quasi tenants in common. A tenancy in common may be of unequal, but not of unascertained shares. In the declaration between parceners or joint tenants, the demandant must state the title, and the distinct shares must appear between tenants in common; the declaration must state the title and share of the plaintiff, and the shares though not the distinct titles of the defendants. The statute of William III. (*c*), for advancing this remedy, adding particular ceremonies, declares, that in default of appearance, the Court may proceed to examine the demandant's title, and the quantity of his purpart; and shall for so much give judgment by default, and award writ to make partition, whereby such purpart may be set out in severalty. The partition can only proceed upon the title so ascertained on the face of the instrument, not by inquiries.

(*a*) Stat. 31 Hen. 8, c. 1, s. 2.

(*b*) Stat. 32 Hen. 8, c. 32, s. 1.

(*c*) Stat. 8 & 9 Will 3, c. 31, made perpetual by 3 & 4 Ann. c. 18, repealed by Stat. Law Rev. Act, 1867 (30 & 31 Vict. c. 59).

It cannot be maintained that common rights form no objection. The lord could not, except under the Statute of Merton (*d*), have inclosed or taken any part of the waste; and that statute gives the right of approving, with the qualification, that it shall not be to the prejudice of the commoners, for whom it requires sufficient to be left. Even for the purposes of inclosure, partition cannot be

(*d*) Stat. 20 Hen. 3.

made in prejudice of that right, and much less for any other purpose. The statute of Edward VI. (*a*) accordingly declares the right of the commoner to pull down an inclosure by the lord infringing that right, and gives the remedy by assize, with treble damages. Formerly a greater degree of strictness prevailed upon partition here than in Courts of law; and that appears to be Lord *Hardwicke's* opinion, in *Cartwright* v. *Pulteney* (*b*). In Lancashire, there are many instances of rights enjoyed by several persons, capable of being ascertained, but still uncertain, of which, therefore, they cannot be considered tenants in common; and, if ascertained, they could not remain two days without variation, fluctuating continually, according to the management, husbandry, and cultivation of the different proprietors.

(*a*) 4 & 5 Edw. 6.

(*b*) 2 Atk. 380.

This property, therefore, enjoyed in common, but by unascertained, indefinite shares, is incapable of partition. It is impossible to frame a declaration, as the ascertained part cannot be proved, and no inquiry can be directed for that purpose. Further difficulties arise, from the nature of the property, with reference to rights long exercised and enjoyed upon it, independent of the title of these proprietors; being stocked, the herbage taken, &c., as it is said, by persons having no right; but it might be common appendant, or because of vicinage; or common appurtenant, or in gross; by grant or prescription. A very formidable impediment is, the covenant against inclosing without mutual consent, which can be the only object of partition.

The form of the decree, in these cases, is not general. In *Curzon* v. *Lyster* (*c*), which was much considered, the direction was, that the persons named, any three or two of them, should go to, enter upon, walk over, and survey the land, and make a fair partition, division, and allotment thereof in moieties: one to the plaintiff, the other to the defendant; and the parts so allotted to divide by metes and bounds, and to examine witnesses upon such interrogatories, as they shall see occasion, &c. In some instances, close commissions were granted, the commis-

(*c*) Cited from a MS. note.

sioners administering an oath of secrecy to the several persons before them. The commission in *Curzon* v. *Lyster* originally was so. But according to Lord *Redesdale's* clear opinion, that is erroneous; the commission is, in all respects, analogous to the writ of partition. The commissioners are to do what the sheriff and jury would have done, and have no power to make any inquiry, except as to the very lands to be divided. The commission being in particular ascertained forms, a new one cannot be directed, and certainly not such as is now required, with power to compel a production of title deeds, to examine witnesses, and then to go upon each separate estate, ascertain the value, and divide accordingly, asking, in the alternative, either a commission or a reference to the Master, for the purpose of all these inquiries. The result will be several distinct cases, producing all the inconvenience which the covenant against inclosure without mutual consent was intended to prevent.

Mr. *Richards,* in reply.—All persons supposed to have rights of common were made defendants, and all disclaimed except two, who are parties claiming right of common, without stint, annexed to houses, directly contrary to law. If there are any common rights subsisting, they cannot be affected by partition. Admitting that the shares are not ascertained, that may and will be done by the commissioners, who will ascertain the shares in which all these joint proprietors of the land are interested; and for that purpose some previous inquiry may be necessary. In *Calmady* v. *Calmady* (*a*), much previous investigation was required to ascertain the shares and to make the proper distinction as to the costs. That course must be taken in every case where the parties differ as to their respective interests, either by an inquiry before the Master, or some other means, as in the case of dower, which is as much a right at law as partition, and depends, in this Court, on much the same principle. The Court will find its way to the ultimate purpose; in the one case, the widow's right of dower; in the

(*a*) 2 Ves. jun. 568; Reg. Book 1794, A. 460.

other, a partition among parties having an undivided interest, either as joint tenants, coparceners, or tenants in common.

This is clearly a tenancy in common: the trustees of Lord Fairfax, seised in fee of the whole, conveying distinct farms and shares of this moor to the several persons from whom these parties claim; under these circumstances, a partition is matter of right; *Parker* v. *Gerard* (*a*). The shares are, in contemplation of law, ascertained, if they are capable of being ascertained, as they are, by reference to the prices paid by the several parties. In *Leigh* v. *Leigh*, a manor, an entire thing, was the subject of partition; and it was impossible to know the value of a moiety of a sixth part without knowing the value of the whole. The only parties to the cause were those who were entitled to a moiety of a sixth; the commissioners must, therefore, have taken into consideration a subject of property, in the hands of persons not parties, and the duty of the commissioners was not less difficult than what is required by this bill,—a valuation having regard to the lands possessed by parties in the cause; in that case, a valuation with reference to shares of a manor not belonging to any party in the cause. This plaintiff prays the Court to declare the rights according to this deed, and that the commissioners shall divide according to the rights so declared. That object must be obtained, if not through commissioners, by a reference to the Master, under all the circumstances; these parties being clearly tenants in common, entitled in shares to be ascertained by comparison of the different farms and respective interests in the moor. The commissioners are to exercise their judgment according to the original price, or rather the present value, which is the true construction; and for owelty of partition they may, in their discretion, give more to one than another.

(*a*) Amb. 236. See *Warner* v. *Baynes*, Amb. 589; *Turner* v. *Morgan*, 8 Ves. 143.

The covenant not to inclose is merely a private engagement, and cannot be considered as binding the parties not to apply to the law of the country, as a covenant to refer to arbitration will not prevent the party's

assertion of his right in a court of justice. This is a covenant inconsistent with the estate, applicable only to certain cases, and cannot prevent partition for ever. Partition is not within the terms of a covenant not to inclose, and there may be great advantage from partition without inclosure. The commission in *Curzon* v. *Lyster* was settled by the Master, the forms being very different.

Sir W. Grant, M. R.—I shall take a little time to consider what will be the proper decree in this case. At present I am strongly inclined not to decree an immediate partition, upon the grounds that have been stated; but I wish to consider, whether, as incidental to the demand of partition, the Court would not put into a train of inquiry, what are the proportions in which they are interested in these lands, in order to lay a foundation for partition afterwards: that previous inquiry to be before the Master, whether the commission ought not, as the writ always does, to state the proportions in which the partition is to be made.

1808. *Dec.* 18*th*.

Sir W. Grant, M. R.—There are two cases in which the Court referred it to the Master to ascertain the interest of the parties, and afterwards directed a commission to issue: *Calmady* v. *Calmady* (*a*) and *Duncan* v. *Howell*. The uncertainty of the shares is not a ground for definitely refusing a partition: it is for refusing it at present. It cannot be referred to the commissioners to ascertain the interests: that must be done, as in those cases, by the Court, through the medium of the Master. In one of the cases, the form of the inquiry was, what undivided shares the several parties were entitled to, and for what estates and interests therein respectively.

(*a*) 2 Ves. jun. 568.

The way in which it strikes me, is this. The parties have among them the whole interest in the soil and freehold, which they possess in common. Some of them seek a partition. It is said there cannot be a partition, on account of the uncertainty of their interests; the propor-

tion to which each is entitled not being ascertained, that depending upon the quantity of interest each has in the estate of another, and the value of that estate, with reference to which value, the allotments of this moor are to be made among the parties, the owners of that estate, and of this moor also. That is no objection, as they are not the less tenants in common; though an operation must be performed before it can be ascertained to what undivided shares they were entitled as tenants in common. It must be seen what is the value of their shares in the other estate, by reference to which this allotment is to be made; and then they will be in the situation of parties having ascertained interests in this moor; but still they are tenants in common, and therefore have a right to a partition.

Upon a bill for partition, the interests and proportions to be ascertained by the Court, not the commissioners.

It seems to me to have been soundly objected, that it is impossible in the present situation to issue a commission, as then it must be referred to the commissioners: first, to ascertain their interests, and the proportions in which they are entitled, and then to make the allotment. The former was never done by commissioners. The Court is to ascertain the proportions and rights of the parties, and when that is done, then the duty of the commissioners begins, to make the division in those ascertained proportions.

A partition never affects third parties; rights of common, for instance.

An objection was then taken to the rights of common over this moor. The rights of common are no objection to the commission, as that right will not be in the least affected by the partition, which regards only the freehold and inheritance of the soil. A partition never affects the interests of third parties. It is immaterial whether others have a right over that soil and freehold, which they have in common among them. Those rights will equally remain.

It is then said, there is a covenant not to inclose, except by consent of all the parties. I do not exactly understand what is the meaning of that covenant. If it is only, as it is expressed to be, against inclosure, what has that to do with partition? Partition does not require inclosure, but

only that an allotment shall be made by metes and bounds. Whether they may have a right to inclose afterwards may depend upon other circumstances. It may depend upon the rights of third persons over this land, and upon the agreement of the parties themselves. The covenant against inclosure may have its effect, and I am not now called upon to say, whether it shall or not.

It is then said, the rule by which the allotment is to be made, may be very unequal. It may be so, but it is a rule they have laid down for themselves. The inconvenience is of their own making, by the terms of their own agreement. If they were all agreed now, that there should be a partition, or that there should be an inclosure, this inconvenience as to the mode of making the valuation would still present itself.

There does not appear to me, therefore, in this case, anything to prevent a partition, after it shall have been ascertained what are the proportions in which the land is to be divided among the parties.

The decree declared, that the piece of land called Bilbrough Moor, is to be allotted according to the present value of the several farms and lands in Bilbrough, purchased by Thomas March, &c., and conveyed to them by the several indentures of the 7th and 8th, and 12th and 13th of September, 1716, and of the farms, &c., retained by Fairfax and Hardwicke, and directed a reference to the Master, to inquire and state to the Court what undivided shares the plaintiff, and such of the defendants as had any estate of freehold or inheritance in the said moor, under the deeds of 1716, were entitled to or interested in the said moor, and for what estates and interests therein respectively, &c.; and it was ordered that a partition should be made of Bilbrough Moor among the plaintiff and the said defendants, who by the report should appear to be entitled to any shares of freehold and inheritance of Bilbrough Moor, under the said deeds of 1716, according to such undivided shares thereof; and it was

ordered, that a commission should issue for that purpose, all deeds in the power of the parties to be produced before the commissioners, with liberty to examine witnesses, &c.; and it was ordered, that what should be allotted to the several parties, should be held and enjoyed by them in severalty, and, if any of the parties were under any disability, they, when capable, and all other proper parties, should join in executing proper conveyances, &c., for conveying and vesting the several shares in and to the said parties respectively, according to their several rights and interests of, in, and to their several undivided parts and shares of and in the said moor, the costs of the commission and inquiry, and of the defendant Parkin (the heir of Hardwicke), whose costs were ordered to be paid by the plaintiff in the first instance, to be borne by the parties interested in the moor, in proportion to what should be their respective shares and interests in it, with liberty to apply.

From this decree a petition of appeal was presented, submitting, that, having regard to the nature and uncertainty of the rights of the parties, as well as of the value, and the particular circumstances of this case, it is not a case for partition, inclosure, or any relief to be administered in a Court of equity.

Mr. *Richards* and Mr. *Bell*, for the plaintiff.—Since the case of *Warner* v. *Baynes* (*a*), the difficulty of making partition has formed no objection in this Court. This case presents no farther difficulty than that this property is to be divided, not in any certain specific proportions, thirds, fourths, &c., but according to the value of certain other estates. There may be some difficulty as to the proportions, until the valuation of those estates shall be made; but from that moment the proportions are accurately defined: and on that ground there is no more objection than to a devise of the residue of real estate among children, to make their fortunes equal, by reference to advances formerly made to them. This Court would proceed in many cases of complicated circumstances, from

(*a*) Amb. 589. See *Turner* v. *Morgan*, 8 Ves. 143. In that case the commission having been executed, an exception was taken by the defendant, on the ground that the commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. The Lord Chancellor overruled the exception, saying, he did not know how to make a better partition for them; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell.

the intricacy of the title, and the nature of the shares; though a Court of law could not. Tenants in common having a right to partition at law, there must be some mode of having a calculation if necessary, before their precise rights as tenants in common can be ascertained. Whatever is capable of division may be the subject of partition: manors for instance; with every right of the lord; and even the waste grounds are divided: *Sparrow* v. *Friend* (the case of the manor of Brighton (*a*)); *Lane* v. *Cox* (the manor of Rolleston in the county of Derby). In *Parker* v. *Gerard* it was resisted. The property, situated in the north of England, consisted of cattle-gates, and of certain other rights, of a very peculiar nature; and partition was decreed in very minute fractions, according to the rights in the cattle-gates.

(*a*) Cited from the decree.

If there were other rights existing over this moor, that would not be an obstacle to partition among those persons having, by conveyance to the trustees, rights in the soil or freehold. It is not, however, made out, and cannot be presumed, that there are rights of common, as stated by the bill; they cannot be supported at law. There is no proof, as suggested, that they were in the habit of taking greensward or sods, earth and soil, from the waste of the manor; and no such right of common exists at law. As to furze and whins, &c., none of these are stated as rights of common; they merely say, they have been in the habit of taking them. A covenant not to divide is not legal. There is no defect of parties; and the decree is right in form, following the precedent of *Duncan* v. *Howell*, referring it to the Master to inquire what undivided shares the several parties were entitled to in the estate in question, and of what estates; and directing partition to be made among the parties who, by the report, shall appear entitled to any share of the estate, according to the shares; and that a commission should issue for that purpose, with the usual directions.

Sir *Samuel Romilly* and Mr. *Hall*, for the defendants.—There is no instance of such a bill as this; and the consequences it will lead to must be very important. The cases

referred to in the Registrar's book have no application. They are cases of complicated interests, in which it was very difficult to ascertain in what proportions the parties were interested. There is no authority for the general principle, upon which it is attempted to maintain the bill. This is the case, not of all the owners except one agreeing, but of one, against the consent of all the rest, claiming a partition and conveyance, contrary to the express covenant, entered into on account of the difficulty, that there should be no partition unless they should all agree. If such a bill can be maintained upon cattle-gates and common rights, why is application made to the legislature to divide common rights? The difficulty, from the number of parties, may be overcome by the expedient of making some represent the rest, where it would be inconvenient to bring all before the Court.

All the authorities state, that a bill for partition is exactly the same as the writ at common law, with this single distinction, that, under the writ, those only are bound who are entitled to a subsisting estate of freehold, not those entitled in remainder, whom a Court of equity will bind as well as those who have particular estates. On that ground, Sir *T. Clark*, in the cases of *Parker* v. *Gerard*, (*a*), held, that this bill is matter of right, and therefore no costs shall be given, as there are none upon the writ. Upon those principles, the Court has granted partition where it must be ruinous to all the parties, as in the case of the house, *Turner* v. *Morgan*, (*b*). Upon the same principle in *Parker* v. *Gerard*, the interest of one party being so inconsiderable that he would have preferred giving it up, he was compelled to make partition, and to pay an equal share of the expense. A stronger instance cannot be produced, that the Court in these cases acts ministerially, rather than judicially. In many instances, where from the complication of the interests, the writ would not lie, this Court would decree partition, which will not be prevented by the difficulty of the division; nor, if it is to be in very small fractions, where they are clearly tenants in common, of ascertained shares,

(*a*) Amb. 236.

(*b*) 8 Ves. 143.

can it depend on the amount of interest. In *Parker* v. *Gerard*, the Master of the Rolls states the injustice which the Court is frequently compelled to do, having no discretion upon the subject. The objection of difficulty is very strong in the case of an advowson.

How can such a decree be executed? A considerable time may elapse between the report and the partition, and the value at the latter period, upon which the shares must depend, may be materially varied. The consequences of this jurisdiction may be easily imagined. Some of these estates having fallen to femes covert, infants, or persons in remote situations, may have been suffered to deteriorate; and that moment would be seized, by a person who had improved this, taking advantage of the consequence of superior wealth or the neglect of the others, to claim partition. For the very purpose of guarding against that, from a foresight of the difficulty, confusion, and injustice to which it would lead, was this covenant against inclosure, except by general consent, introduced. It is said, the covenant is void, as inconsistent with the nature of the estate, and it would be so; but this is the case, not of tenants in common, standing upon the common-law right, but of persons agreeing to hold, and looking to partition, in a mode not according to the law, protecting themselves against the improvidence of such an agreement in an unlimited way; and one of the parties to that special contract desires now to have a part performance, striking out that express provision for the consent of all. A Court of equity does not administer that peculiar and extraordinary relief, a specific performance of a contract, where the effect will be injustice, but leaves the parties to the law; and this is a case most proper for the exercise of that discretion. Another difficulty arises from the rights of common of estovers and turbary, the bill stating the manner in which those rights have been always enjoyed.

The constant course of these decrees, is first to ascertain the shares, and then to come for a partition; and it may be doubted, whether one of the cases referred to from the

Registrar's book, in which that course appears not to have been followed, was an adverse decree. The reference, therefore, in the first instance, ought to be to ascertain, not the interests, but the value computing the outgoings, &c., so as to ascertain the value at the time of division; but if the course is not to come to the Court again, the commissioners must both ascertain the value, and make the division in the first instance, which would be very inconvenient; and there is no instance of such a discretion in commissioners, the Court only giving them the rule. This has not the character of a tenancy in common, in certain shares and proportions; and besides uncertainty, another objection is, that nothing passed immediately by this deed. The objection of uncertainty here is much stronger than in the case put by Walmesley in *Corbett's case* (*a*), where the whole estate went to each on different days; but this consists of a great number of minute shares constantly varying. They may have unequal shares, as Lord *Hardwicke* observes (*b*); but they cannot be uncertain. The statute of Hen. 8 (*c*), gives partition between joint tenants and tenants in common, in the same manner as it previously could have been had between parceners. It was necessary, therefore, to obtain judgment in the same way upon the title in joint tenancy. And as tenant in common, the defendant was obliged to state his title and share and the shares of the others, though he could not know their titles, and a mistake in stating the shares was fatal. Upon what ascertained share could any of these proprietors have declared? They calculate upon the value, which cannot remain the same for two days; and that objection of uncertainty applies equally to the whole and all the component parts; the number of shares always varying, and consequently the amount of each share. No instance can be produced of partition under this difficulty, arising from the number of shares constantly varying, and an express provision that they should remain unascertained and indefinite.

(*a*) Co. 76. See 78, a.

(*b*) 2 Ves. 81.

(*c*) Stat. 31 Hen. 8, c. 1.

Lord Chancellor Eldon.—The plaintiff in this cause is entitled to a partition; but the decree, though in terms

as near as possible to the case of *Duncan* v. *Howell*, I think is not in form the exact decree authorized, under the circumstances of this case, by that precedent. The variation, however, will be in form merely, not in substance. The ground upon which the case of *Calmady* v. *Calmady* (2 Ves. jun. 568) proceeded was, that the plaintiff, showing title to a part of the estate, was entitled to have a partition; and though the titles of the defendants were not proved, a reference to the Master was directed for the purpose of ascertaining them; and the report finding that the plaintiff and the defendants were entitled to the whole subject, upon further directions the decree was made for a partition according to the shares so ascertained. I cannot find any other instance of such directions given as to the costs. How can I make infants pay costs?

This Court issues the commission, not under the authority of any Act of Parliament, but *on account of the extreme difficulty attending the process of partition at law;* where the plaintiff must prove his title, as he declares, and also the titles of the defendants; and judgment is given for partition according to the respective titles so proved. That is attended with so much difficulty, *that by analogy to the jurisdiction of a Court of equity in the case of dower, a partition may be obtained by bill.* The plaintiff must, however, state upon the record his own title and the titles of the defendants; and, with the view to enable the plaintiff to obtain a judgment for partition, the Court will direct inquiries, to ascertain, who are, together with him, entitled to the whole subject. If, therefore, the state of the record, as originally framed, is not such as to authorise the Court to say, that the plaintiff and the defendants are respectively entitled in distinct shares, comprehending the whole subject, the proper course is to direct a reference to the Master, to ascertain what are the estates and interests of the plaintiff and defendants respectively; and, if it appears that they, or some of them, are entitled to the whole, then to order a partition, according to the rights of all, or such of them

Fonbl. 1, Treat. Eq. 18.

as appear entitled; dismissing the bill as against those who do not appear to have any right.

The decree in *Calmady* v. *Calmady* is perfectly regular; directing the inquiry, and afterwards a commission to issue, to divide the estate among the several parties, who appear upon the Master's report entitled to it. The omission in this decree to reserve further directions, is a mere informality, in not reserving a mode of dismissing from the record those who may have no title. Considerable difficulty arises in this case, from the covenant not to enclose.

The order afterwards pronounced by the Lord Chancellor, directed the decree to be affirmed, with the alteration after mentioned; viz., instead of the words, "after the direction for the partition to be allotted, according to the present value of the several farms and lands in Bilbrough, purchased, &c.," inserting the following words: "in shares according to the present respective values of the several farms and lands in Bilbrough respectively purchased;" and adding a declaration, that the plaintiff, being entitled to an undivided part of the said piece of land, called Bilbrough Moor, has a right to call for a partition of the said piece of land, as between him and the several persons entitled to the rest of the said piece of land: such partition to be made according to the declaration before mentioned; and directing a reference to the Master, to inquire and state, whether the plaintiff and the defendants respectively, or any and which of them, are entitled to the freehold and inheritance of Bilbrough Moor; and how and if it shall appear, that all or any of them are so entitled to the said moor, then to ascertain the respective values of the farms and lands respectively purchased as aforesaid; and, having so ascertained the respective values of the said farms and lands, the Master is to ascertain, as among the plaintiff and the defendants, whom he shall find to be entitled to Bilbrough Moor, in what undivided shares they are respectively entitled according to the declaration

before mentioned; and in that case, a commission to issue to divide the said moor among the plaintiff and defendants, who, by the report, shall appear entitled to any shares of the freehold and inheritance of Bilbrough Moor, under the deed of 1716, according to such undivided shares thereof; with the usual directions for the production of deeds, &c., and liberty to examine witnesses; the shares allotted to the several parties to be held and enjoyed by them in severalty; and, if any parties appearing entitled to shares in Bilbrough Moor, are under any disability, and not capable of making the conveyance, they, when capable, and all other proper parties to join in all proper conveyances, &c., respectively, according to their several rights and interests of and in the several undivided shares of the said moor; and if the Master shall not find the plaintiff and defendants, or any of them, entitled to the freehold and inheritance of the said moor, to state that to the Court, before any further proceedings; and the consideration of costs and further directions was reserved, with liberty to apply.

(a) The decree in that cause declared, that, the cause coming on for further directions, the report of the commissioners was confirmed, and it was ordered, that, when the defendant Hamlyn, an infant, shall attain the age of twenty-one, the plaintiffs and the said defendant shall execute mutual conveyances to each other of the several parts of the estate allotted to them; and in the meantime the plaintiffs and the defendant to hold and enjoy the several parts of the estate so allotted, &c.; and that the costs of issuing and executing the said commission of partition, and also the costs of making out the title to the several parts of the said estate, be paid and borne by the plaintiffs and the said defendant, the infant, in the shares and proportions in which they are respectively entitled to the said estate under the said commission; and it was ordered, that such costs of the plaintiffs be raised by the plaintiffs, the trustees in the settlement made upon the marriage of the plaintiff Calmady, by sale or mortgage of the estate in the settlement, according to the trusts of the settlement.

The cause was heard (Dec. 11, 1810), for further directions, and upon the costs.

Mr. *Richards* and Mr. *Bell*, for the plaintiff.—The rule laid down in the case of *Calmady* v. *Calmady* (*a*) is, that in these cases the costs are given in proportion to the interests of the parties. The decree, distinctly directing the costs of the plaintiff to be raised out of the estate, certainly has no such direction as to the costs of the infant defendant, whose costs, however, ought, upon the same principle, to be a charge upon the estate of the infant. The old rule that prevailed previously to that case, certainly operated as a great hardship, where one part-owner might have a single acre, and another ten thousand.

Sir *Samuel Romilly* and Mr. *Hall*, for the defendants.

—The Court is now called upon to lay down a new rule as to the costs in a suit for partition. Formerly, in most cases costs were not given, and the rule never could have been as represented in *Parker* v. *Gerard* (Amb. 236), that they shall be paid in equal moieties. The case of partition has been considered as analogous to that of dower, in which there are no costs. In *Calmady* v. *Calmady*, both at the bar and by the Court, the previous cases were distinguished into two classes: where costs had been, and where they had not been given; and the costs of the commission were distinguished from costs of the cause. A new rule upon this subject should not be laid down without consideration, as the effect may be mischievous: for instance, where there is an interest extremely minute, two or three acres only, and in reversion, the old rule giving no costs, may have the salutary effect of preventing a suit by one against the inclination of all the other parties. In many cases, the only way of providing for a portion of the costs may be by selling the interest: perhaps the interest of an infant in settlement; and if in reversion, the whole might be exhausted. The apportionment of costs ought also to extend to the interests of persons not *in esse*. These, and many other instances, show the wisdom of the old rule, and its justice, considering that a suit for partition is admitted only as being more convenient than the common-law writ. By the decree in *Calmady* v. *Calmady* justice was done most imperfectly, as no reason can be assigned for not apportioning the costs, previous to the hearing, as well as the subsequent costs. The effect in this case will be, that persons brought by the plaintiff before the Court are to pay costs to the hearing, because they have set up a claim which has not succeeded. The plaintiff in this suit is bound to state who are jointly interested with him; and there is no instance of making a defendant so brought before the Court, pay the costs of a claim set up by him though mistaken. He does not appear voluntarily before the Court. This application is new in another respect: the plaintiff desiring the costs of those

who, as the defendants insisted, set up a claim, but who have disclaimed. The defendants, having only given notice that such a claim was set up, ought not to pay those costs. The plaintiff ought also to state how the costs of those defendants who are not *sui juris* are to be paid: whether by a sale of their interest, or in what other manner.

Lord Chancellor Eldon.—This is really the great question, how costs are to be paid on partition. Several cases have occurred since *Calmady* v. *Calmady;* and I wish to know whether the practice has been uniform. It is, I apprehend, universally true, that no costs are given, up to the hearing; of which I do not know an instance. As to the costs of making out the title being borne in proportion to the respective interests, that does not seem very just; as the expense may be greater of making out the title of a share worth 50*l.*, than of one of the value of 5000*l.* On the other hand, the decrees are short, in not providing that the costs of infants and married women shall be borne by the share in respect of which they were incurred. My impression is, that all the subsequent decrees have followed *Calmady* v. *Calmady*.

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The Lord Chancellor gave judgment upon the question of costs; declaring (*a*) that, as the party came into equity, instead of going to law, for his own convenience, the rule of law should be adopted, and therefore, no costs should be given until the commission; that the costs of issuing, executing, and confirming the commission, should be borne by the parties, in proportion to the value of their respective interests; and there should be no costs of the subsequent proceedings. (*b*)

(*a*) Ex relatione.

(*b*) See now, as to costs, the Partition Act, 1868, sect. 10, and cases cited *post*, p. 462.

Although Mr. Hargrave, in his note to Co. Litt. 169, b., has treated the jurisdiction of equity to compel partition between joint owners of real estate, as of modern origin, and as trenching upon the

writ of partition, and wresting from the Courts of common law their ancient exclusive jurisdiction over the subject, he cites a case in Tothill, so far back as the 40 Elizabeth, (see tit. "Partition,") which one might suppose would almost give the jurisdiction the sanction of antiquity. It is, indeed, by no means clear that Courts of common law exercised exclusive jurisdiction over the subject, as Mr. Hargrave has assumed; but be that as it may, the Court of Chancery most probably assumed concurrent jurisdiction, not only, as is laid down in the principal case, from the extreme difficulty attending the process of partition at law, but also from the inadequacy of Courts of law, by the writ of partition to deal properly with those cases in which partition was often desired. Many instances might be mentioned, in which the deficiency of Courts of law, in proceedings on the writ of partition was supplied in equity, which appears, in an enlarged and liberal manner, to have acted upon the well-known rule of the Roman law: "*In communione vel societate nemo compellitur invitus detineri.*" —Cod. Lib. 3, tit. 37, l. 5. Upon the abolition of the writ of partition (see 3 & 4 Will. 4, c. 27, s. 36), equity acquired exclusive jurisdiction in cases of partition, and amongst other business assigned by sect. 34 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), to the Chancery Division of the High Court, are all causes and matters for the partition and sale of real estates. Subsect 3.

Freeholds have always been subject to partition, but previous to 4 & 5 Vict. c. 35 (amended by 21 & 22 Vict. c. 94), the Court of equity had no power to direct the partition of copyholds nor of customary freeholds: it is given, however, by the 85th section of that Act (*Horncastle* v. *Charlesworth*, 11 Sim. 315; *Jope* v. *Morshead*, 6 Beav. 213; *Clarke* v. *Clayton*, 2 Giff. 333; *Bowles* v. *Rump*, 9 W. R. (V. C. S.) 370); nevertheless, before the passing of that Act, the Court might decree specific performance of an *agreement* to divide copyholds (*Bolton* v. *Ward*, 4 Hare, 530); or where there were both freeholds and copyholds to be divided, the Court might direct such a partition as to give the entire copyhold to one party, and the freehold, or a part of the freehold, to the other: *Dillon* v. *Coppin*, 6 Beav. 217, n.; *Jope* v. *Morshead*, 6 Beav. 217, n.

Leaseholds, also, under the statute 32 Hen. 8, c. 32, s. 1, were subject to a partition during the term, at the instance of the termor of an undivided share (*Baring* v. *Nash*, 1 V. & B. 551), and the rent apportioned (*Ames* v. *Comyns*, 16 W. R. 74), but the Court has refused to decree partition of leaseholds where the landlord might immediately apply for an injunction to restrain the

parties from executing it by any act amounting to waste (*North* v. *Guinan*, Beat. 342); or where the Court could not protect one of the tenants in common from a breach of covenant, which might be committed by the other (Ib.); and, it seems, if the lessor had reserved to himself powers against his lessee, such as of entry, to work minerals, or cut timber, the Court would not have thought the case within the statute (32 Hen. 8, c. 32), so as to decree partition to the termor in his absence. Ib.

A partition of a manor (*Sparrow* v. *Fiend*, Dick. 348; *Hanbury* v. *Hussey*, 14 Beav. 152; *Ley* v. *Cox*, Ib. 157; *Cattley* v. *Arnold*, 4 K. & J. 595), and of an advowson (*Johnstone* v. *Baber*, 6 De G. Mac. & G. 439), has been decreed.

Coparceners only, had at common law a right to compel partition (Co. Lit. 169, a), but by the Statute of Partition (31 Hen 8. c. 1) joint-tenants and tenants in common of any estate of *inheritance* in their own right, or in right of their wives, might be compelled to make partition between them, and by 32 Hen. 8, c. 32, s. 1, joint-tenants and tenants in common for *lives* or *years* are declared compellable to make partition in the same way.

Subject to the power conferred upon the Court by the Legislature under the Partition Acts, 1868 & 1876 (31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17) in many cases (as will be hereinafter shown) to direct a sale instead of a partition, a decree of partition is a matter of right (*Baring* v. *Nash*, 1 V. & B. 554; *Parker* v. *Gerard*, Amb. 236), and it was held to be no objection to a bill for partition that the interests of all parties would not be finally bound by it. Consequently, a decree may be obtained either by or against a person having only a limited interest as tenant for life (*Gaskell* v. *Gaskell*, 6 Sim. 643); or a tenant for life determinable upon marriage (*Hobson* v. *Sherwood*, 4 Beav. 184); or a tenant by the curtesy (Co. Litt. 175-6); or a tenant for a term (*Baring* v. *Nash*, 1 V. & B. 551; *Heaton* v. *Dearden*, 16 Beav. 147); and where there are remaindermen who may come into esse and be entitled, they will be bound by a decree made against the tenant for life (*Wills* v. *Slade*, 6 Ves. 498). And in *Gaskell* v. *Gaskell*, 6 Sim. 643, Sir *L. Shadwell*, V.C., held, that a decree for partition would be binding on the unborn sons of the tenant for life of an undivided moiety of an estate, who, when they came into esse, would be tenants in tail; but as an agreement for a partition had been entered into between the tenant for life and the owners of the fee, of the other moiety, an inquiry was directed, whether it would be for the benefit of the future issue of the plaintiff, that the agreement, either with or without variations, should be carried into effect. And his Honor

said, that, in *Martyn* v. *Perryman* (1 Ch. Rep. 235), the Court decreed a partition, notwithstanding femes coverts, infants, and incumbrancers, were concerned.

A tenant in tail also may compel partition (*Lord Brook* v. *Hertford*, 2 P. Wms. 518), and it has been decided that a partition between tenants in tail, though but by parol, bound the issue, *Burton* v. *Jeux*, 2 Vern. 232 cited; *Rose* v. *Rose*, Ib.

It has been held to be irregular for a bill to be filed by a person of unsound mind not so found by inquisition, by his next friend, for the purpose of dealing with the real estate of the person of unsound mind, by partition or sale. See *Halfhide* v. *Robinson*, 9 L. R. Ch. App. 373, in which case such a bill having been filed and a decree for sale made, upon a petition being afterwards presented under the Trustee Act, 1852, for an order vesting the estate of the plaintiff in the purchaser, the Lords Justices refused to make the order, considering the suit to be irregular, but as the plaintiff's share was only 200*l.*, and she had no other property, directed an application to be made in Lunacy, under the 13th section of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86) for a sale, and permitted the petition to be amended for that purpose.

A person when entitled in possession only can compel partition. For it has been held, that a bill for a partition could not be maintained by a joint-tenant or tenant in common in reversion or remainder (*Evans* v. *Bagshaw*, 8 L. R. Eq. 469; 5 L. R. Ch. App. 340); nor could he, after he has filed a bill, by acquiring a title in possession and amending his bill, put himself in a better position. *Ib.*

A mortgagee of an undivided share may file a bill for foreclosure and partition, and may move for a receiver of the rents of the undivided share of the mortgagor: *Fall* v. *Elkins*, 9 W. R. (M. R.) 861.

A partition, however, appears not to be properly incident to a foreclosure or redemption suit in such a way, that the owners of the equity of redemption can be allowed to insist on it against the will of the mortgagee, who has no interest in the question: *Watkins* v. *Williams*, 3 Mac. & G. 622.

It has been laid down that it is essential to partition that the legal title should be before the Court (*Miller* v. *Warmington*, 1 J. & W. 493), hence where one of several tenants in common made a lease of his undivided share for 99 years, it was held that the lessee was a necessary party to a bill for partition (*Cornish* v. *Gest*, 2 Cox, 27); but a mortgagee of the entirety was not (*Swan* v. *Swan*, 8 Price, 518). Service, however, of a notice of a decree under section 9 of the Partition Act, 1868 (31 & 32 Vict. c. 40) will now be sufficient to bind persons who

formerly were made parties in the first instance.

The title of the plaintiff to an interest in the property of which he seeks partition must be shown, and where he could show none, his bill has been dismissed: *Parker* v. *Gerard*, Amb. 236; *Jope* v. *Morshead*, 6 Beav. 213.

Where, however, there is only a small failure in the proof of title, or the interests of the parties in the property are uncertain, they may be ascertained by a reference, and this must have been done previous to a commission issuing under the old practice for, as is laid down in the principal case, it was not the duty of the commissioners to ascertain the proportions and rights of the parties: their duty commenced when they were ascertained, and they would then have to make a division between the parties in those ascertained proportions: *Calmady* v. *Calmady*, 2 Ves. jun. 568; *Cole* v. *Sewell*, 15 Sim. 284; *Jope* v. *Morshead*, 6 Beav. 213. The uncertainty, therefore, of what are the shares of the different parties, is an objection, not to partition altogether, but to partition until such shares have been ascertained.

It is not the ordinary practice to issue a commission for the purpose of making a partition, as a partition can now be made in Chambers where inquiries are necessary, if they are not, a partition may be made at the hearing.

On the death, after decree, of a person entitled to a share, the Court will direct, in case he has devised it, that it should be allotted to his devisee: *Valentine* v. *Middleton*, 2 Ir. Ch. Rep. 93.

The inconvenience or difficulty in making a partition has been held to be no objection to a decree. See *Warner* v. *Baynes*, Amb. 589; *Parker* v. *Gerard*, Amb. 236. The absurdities to which this state of the law led plainly pointed out the propriety of conferring upon the Courts (as has since been done) power in certain cases to order a sale instead of a partition of lands held in joint-ownership. In the well-known case of *Turner* v. *Morgan*, 8 Ves. 143, there was a decree for a partition of a single house. Sir *Samuel Romilly*, moreover, in his argument, mentions the case of one Benson, an attorney at Cockermouth, where the partition was actually carried into effect by building up a wall in the middle of a house. It appears also from a note in the principal case (ante, p. 430), that after the commission in *Turner* v. *Morgan* had been executed, an exception was taken by the defendant, on the ground that the commissioners allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only stair-case, and all the conveniences in the yard; but Lord *Eldon* overruled the exception, saying, he did not know how to make a better partition for them;

that he had granted the commission with great reluctance, but was bound by authority, and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell.

But it has never been considered necessary that every house on an estate should be divided, if a sufficient part of the whole could be allotted to each; and in making a division the Court would take the convenience of the parties into consideration. See *The Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446; *Watson* v. *Duke of Northumberland*, 11 Ves. 162; *Lister* v. *Lister*, 3 Y. & C. Exch. Ca. 540.

In a case, where a partition had been directed between two co-heiresses, Sir *R. T. Kindersley*, V.-C., said, "It appears to me what the commissioners ought to do in this case is, that having divided the property into two equal parts, they should consider all the circumstances of the parties and the property. Suppose, for example (which sometimes happens), that one of the parties has property in a particular county or parish, and that one of the allotments is contiguous to the property already belonging to one party, and there is another allotment not contiguous, that would be a good ground, *cæteris paribus*, for allotting that particular portion to the individual to whom it is much more convenient to have it than the other. They may also take into consideration the circumstance that one of these is the eldest daughter, and therefore, although she has no right of priority of choice, still her being the elder is a circumstance which the commissioners may consider to be a ground, *cæteris paribus*, of coming to a decision on the allotment. So, again, you have the circumstance that she is a married lady, and that her husband has taken the family name, and has no mansion, and it is proposed that they should keep up the family mansion; and when the commissioners are looking into the matter, they must exercise their discretion, and give the lots with reference to that state of circumstances; although the fact of the plaintiff being the eldest daughter constitutes, as I conceive, no right or claim under the commission to priority of choice." Per Sir *R. T. Kindersley*, V.-C., in *Canning* v. *Canning*, 2 Drew. 436.

"If the commissioners can find nothing to guide their discretion, as a last resort they may draw lots." *Ib.* 437. "If they cannot agree as to what they ought to do, they ought to make separate returns, so that the Court may deal with the separate returns as it may think advisable, and not a joint return, saying they cannot agree." *Ib.* 437, 438. "The Court, however, has no authority where the commissioners cannot agree to

appoint a person to draw lots." *Ib.* 438.

For the sake of convenience, in equity a recompense has been made, either by a sum of money, or rent for equality, or owelty of partition: *The Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446; *Warner* v. *Baynes*, Amb. 589; *Story* v. *Johnson*, 1 Y. & C. Exch. Ca. 538; *S. C.*, 2 Y. & C. Exch. Ca. 586, 610, 611. This could not have been done under the writ of partition at law: Co. Litt. 176, a., b., 168, a. Littleton has indeed spoken of a rent-charge for owelty, or equality of partition: Litt. 251. But, as observed by Mr. Justice *Story*, this is not in a case of compulsory partition by writ, but of a voluntary partition by deed or parol: 1 Stor. Eq. Jur. 534, n. 4.

But the commissioners themselves unless directed by a decree (*Briant* v. *Mann*, 1 Seton on Decrees, 580, 3rd Ed.) have, it seems, no power to award sums to be paid for owelty of partition: such power rests with the Court; and in *Mole* v. *Mansfield*, 15 Sim. 41, where the commissioners had awarded certain sums to be paid for such purpose, Sir *L. Shadwell*, V.-C., said, they had no power to do so; and, one of the parties being an infant, he directed the Master to inquire and state whether it was fit and proper that the sums awarded should be accepted. See *Peers* v. *Needham*, 19 Beav. 316.

Sometimes the Court would approve of a partition without a commission, even when infants were interested, upon satisfactory evidence of value: *Brassey* v. *Chalmers*, 4 De G. Mac. & G. 528; *Stanley* v. *Wrigley*, 3 S. & Giff. 18; *Clarke* v. *Clayton*, 2 Giff. 333; *Bowles* v. *Rump*, 9 W. R. (V. C. S.) 370; *Greenwood* v. *Percy*, 26 Beav. 572.

In making a decree for a partition, the equitable rights of all the parties interested in the estate have been adjusted: *Story* v. *Johnson*, 2 Y. & C. Exch. Ca. 586. Thus, although in point of law, a defendant to a bill for partition might not have a lien on the premises for money expended in buildings and improvements, plaintiffs have not been allowed to take advantage of that expenditure without making an allowance: the Court, therefore, has refused to interfere but on such terms, and has ordered a reference to take an account of what has been expended necessarily, or with the concurrence of the plaintiff: *Swan* v. *Swan*, 8 Price, 518. And where one joint owner appears to have received more than his share of the rents and profits of the estate, the Court has directed an account, and has declined to act, in analogy to proceedings at law for a partition, by confining its relief merely to partition (*Lorimer* v. *Lorimer*, 5 Madd. 363; *Hill* v. *Fulbrook*, Jac. 574; *Story* v. *Johnson*, 1 Y. & C. Exch. Ca. 598; *S. C.*, 2 Y. & C. Exch. Ca. 586); or where he

had been in possession, he has been charged an occupation rent *Turner* v. *Morgan*, 8 Ves. 145.

A tenant in common, however, occupying the premises, but admitting some co-tenants, and not excluding any, has been held not so chargeable (*M'Mahon* v. *Burchell*, 5 Hare, 322), but he has been held to be chargeable if he excluded the others (*Pascoe* v. *Swan*, 27 Beav. 508). However, unless a tenant in common in possession be charged with an occupation rent, he will not be entitled to any account of substantial repairs and lasting improvements on any part of the property: *Teasdale* v. *Sanderson*, 33 Beav. 534. See *Swan* v. *Swan*, 8 Price, 518.

A mill may be divided by giving to the parties every other toll-dish, as would have been done at law in case of the writ *de partitione faciendâ*; and in this case *æquitas sequitur legem*: *Earl of Clarendon* v. *Hornby*, 1 P. Wms. 447, per Lord *Macclesfield*.

It was also said by Lord *Macclesfield*, that an advowson might be divided by giving every other presentation to the church. *Ib.* In the case, however, of *Johnstone* v. *Baber*, 6 De G. Mac. & G. 439, the right to present to an advowson being vested in tenants in common, it was held by the Court of Appeal in Chancery, overruling the decision of Sir *John Romilly*, M. R. (22 Beav. 562), that the right to nominate was not to be exercised according to seniority, but was to be determined by lot.

In such cases, even under the old law, the Court would, it seems, direct the partition at once, by decree, without resorting to a commission: *Bodicote* v. *Steer*, 1 Dick. 69; Seton on Decrees, 586, 587, 3rd Ed.

But under the present law, the Court, in the case of any advowson, would order it to be sold, and the proceeds to be divided amongst the parties according to their interests: *Young* v. *Young*, 13 L. R. Eq. 174, cited, because by reason of the nature of such property a sale, and a distribution of the proceeds thereof, after payment of costs, would be more beneficial for the parties interested than a partition of the property between them.

A partition never affects the rights of third parties; for instance, in the principal case, it was held, that the rights of common of others over the soil and freehold, which the parties to the bill had in common amongst them, would not be affected by the partition.

For this reason, as a mortgagee of the premises is entitled to the whole, and is not affected by a partition, he will not be a necessary party to the suit: *Swan* v. *Swan*, 8 Price, 518.

Where, in a suit for partition, the defendants are desirous that there shall be no partition of their several shares, the partition may

be confined to the aliquot share of the plaintiff: *Hobson* v. *Sherwood*, 4 Beav. 184.

Where the shares have been allotted to each of the parties, the partition is perfected by reciprocal conveyances; and one party cannot impose upon another as a condition of his executing a conveyance, that all the other parties must join in the conveyance to him: *Orger* v. *Spark*, 9 W. R. (V.-C. W.) 180. And see *Bowra* v. *Wright*, 4 De G. & Sm. 265.

Where the shares of the parties were very minute and complicated, the Court, in order to save expense, *instead* of directing a conveyance of the several shares, has declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares: *Shepherd* v. *Churchill*, 25 Beav. 21.

Where infants were parties, the conveyances formerly were respited until they came of age, and a day given them to show cause against the decree. See *Brook* v. *Hertford*, 2 P. Wms. 518, 519; *Tuckfield* v. *Buller*, 1 Dick. 240, Amb. 197; *Thomas* v. *Gyles*, 2 Vern. 232; *Wills* v. *Slade*, 6 Ves. 498; *Attorney-General* v. *Hamilton*, 1 Madd. 214. Where, however, the legal estate of the share in which an infant was beneficially interested, was vested in trustees, the order need not contain a direction for the infant to execute a conveyance when of age, as the decree of the Court would bind the equitable interest of the infant, and the trustee might make an immediate conveyance of the legal estate: *Cole* v. *Sewell*, 17 Sim. 40.

It seems now that under the Trustee Act, 1850, ss. 7 and 30, the Court, in a partition suit, instead of giving an infant a day to show cause, may declare him a trustee of such parts of the property as are allotted to other parties: *Bowra* v. *Wright*, 4 De Gex & Sm. 265. So where in a suit for the partition of lands in which a lunatic was entitled to an undivided share, a partition has been made, and the lunatic declared a trustee within the Trustee Act, 1850; and, on a petition by the lunatic to have the partition carried into effect, the Lords Justices have, under the Trustee Act, 1850, and the Lunacy Regulation Act, 1850, directed the committee to convey according to the partition: *Re Bloomar*, 2 De G. & Jo. 88; see also, *Moorehead* v. *Moorehead*, 2 I. R. Eq. 492; 1 Seton, Dec. 581.

Partition at law, in this respect, differed from partition in equity, for in the former no conveyances were requisite, as it operated by the judgment of the Court of law, in pursuance of which, possession was at once delivered up, and the rights of all parties were there-

upon concluded. See *Whaley* v. *Dawson*, 2 S. & L. 371, 372.

It may be here briefly mentioned that a return by commissioners might be set aside for gross error of judgment (*Story* v. *Johnson*, 1 Y. & C. Exch. Ca. 538) or if made according to an understanding between some of the parties (*Peers* v. *Needham*, 19 Beav. 316).

And where two different returns were made by different commissioners, both would be suppressed: *Watson* v. *Duke of Northumberland*, 11 Ves. 153; *Corbet* v. *Davenant*, 2 Bro. C. C. 252; *Anon.*, 11 Ves. 163.

Where parties to a partition suit are equally interested, the practice is to give the custody of the deed of partition and other deeds to the plaintiff; but if they are not, then they are usually given to the person who has the largest interest in the property: per Sir *John Romilly*, M. R., in *Elton* v. *Elton*, 27 Beav. 633; and see *Jones* v. *Robinson*, 3 De G. Mac. & G. 911.

In a recent case, where a great many persons were interested in a partition deed, it was directed to be enrolled, with liberty to any party to have a duplicate at his own expense: *Elton* v. *Elton*, 27 Beav. 632. But if any of the deeds relate solely to any distinct part of the property allotted to any party, they will be delivered to him: *Jones* v. *Robinson*, 3 De G. Mac. & G. 910, 913; 1 Seton on Decrees, 577, 3rd Ed.

The Court, before the Partition Act, 1868 (31 & 32 Vict. c. 40) had jurisdiction in a partition suit even where infants were interested, if it appeared to be for their benefit, to direct a sale, instead of a partition; at any rate, if the parties *sui juris* desired a sale, it was managed somewhat indirectly in this manner, the Court directed that the infant's costs should be a charge on his share, and that they should be raised by a sale, and if the other parties who were *sui juris* concurred, a sale of the entirety could then be made. See *Rickards* v. *Rickards*, 15 W. R. 380; *Smith* v. *Birch*, 18 L. T. (N. S.) 174; *Thackeray* v. *Parker*, 1 N. R. (V. C. W.) 567; *Davis* v. *Turvey*, 32 Beav. 554; *Hubbard* v. *Hubbard*, 2 Hem. & Mill. 38). So a sale was by consent directed in a partition suit of a freehold estate in which a married woman was interested for *her separate use without power of anticipation*, the Court having first made her costs a charge on her share, and directed them to be raised by a sale thereof. See *Fleming* v. *Armstrong*, 34 Beav. 109. A similar order was also made in the case of a lunatic, *Singleton* v. *Hopkins*, 4 W. R. 107. But it was decided in a partition suit, that if one of several tenants in common refused to sell, he could, however ruinous to all parties might be the result, insist upon a partition: *Griffies* v.

Griffies, 11 W. R. (V. C. K.) 943. As to form of order when one of the defendants was an infant and another was out of the jurisdiction: see *Hubbard* v. *Hubbard*, 2 Hem. & Mill. 38.

The Partition Act, 1868 (31 & 32 Vict. c. 40) has very usefully increased the jurisdiction of Courts of equity to direct sales instead of partitions. By this Act it is enacted that "In a suit for partition, where if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court (by which is meant, the Courts of Chancery in England, Ireland, and the county palatine of Lancaster, and the Landed Estates Court in Ireland, sect. 2), that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested, or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be *more beneficial for the parties interested* than a division of the property between or among them, the Court may, if it thinks fit, on *the request of any of the parties interested*, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions" (sect. 3).

"In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions" (sect. 4).

"In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the property to which the suit relates, requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale, in such manner as the Court thinks fit, and may give all

necesary or proper consequential directions " (sect. 5).

" On any sale under this Act, the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting-off or accounting for the purchase-money, or any part thereof, instead of paying the same, or as to any other matters, as to the Court seem reasonable " (sect 6).

" Section 30 of the Trustee Act, 1850, shall extend and apply to cases, where in suits for partition the Court directs a sale instead of a division of the property " (sect. 7).

" Sections 23 to 25 (both inclusive of the Act of the session of the 19th and 20th years of her Majesty's reign (ch. 120), 'To facilitate the leases, and sales of settled estates,' shall extend and apply to money to be received on any sale effected under the authority of this Act " (sect. 8).

" Any person who, if this Act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause, the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings, as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order " (sect. 9).

" In a suit for partition, the Court may make such order as it thinks just respecting costs up to the time of the hearing " (sect. 10).

" In England, the County Courts shall have and exercise the like power and authority as the Court of Chancery in suits of partition (including the power and authority conferred by this Act), in any case where the property to which the suit relates does not exceed in value the sum of 500*l.*, and the same shall be had and exercised in like manner, and subject to the like provisions as the power and authority conferred by section 1 of the County Courts' Act, 1865 " (sect. 12).

The Partition Act, 1868, is retrospective. Accordingly, in a partition suit instituted before the passing of the Act, by the owners of two undivided fourths of the property, a sale was ordered, although opposed by the owners of the remaining fourths. *Lys* v. *Lys*, 7 L. R. Eq. 126.

But although this Act is retrospective in its operation, it does not enable the Court to direct a sale under a decree for partition before the Act, but not carried into operation at the time of the passing of the Act. So that in such a case a sale can only be made by the consent of all the parties interested. *Pryor* v. *Pryor*, 19 L. R. Eq. 595; 10 L. R. Ch. App. 469.

It was doubtful whether under the Partition Act, 1868, a decree could be made for sale of an estate, if the bill contained no prayer for partition, unless it were added by amendment (*Teall* v. *Watts*, 11 L. R. Eq. 213; *Holland* v. *Holland*, 13 L. R. Eq. 406), although a decree in the absence of such prayer was made in one case. See *Aston* v. *Meredith*, 11 L. R. Eq. 601.

In order to settle the law it has been enacted by the Partition Act, 1876 (39 & 40 Vict. c. 17) that "For the purposes of the Partition Act, 1868, and of this Act (the Partition Act, 1876) an action for partition shall include an action for the sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition" (sect. 7).

In considering the question whether a sale, in the words of the 3rd section of the Act of 1868, would be "more beneficial" for the parties than a division of the property, the Court has held that to mean beneficial in a pecuniary sense, as the Court cannot go into questions of sentiment, but must look merely to monetary results, hence where the evidence showed that a farm from its proximity to factories, would probably sell at sixty years' purchase, a sale instead of partition was directed: *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 528, 533.

The 3rd section gives power to the Court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are the nature of the property, the number of the parties interested, the absence or disability of some of the parties. The reasons are unspecified in one case, viz., where by reason of any "other circumstance" a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the Cuort may direct a sale. It is an absolute power of sale

on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division. (Per Sir *G. Jessel*, M.R., in *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 530,) and this section is not controlled in its operation by the 5th section. *Ib.* Hence under the 3rd section the Court has ordered as being more beneficial to the parties than a partition the sale of advowson (*Young* v. *Young*, 13 L. R. Eq. 175) of a farm house and thirty acres of land divisible into thirty-six shares (*Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 528) of an estate comprising a first-class mansion, with a park of nearly 200 acres, above 3000 acres of agricultural land, and a manor the rights of which extended over thirty square miles, divisible in moieties (*Pemberton* v. *Barnes*, 6 L. R. Ch. App. 685), and in Ireland, of an estate during the minority of three of the defendants, although there was a direction in the will under which they derived their interest in the estate that no sale should take place until the youngest of them should attain twenty-one. *Thompson* v. *Richardson*, 6 I. R. E. 596.

And the Court, if it thinks it to be beneficial so to do, may order a sale at request of parties holding a small amount of shares against the wishes of those holding a very much larger amount. Thus in a recent case it was laid down that a sale might be ordered at the request of a person holding one-tenth against parties holding the other nine-tenths. *Pemberton* v. *Barnes*, 6 L. R. Ch. App. 699. But the onus lies on the owners of the smaller share who desire a sale, of showing that it is, under the circumstances, the most beneficial course for all parties. *Allen* v. *Allen*, 21 W. R. (V. C. W.) 842.

Under the 3rd section of the Partition Act of 1868 orders for sale were made at the request both of infants (*Young* v. *Young*, 13 L. R. Eq. 175 n. ; *France* v. *France*, 13 L. R. Eq. 173 ; *Grove* v. *Comyn*, 18 L. R. Eq. 387) ; and married women : (*Davies* v. *Wietlisbach*, 18 L. R. Eq. 388, cited, *Higgs* v. *Dorkis*, 13 L.R. Eq. 280), although it appears to be somewhat doubtful whether an order for sale is authorized upon the request of persons under disability, though it clearly might be made upon the request of any of the parties who were *sui juris*, notwithstanding the disability of any others of them. And a sale has been directed of freehold estate to which a married woman was entitled for her separate use without power of anticipation. *Fleming* v. *Armstrong*, 34 Beav. 109.

But where two of the plaintiffs who requested a sale were married women, Lord *Selborne* (sitting for the Master of the Rolls) thought that their consent to the sale ought to be

taken on their separate examination, and for that purpose ordered the cause to stand over. *Leigh* v. *Edwards*, 21 W. R. 835.

It was also held that a married woman could not enter into an undertaking to purchase, under the 5th section of the Partition Act, 1868, unless her husband joined therein. *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 528.

In order to clear away any doubts, and to increase the jurisdiction of the Courts with regard to sales upon the request of, or on undertakings to purchase by, persons under disabilities, it was enacted by the Partition Act, 1876 (39 & 40 Vict. c. 17) that "in an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy, (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability; but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit" (sect. 6).

A party who has made a request for a sale, may it seems withdraw it, and have a partition. *Williams* v. *Games*, 10 L. R. Ch. App. 204, 205; *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 531.

The 4th section of the Act of 1868 differs materially from the 3rd. The 4th section provides that if the parties interested to the extent of a moiety or upwards request a sale, the Court shall sell, unless it sees good reason to the contrary—that is, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances which make the Court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shewn; they have not to shew any reason for the sale, but a reason to the contrary must be shewn. Per Sir *G. Jessel*, M.R., in *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 530.

And where the owners of a moiety ask for a sale under this section, it is imperative on the Court to order a sale, unless it sees good reason to the contrary; that is to say, the onus is thrown on the persons who say that the Court ought not to order a sale, to show some good reason why it should not do so; otherwise the Court is bound to order it. *Pemberton* v. *Barnes*, 6 L. R. Ch. App. 693; *Lys* v. *Lys*, 7 L. R. Eq. 126, 128. The mere fact that the owners of the other moiety oppose a sale is not a sufficient

reason to the contrary. "It would," said Lord *Hatherley*, C., "be striking the 4th section out of the Act to say that the owners of the other moiety have no more to do than to come and say 'we do not wish for a sale'": *Pemberton* v. *Barnes*, 6 L. R. Ch. App. 685, 694.

The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed under sect. 4 of the Partition Act, 1868. *Wilkinson* v. *Joberns*, 16 L. R. Eq. 14. See also *Roughton* v. *Gibson*, W. N. 1877 (V.-C. B.), p. 32.

The fact, moreover, that the income of an infant defendant, interested in a moiety of the property in question, might be materially diminished by the Court directing a sale, is not a sufficient reason within the meaning of the 4th section, against the Court directing a sale when asked for by the owner of the other moiety. *Rowe* v. *Gray*, 5. L. R. Ch. D. 263. See also *Roughton* v. *Gibson*, W. N. 1877, p. 32.

In a case in Ireland it has been laid down that the only "good reason to the contrary" is to show affirmatively that there is no difficulty in making an actual partition. *In re Langdale's Estate*, 5 I. R. E. 572.

With regard to the question who can be considered owner of a moiety, where real estate was settled as to one moiety to the separate use of P., a married woman, for life, with remainder as she should, notwithstanding coverture, by will, appoint, and in default to T., it was held by Sir *J. Bacon*, V.-C., that although if M. did not appoint, her share would go over, she was the owner of one moiety of the estate within the meaning of the 4th section. *Parker* v. *Trigg*, W. N. 1874, p. 27.

As to a form of order providing for the case of a certificate finding that all the parties interested were not parties. See *Senior* v. *Hereford*, 4 Ch. D. 494.

It is clear that the 5th section was intended for the benefit of part-owners who desire a sale; in which case the other parties interested who object to a sale may be compelled to buy the shares or have a sale, but there is nothing to compel a man to sell his shares. See *Williams* v. *Games*, 10 L. R. Ch. App. 204. There, in a partition suit, one of the part-owners asked for sale, and others asked for partition, it was held by the Court of Appeal in Chancery that the Court had no power under the 5th section to order that the part-owner who asked for a sale should sell to the others his share at a valuation, and to order that a partition amongst the others should then be made.

The construction to be put upon

the 5th section has been well explained by Sir *G. Jessel*, M. R. "The 5th section," says his Lordship, "provides that, if any party interested in the property requests the Court to direct a sale of the property instead of a division, the Court may, if it thinks fit (this is discretionary), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such sale. What does that mean? Under the 4th, where the parties requesting a sale have got more than a moiety, you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section; in every possible case where the Court thinks a sale is proper and for the benefit of the parties interested. Therefore the 5th must apply to a case where the Court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the Court sees no reason at all, still any party interested may apply; and then there is a limit imposed, and the limit is this, that the Court shall not exercise the new power given by the 5th section, which depends entirely upon the caprice of the party asking, without any opinion of the Court being expressed, if other people will buy. That is a check upon the new power—not, as it has been supposed to be, a limitation of the 3rd and 4th sections; but it is a new power given to any party, whether plaintiff or defendant, to apply with or without any reason whatever, to the Court for a sale, and he is entitled to ask for it unless somebody is going to buy; and then *Williams* v. *Games* (10 L. R. Ch. App. 204) says that if he does apply for it and somebody else does offer to buy his share, he may withdraw his request. That is my view of the law; and, considering that *Williams* v. *Games* is the last decision, I think I am entitled to express that view as one that ought to guide me in future unless corrected, notwithstanding some observations of Lord *Hatherley* in the case of *Pemberton* v. *Barnes* (6 L. R. Ch. App. 693), which seem to point to the conclusion that the 5th section was in the nature of a proviso to the following effect:—'Provided always that no sale shall be directed under the 3rd or 4th sections of this Act, if any other party interested shall undertake to buy the share of the parties asking for a sale.' That appears to me contrary to the plain meaning of the words of the 5th section." *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 531, 532.

The undertaking to purchase ought to be given at the hearing (*Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 528, 532), and may now be given, as we have already seen,

by a party under disability (*ante*, p. 453). *Mildmay* v. *Quicke*, W. N. 1877, p. 138.

Although as a general rule parties having the conduct of a sale are not allowed to bid, the Court, nevertheless, has, under peculiar circumstances, allowed this to be done. *Pennington* v. *Dalbiac*, 18 W. R., 684. And in another case on an order for sale, liberty was given to either party to bid, some third party in Chambers to have the conduct of the sale. (V.-C. B.) *Roughton* v. *Gibson*, W. N. 1877, p. 1877. Under the 6th section, moreover, a defendant, the owner of a moiety, was allowed to bid, upon the terms, in the event of his becoming a purchaser, of paying into Court one moiety only of the purchase-money. *Wilkinson* v. *Joberns*, 16 L. R. Eq. 14, 18. In a subsequent case, where parties had liberty to bid, and a third person was to have the conduct of the sale in Chambers, it was directed that, in the event of the defendants (who owned three-fourths of the property) being purchasers, they were to pay into Court not merely one-fourth, but, in order to cover the plaintiff's costs subsequent to the hearing, a sum equal to one-half of the purchase-money. *Roughton* v. *Gibson*, W. R. 1877 (V.-C. B.), p. 32.

The object of the legislature in passing the 7th section was to transfer the legal estate, because, independently of sec. 30 of Trustee Act, 1850 (13 & 14 Vict. c. 68), wherever the Court had jurisdiction to make a decree for sale, such decree bound in equity the interests of all persons not in existence, and who could not be made parties to the suit, whether they were not in existence, because they were not actually living (and of course could not be made parties) or not in existence, because it was uncertain who might become entitled, and that even although it might be certain that some living person would ultimately become entitled. *Basnett* v. *Moxon*, 20 L. R. Eq. 182, 184.

Thus, where real estates were held by a complicated title, under which the parties interested were very numerous, and unborn issue might become entitled to legal estates, it was held by Sir *G. Jessel*, M. R., that all persons in existence who were interested in the estate being parties to a suit for partition, and the title being proved at the hearing, an immediate decree for sale might be made without any preliminary inquiry: that a declaration might be made that the parties to the suit were, and that unborn issue upon coming into existence would be trustees of their shares and interests within the meaning of the Trustee Act, 1850. *Lees* v. *Coulton*, 20 L. R. Eq. 20.

The appointment, however, in such a case of a new trustee, and consequent vesting order, ought to be the subject of a subsequent

application, and ought not to be made by the decree. *Lees* v. *Coulton*, 20 L. R. Eq. 20. Sed vide *Shepherd* v. *Churchill*, 25 Beav. 21.

As to a vesting order in the case of a partition of lands belonging to a lunatic, see *Bowra* v. *Wright*, 4 De G. & Sm. 265; and see *Re Sherard*, 1 De G. J. & S. 421.

Under the 8th section the Court has power to direct money to arise from a sale to be paid in pursuance of secs. 23 & 24 of 19 & 20 Vict. c. 120, to trustees. (*Hayward* v. *Smith*, 20 L. T. Rep. 70; *Chubb* v. *Pettipher*, W. N. (V.-C. M.), 1872, p. 110). The Court, however, refused an application for the payment of the purchase-money to arise from a sale to trustees, and ordered it to be paid into Court, when the only parties interested were a married woman and an infant. *Higgs* v. *Dorkis*, 13 L. R. Eq. 280. And where money produced by sale under the Partition Act, 1868, had been paid into Court, and some of the persons interested were married women, and resident in Australia, the Court refused to make an order for the payment out of the money to trustees. *Aston* v. *Meredith*, 13 L. R. Eq. 492.

As to conversion upon a sale, see ante Vol. I. 945, *Grimwood* v. *Battels*, W. N., 1877, p. 177, where payment to the foreign curator of a foreign lunatic was refused.

With regard to the time when a decree may be made, it has been laid down that if all persons interested are parties to the cause a decree may be made at the hearing. Per Sir *G. Jessel*, M. R., in *Mildmay* v. *Quicke*, 20 L. R. Eq. 538. See also *Lees* v. *Coulton*, 20 L. R. Eq. 20; *Powell* v. *Powell*, 10 L. R. Ch. App. 130.

But if they were not all parties, then the 9th section of the Partition Act, 1868, applied, and a sale could only be ordered "on further consideration." Per Sir *G. Jessel*, M. R., in *Mildmay* v. *Quicke*, 20 L. R. Eq. 538.

It might be that these words were not used in their strict technical sense, but before a sale could be ordered there must be further consideration of some sort or other; and the utmost that could be done in such a case would be to give liberty to apply at Chambers with reference to a sale in the event of its being certified that all parties interested had been either parties to the cause or had been served with notice of decree. Ib. See also *Powell* v. *Powell*, 10 L. R. Ch. App. 134; *Gilbert* v. *Smith*, W. N. 1876, p. 150.

When in a partition suit a decree is made for sale dependent upon its being found under inquiries thereby directed that it would be more beneficial than a partition, and that all parties entitled were parties to the suit, if a sale takes place before the certificate is made, the purchaser is entitled

to be discharged, although a certificate may be afterwards made, finding that the proper parties are before the Court, and that a sale is beneficial. *Powell* v. *Powell*, 10 L. R. Ch. App. 130.

Where, however, all the parties interested are in fact before the Court at the hearing, are willing to convey, and a good title can be made independently of the Partition Act, 1868, the purchaser is bound to accept such title, and cannot rely upon a technical informality in the decree. *Rawlinson* v. *Miller*, 1 Ch. D. 52. See also *Cavendish* v. *Cavendish*, 10 L. R. Ch. App. 319.

Although when there was a legal presumption of the death of parties not heard of for a considerable time, an order for sale could be made (*Jackson* v. *Lomas*, 23 W. R. 744; *Rawlinson* v. *Miller*, 1 Ch. D. 52), considerable difficulty arose in other cases where persons were out of the jurisdiction, and it was held that no sale could be ordered unless every person interested in the property, the subject of a partition suit, was either a party to the cause or had been served with notice of the decree. The cases, however, on this subject, from defects in the Partition Act, 1868, which, moreover, did not confer sufficient powers upon the Court, are somewhat conflicting. It was laid down in one case that although the Court had jurisdiction to direct an immediate sale in a partition suit in the *absence* of parties interested in the property, but shown to be out of the jurisdiction, nevertheless, where it was uncertain whether absent parties were or were not within the jurisdiction, an inquiry should be directed as to the persons interested in the property and their shares therein, and whether such persons were out of the jurisdiction. *Silver* v. *Udell*, 9 L. R. Eq. 227.

But in the subsequent case of *Hurry* v. *Hurry*, 10 L. R. Eq. 346, where one of the parties entitled to a small fraction of the estate, was out of the jurisdiction, and had not been served, and it did not appear that any attempt had been made to serve him, it was held by Sir *W. M. James*, V.-C., that the decree for sale could not be made in his absence.

Where a decree had been made for sale, in the absence of parties who were out of the jurisdiction, the Court refused to allow the decree to be acted on in their absence, but directed notice to be given to them of the decree by advertisement, with liberty for the plaintiffs to apply as to proceeding with the sale after the advertisements had appeared: *Peters* v. *Bacon*, 8 L. R. Eq. 125. In a more recent case, however, it was doubted whether an advertisement was sufficient notice of the decree, unless it could be shown that the advertisement had been brought to the notice of the party to be affected by it, and in

that case the plaintiff had liberty to apply at Chambers as to the service of the decree on the party out of the jurisdiction. *Teall* v. *Watts*, 11 L. R. Eq. 213.

And the Court has refused to make an order for sale in the absence of a married woman, whose share in the property was vested in trustees. *Dodds* v. *Gronow*, 20 L. T. 104.

In order to remedy these defects in the Partition Act of 1868 (31 & 32 Vict. c. 40), it has been enacted by the Partition Act, 1876 (39 & 40 Vict. c. 17), that "Where in an action for partition it appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is, by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the Court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before a judge in Chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability) shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the Court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property, and give all necessary or proper consequential directions. Sect. 3, 1877.

Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court, the following provisions shall have effect:—

(1). The proceeds of sale shall be paid into Court to abide the further order of the Court.

(2). The Court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may, from time to time, by further order extend that time.

(3). The Court shall direct

such notices to be given by advertisements or otherwise, as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made.

(4). If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons.

(5). If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the Court to have any *primâ facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person (sect. 4).

Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time" (sect. 5).

The Court has power since the passing of the Master in Chancery Abolition Act (15 & 16 Vict. c. 80), to have a sale of real estate, directed to be sold under

the Court, made by auction in Chambers before the chief clerk; and where all the parties are *sui juris*, and before the Court, they may, if they think it expedient, have a sale effected in this manner. Where, however, there are parties not before the Court, or not *sui juris*, the duty is thrown upon the Court of determining which is the most beneficial mode of conducting the sale, and the fact of the power having fallen into disuse tending to shew that its exercise was in general inexpedient, the Court will direct a sale by an auctioneer: *Pemberton* v. *Barnes*, 13 L. R. Eq. 349.

The Court has power, however, instead of directing a sale by auction in Chambers or by an auctioneer, to confirm a conditional contract for sale entered into by the parties. See *Grove* v. *Comyn*, 18 L. R. Eq. 387, where the Court got over the difficulty of there not having been any "request" for a sale under the 3rd section, by prefacing the decree with a recital that a sale appeared more beneficial than a division, and that the infant plaintiff requested a sale.

An order may be made under the Partition Act, 1868, for partition as well as for a sale (*Dicks* v. *Batten*, W. N., 1870, p. 173), even in opposition to the chief clerk's certificate (*Allen* v. *Allen*, 21 W. R., 842), or for a partition of part of an estate and sale of the rest: *Roebuck* v. *Chadebet*, 8 L. R. Eq. 127; *Pennington* v. *Dalbiac*, 18 W. R. 684: *Allen* v. *Allen*, 21 W. R. 842.

A sale has been ordered, the defendant not opposing, of a freehold estate, subject to an executory devise over; *Groves* v. *Carbert*, 29 L. T. 129, but the Court has refused to order a sale reserving the minerals: *Lawe* v. *Stoney*, W. N. 1876, p. 141.

After a decree has been made in a partition suit, the Court has jurisdiction to grant an injunction to restrain the defendant from destroying or wasting the property: *Bailey* v. *Hobson*, 5 L. R. Ch. App. 180; *Hughes* v. *D'Arcy*, 8 I. R. Eq. 71.

But where, after a decree for sale in a partition suit, a defendant who was in the occupation of the property, but bound by no contract of tenancy, proposed to sell the hay and turnips from off the land, contrary to the custom of the country as between landlord and tenant, it was held by Lord Justice *Giffard*, reversing the decision of Sir *J. Stuart*, V.-C., that this was not such a destruction of the property as the Court would restrain, and a motion for an injunction was refused: *Bailey* v. *Hobson*, 5 L. R. Ch. App. 180.

A suit for partition being based on the assumption that there is no litigation, it has been held that a bill for a partition could not be made the means, even under Sir *John Rolt's* Act (25 & 26 Vict.

c. 42), for trying a disputed legal title. Thus in *Slade* v. *Barlow*, 7 L. R. Eq., 296, a plaintiff claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question, whether upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise, it was held by Sir *W. M. James*, V.-C., that the Court had no jurisdiction to try such a question in a partition suit, and the bill was ordered to be retained for a year with liberty to the plaintiff to bring such action as he might be advised. See also *Potter* v. *Waller*, 2 De G. & Sm. 410; *Gifford* v. *Williams*, 5 L. R. Ch. 546, reversing *S.C.*, 8 L. R. Eq. 494; *Bolton* v. *Bolton*, 7 L. R. Eq. 298, n.

With the consent, however, of the parties, the Court has, it seems, decided a disputed question in a partition suit: *Burt* v. *Hellyar*, 14 L. R. Eq. 160; 41 L. J. Ch. (N.S.) 430; *Hurry* v. *Hurry*, 10 L. R. Eq. 346; *Davey* v. *Wietlisbaeh*, 15 L. R. Eq. 269; and see now the Judicature Act, 1873, sect. 24, subs. 7.

The rule laid down by Lord *Eldon*, in the principal case, as to costs, was this, that as a party comes into equity, instead of going to law, for his own convenience, the rule of law ought to be adopted, and therefore no costs would be given until the commission, that is to say up to the hearing, but that the subsequent costs of issuing, executing, and confirming the commission, should be borne by the parties in proportion to the value of their respective interests, without any costs of the subsequent proceedings: see *Baring* v. *Nash*, 1 V. & B. 554; *Whaley* v. *Dawson*, 2 S. & L. 371; *Balfe* v. *Redington*, 2 Ir. Ch. Rep. 324. And the costs of mutual deeds of partition and of having the same settled by the Master, being subsequent costs, must be borne by the parties respectively: *Balfe* v. *Redington*, 2 Ir. Ch. Rep. 324; Beames on Costs, 50.

And it was held by Lord *Romilly*, M. R., that the practice remained the same when a sale was ordered under the Partition Act, 1868. See *Landell* v. *Baker*, 6 L. R. Eq. 268. Lord Chancellor *Selborne*, however (sitting for the Master of the Rolls), in a suit for sale under the Partition Act, 1868, where the plaintiffs were owners of one moiety and the defendants of one-fourth of the estate, and the owners of the remaining fourth were served with notice of the decree, held that the costs of all parties ought to be paid out of the estate, and his Lordship observed that, having regard to the 10th section of the Partition Act, 1868, it could not be said that the Court was bound by the old rule as to costs of partition suits. That it was impossible to lay down a general rule

on the subject, that there might be cases in which the Court, in the exercise of its discretion, would follow the old practice. *Simpson* v. *Ritchie*, 16 L. R. Eq. 103; Similar orders as to costs were made in *Osborn* v. *Osborn*, 6 L. R. Eq. 338; *Miller* v. *Marriott*, 7 L. R. Eq. 1; *Leach* v. *Westall*, 17 W. R. 313. It is true that Lord *Selborne*, in a former case (*Wilkinson* v. *Joberns*, 16 L. R. Eq. 14), ordered that there should be no costs up to and including the hearing; but in making such order as to costs, his Lordship expressly states that he did so, "looking at all the circumstances of the case in the exercise of his discretion, under the Act."

It has, moreover, been laid down as a general rule that the entire costs of a partition suit should be borne by the parties in proportion to their interests, as declared by the decree, except where there are any special circumstances arising from the conduct of any of the parties, which may lead the Court to apportion the costs otherwise. *Cannon* v. *Johnson*, 11 L. R. Eq. 90; and see *Thompson* v. *Richardson*, 6 I. R. Eq. 596. A defendant, however, who improperly disputed the plaintiff's title, has been ordered to pay so much of the costs as he thereby occasioned; *Hill* v. *Falbrook*, Jac. 574; *Wilkinson* v. *Castle*, 16 W. R. 501; *Morris* v. *Timmins*, 1 Beav. 411, 418; and a defendant through whose conduct the suit was rendered necessary, was ordered to pay his own costs. *Graham* v. *Cole*, L. J.; Notes of Cases, 1873, p. 102.

Where a bill is filed for a partition, and a purchaser of an undivided share of a defendant is made a party by amendment, he is entitled to have his costs paid by the plaintiff: *Williams* v. *Williams*, 10 W. R. (V.-C. K.) 609.

The costs of infants (*Cox* v. *Cox*, 3 K. & J. 544), or of a lunatic (*Singleton* v. *Hopkins*, 4 W. R. 107), may, it seems, be charged upon and ordered to be raised out of the shares allotted to them.

As to the jurisdiction of the County Courts under section 12. See *Thomson* v. *Flinn*, 17 L. R. Eq. 415.

With regard to the jurisdiction of the Inclosure Commissioners as to partition, see 8 & 9 Vict. c. 118, ss. 90, 91; 9 & 10 Vict. c. 70, ss. 9, 10, 11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c 97, s. 5; 20 & 21 Vict. c. 31, ss. 7—11; 22 & 23 Vict. c. 43, ss. 10, 11.

By the Incumbered Estates Act, power was given to the commissioners to make partition. See *In re Wilkins*, 4 Ir. Ch. Rep. 575.

As to Dower.]—Upon the same principle, as in cases of partition, although dower was originally a mere legal demand, a widow being

a joint owner became entitled in equity to an assignment of one-third of the lands of which her husband was seised in fee or in tail, which her issue might by possibility have inherited, as her dower. The difficulty of proceeding at law together, probably, with the necessity of obtaining a discovery from the heir, devisees, or trustees, gave equity a concurrent jurisdiction with the old Courts of law, which, it seems, would have been exercised without its being shown whether such difficulty actually existed or not.

For an able exposition of the law of dower, see the judgment of Lord *Alvanley*, M. R., in the leading case of *Curtis* v. *Curtis*, 2 Bro. C. C. 620; and see *Mundy* v. *Mundy*, 2 Ves. jun. 122; *Pulteney* v. *Warren*, 6 Ves. 89; *Strickland* v. *Strickland*, 6 Beav. 77, 81.

Widows, before the Dower Act, (3 & 4 Will. 4, c. 105), were only dowable out of legal estates; but by that Act every woman married after the 1st Jan., 1834, is dowable out of her husband's equitable estates of inheritance (sect. 2). The Act, however, has put her right to dower entirely in the hands of her husband, who may defeat it wholly by an absolute disposition of his lands in his life-time, or by will (sect. 4), or partly, by partial estates and interests similarly created, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable are made valid and effectual as against the right of his widow to dower (sect. 5). Dower was also made liable to be barred by a declaration of the husband by deed (sect. 6), or will (sect. 7), by the latter of which it might be made subject to restrictions (sect. 8), and a devise to a widow of any land out of which she would otherwise be dowable, or of any estate or interest therein, to or for the benefit of his widow, will disentitle such widow to dower out of any land of her husband, unless a contrary intention should be declared by his will (sect 9). On the other hand, no gift or bequest by a husband out of his personal estate, or of or out of land of which she was not dowable, is to prejudice her right to dower, unless a contrary intention should be declared by the will (sect. 10).

Upon the construction of this Act it has been decided that the dower of a woman, married *after* 3 & 4 Will. 4, c. 105, came into operation, out of an estate made subject to dower by that Act, will not be excluded by a declaration against dower contained in a conveyance *prior* to that Act (*Fry* v. *Noble*, 20 Beav. 598; *S. C.*, on appeal, 7 De G. Mac. & G. 687; *Clarke* v. *Franklin*, 4 K. & J. 266), and a widow's dower and freebench is not by Sir *John Romilly's* Act (3 & 4 Will. 4, c. 104), nor by the Dower Act (3 & 4 Will. 4, c. 105), rendered liable

to the mere debts of her husband: see *Spyer* v. *Hyatt*, 20 Beav. 621, 623, where Sir *John Romilly*, M.R., observes, that "what is claimed by or comes to the widow is no part of what the intestate is seised of at his death. He dies seised of land *subject to the widow's right to dower*, and it is only that which becomes subject to the payment of his debts."

The better opinion appears to be that a husband may deprive his widow of dower by will, under the 4th section of the Dower Act, by a mere general disposition of his land. See *Lacey* v. *Hill*, 19 L. R. Eq. 346, 349, overruling the dicta of Lord *Romilly*, M.R., in *Rowland* v. *Cuthbertson*, 8 L. R. Eq. 469, where his Lordship was under the impression that the disposition of the husband by will in order to defeat the dower of his widow "must point the land out specifically, or designate it in some way."

It is clear, moreover, that in order to bar the widow's right of dower, under the 9th section of the Act, a general disposition of his land by will, under which she takes a partial interest, will, in the absence of a contrary intention, be sufficient (*Rowland* v. *Cuthbertson*, 8 L. R. Eq. 466.; *Lacey* v. *Hill*, 19 L. R. Eq. 346), and a general devise by a husband of his real estate upon trust to sell, and give his widow part, even in the shape of part of the capital, or of any income of the proceeds to be invested, is a gift of "an estate or interest" in the land for the benefit of the widow, within the meaning of the 9th section. *Lacey* v. *Hill*, 19 L. R. Eq. 346, 350.

As to a widow's being put to her election between dower and a benefit conferred upon her, see note to *Streatfield* v. *Streatfield*, Vol. i. p. 369.

The Dower Act does not apply to freebench, see *Smith* v. *Adams*, 5 De G. Mac. & G. 712. There the purchaser of a copyhold, held of a manor the custom of which entitled widows of the copyholders to freebench in one moiety of the land of which their husbands died seised, took a surrender, but died before admittance. It was held by the Lords Justices, reversing the decision of Sir *John Romilly*, M.R. (reported 18 Beav. 499), that the widow was not entitled to freebench at law or in equity.

Moreover, independently of the Dower Act, a husband may by devise deprive his widow of freebench in copyholds. For, under the old law, if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench, the effect of the surrender being to destroy her title to freebench. Then 55 Geo. 3, c. 192, was passed, which enabled a man to devise copyholds without surrender; and under it the devise took effect as if the testator had surrendered, and therefore the widow did not take freebench. And now,

under the 3rd section of the Wills Act (1 Vict. c. 26), the same effect is to be given to a gift of copyholds, by will under the new law, as it stood before the Wills Act, and consequently the widow in such case is not entitled to free-bench. *Lacey* v. *Hill*, 19 L. R. Eq. 346, 350, 351.

It has long been established that a purchaser for valuable consideration, even with notice of the inchoate right of a woman to dower, may, by obtaining the assignment of an outstanding term, protect himself against any claim in respect of such dower. *Lady Radnor* v. *Vandebendy*, Show. P. C. 69, Prec. Ch. 65; *Maundrell* v. *Maundrell*, 10 Ves. 246.

It followed, therefore, that a purchaser or mortgagee (who is a purchaser *pro tanto*), though he knows of the right of dower, may advance his money, and taking in a term may avail himself of it, though the consequence will be the utter defeating of the right of dower. (Per Sir *W. Grant*, M.R., in *Wynn* v. *Williams*, 5 Ves. 134.) The Court of Chancery, moreover, has enforced specific performance against the husband, where there was an outstanding available term which could be assigned to a trustee for the purchaser, although the wife would not concur in the conveyance of the inheritance (*Simpson* v. *Gutteridge*, 1 Madd. 613, 618), and even where the term happened to be vested in the widow, as a trustee, the Court has compelled her to assign it for the purchaser's protection against her own dower. *Mole* v. *Smith*, 1 J. & W. 665.

The protection, however, which a purchaser might obtain from the assignment of outstanding terms was somewhat limited by the Satisfied Terms Act (8 & 9 Vict. c. 112), which in effect enacts that every satisfied term which was attendant upon the inheritance on the 31st of December, 1845, was on that day to cease, except that, if attendant by *express declaration*, it should afford the same protection as it would have afforded if it had continued to subsist, but had not been assigned or dealt with after that day (sect. 1), and that every term which, after the 31st of December, 1845, should become satisfied, should cease immediately upon the same becoming so attendant (sect. 2).

It has been held that a term in the hands of a trustee for a mortgagee, does not become a satisfied term under 8 & 9 Vict. c. 112, so as to deprive the mortgagee of its protection against the dower of the mortgagor's wife, in consequence of the mortgagee having taken a conveyance of the fee discharged from the equity of redemption, in consideration of his releasing the estate of the mortgagor, who had become bankrupt, from the debt. *Anderson* v. *Pignet*, 8 L. R. Ch. App. 180, reversing *S. C.*, 11 L. R. Eq. 329.

If the widow's right to dower

were disputed, an issue might be directed (*Mundy* v. *Mundy*, 2 Ves. jun. 122); or the bill retained for a certain time, with liberty to the widow to bring a writ of dower, as she might be advised (*Curtis* v. *Curtis*, 2 Bro. C. C. 620; *D'Arcy* v. *Blake*, 2 S. & L. 390); and if necessary an inquiry might be directed as to the lands of which she was dowable (*Meggot* v. *Meggot*, Seton on Decrees, 671, 672, 3rd Ed.).

The right being established, and the property out of which the widow is dowable being ascertained, the next step is to ascertain the dower; and this may be done either by a reference (*Goodenough* v. *Goodenough*, 2 Dick. 795); or by directing a commission to issue, which is made out, executed, and returned in the same manner as a commission of partition (*Wild* v. *Wells*, 1 Dick. 3; *Huddlestone* v. *Huddlestone*, 1 Ch. Rep. 38; *Lucas* v. *Calcraft*, 1 Bro. C. C. 133; 2 Dick. 594; *Mundy* v. *Mundy*, 2 Ves. jun. 125; 4 Bro. C. C. 294; Tudor's L. C. Real Prop. 67, 2nd Ed.).

As a general rule, on a bill to assign dower, no costs were given on either side: Beames on Costs, 35, 36. But if the defendant added another case, as by disputing the title of the widow, denying the marriage, or the seisin of the husband, or set up any other ground of defence in which he fails, he might be liable to pay the costs of the suit occasioned by that unsuccessful defence: (per *Wigram* V.-C., in *Bamford* v. *Bamford*, 5 Hare, 205); although the question as to the right might be one of considerable nicety (*Fry* v. *Noble*, 20 Beav. 598, 606), and it was immaterial that the defendant admitted the right to dower in his answer (*Harris* v. *Harris*, 11 W. R. (M. R.) 62). However, in *Bamford* v. *Bamford*, 5 Hare, 203, where the defendant had resisted the claim of the widow to dower, under peculiar circumstances, no costs were given. In that case it appeared that the husband had been transported, and the only means the defendant had of procuring information as to the time of his death was from the office of the Secretary of State for the Home Department, and the information which he there received was such as to mislead, and might have misled any one making a similar inquiry.

When land belonging to an infant, subject to his mother's right of dower, was taken by a Railway Company, and the purchase-money as determined by two valuers was paid into Court under the Lands Clauses Act (8 Vict. c. 18), it was held that the dowress was entitled to have the value of her right of dower as determined by the valuers, paid to her out of the fund in Court. *In re Hall's Estate*, 9 L. R. Eq. 179.

WOOLLAM *v.* HEARN.

May 24th, 25th ; June 3rd, 1802.

[REPORTED 7 VES. 211.]

DISTINCTION BETWEEN SEEKING AND RESISTING SPECIFIC PERFORMANCE, AS TO THE ADMISSION OF EVIDENCE.]— *Though a defendant resisting a specific performance, may go into parol evidence to show that, by fraud, the written agreement does not express the real terms, a plaintiff cannot do so, for the purpose of obtaining a specific performance with a variation.*

WILLIAM HEARN, being possessed of a house in Ely Place, under an agreement for a lease of seven, fourteen, or twenty-one years, from the 25th of December, 1794, agreed to let the house to Penelope Woollam, for seventeen years; and a memorandum, dated the 11th of December, 1798, was executed by them, stating an agreement for a lease to the plaintiff from the defendant for seventeen years, to commence at Christmas next, at the yearly rent of 73*l.* 10*s.*, the tenant paying all taxes except the land tax, which Hearn agreed to pay: the lease to contain all usual covenants, and also covenants that no public trade should be carried on in the premises; and that no alteration should be made in the front; that the lessee should leave the premises in tenantable repair, with other covenants relative to the situation of Ely Place, as being extra-parochial.

The bill was filed by Mrs. Woollam against Hearn, stating, that the rent of 73*l.* 10*s.* was inserted by mistake, or with some unfair view; the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that

he did not pay more than 60*l.*: and in confidence that a lease would be executed to her, she paid 60*l.* to the defendant at the time of executing the agreement, being the moiety of the sum which the defendant alleged he had laid out in repairs. She also paid 33*l.* 15*s.* 6*d.* for fixtures.

The bill prayed a specific performance, and that the defendant may be decreed to execute a lease according to the agreement, at the rent of 60*l.*, or such other rent as the defendant paid his lessor.

The defendant by his answer denied that 73*l.* 10*s.* was inserted by mistake, or with any unfair view; or that the agreement was, that the plaintiff should pay the same rent as the defendant paid, which he admitted to be 63*l.* He stated that he believed he might say, in the course of the treaty, that she would have the premises upon the same terms as the defendant had; not meaning that she was to have them at the same rent, but that she would, on the whole, have them upon terms of equal advantage with the defendant, considering the money he had expended upon them. He admitted the payment of 60*l.*, stating, that it was not a moiety of the money laid out by him, though at the time of payment it might have been so called.

On the part of the plaintiff, her son stated by his depositions, that when he treated with the defendant for a lease of the house, he said he had got a lease of it, but could not at that moment lay his hands upon it: that he did not exactly know what the rent was, but it was somewhere about 70*l.* a year, that he did not want to get anything by her, and she should have the house upon the same terms he had it himself, which he repeated several times afterwards. The plaintiff's solicitor stated, that the defendant repeatedly said, upon being pressed to execute a lease, that the plaintiff held the house upon the same terms upon which he held; but, when the deponents deposed to him to execute an assignment of the original lease, he objected, that it was always his maxim not to part with the original

lease, but to hold it in his own possession for his security.

Mr. *Romilly* and Mr. *Wetherell*, for the plaintiff.—To the objection, that the plaintiff cannot vary the written agreement, the answer is, that this is a case of fraud, upon which you must have recourse to parol evidence, otherwise it cannot be made out; and that takes it out of the statute (*a*); *Shirley* v. *Stratton* (*b*), *Young* v. *Clerk* (*c*), *Buxton* v. *Lister* (*d*). These are cases of defendants resisting the performance on the ground of fraud, but the same principle must apply to the case of a plaintiff complaining of fraud. The rule *caveat emptor* does not apply in this instance. A person buying an estate has no right to ask the vendor what he gave for it. But this is very different, amounting to a warranty. Though there is no case precisely similar, the result of all, which are collected by Mr. Fonblanque (*e*), is, that upon fraud or mistake, parol evidence is admissible. There are several cases before Lord *Thurlow*, in which it is laid down that a party may alter a term in the agreement, in the case of fraud: *Lord Irnham* v. *Child* (*f*), where it was taken as clear, that, if the clause had been omitted by fraud, a redemption would have been permitted: so in *Lord Portmore* v. *Morris* (*g*), before Lord *Kenyon*. In *Joynes* v. *Statham* (*h*), and *Walker* v. *Walker* (*i*), Lord *Hardwicke* intimates an opinion that the plaintiff might have done so, if the parties had been reversed. *Rich* v. *Jackson* (*k*) was determined upon the ground that it was not a case of fraud. If the bill had been filed against this plaintiff, upon all the authorities she might have insisted upon this variation, for the Court would not assist a plaintiff coming to enforce an agreement by his own fraud, not according to the true contract. There can be no principle why a man may set up a fraud defensively, which he cannot offensively. The defendant must go the length of saying, that no proof of fraud, however clearly it may be made out that the written agreement was not the actual agreement, will be adequate. Certainly a plaintiff must make out a stronger case. The conse-

(*a*) Stat. 29, Car. 2, c. 3.
(*b*) 1 Bro. C. C. 440.
(*c*) Prec. Ch. 538. See the references in the notes by Mr. Finch.
(*d*) 3 Atk. 383.
(*e*) 1 Fonb. 122.
(*f*) 1 Bro. C. C. 92.
(*g*) 2 Bro. C. C. 219.
(*h*) 3 Atk. 388.
(*i*) 2 Atk. 98.
(*k*) 4 Bro. C. C. 514; 6 Ves. 334, in a note to *The Marquis of Townshend* v. *Stangroom*, 6 Ves. 328; where all these cases are fully discussed

quence of refusing this relief would be, that the person who contrived the fraud, and who, if he filed a bill, would not be permitted to set it up, may secure the advantage by refusing to perform the agreement, driving the other to be the actor, and to file a bill. In many of these cases the fraud has not been clear. This is, beyond a doubt, misrepresentation from first to last; not only *suppressio veri*, but also *suggestio falsi*. How is it to be distinguished from a purchase of an estate, represented by the vendor at a certain number of acres, and turning out to be less? There is a similar reference here to the rent. The defendant's construction of his words is impossible.

Mr. *Leach*, for the defendant.—The cases cited proceed upon a principle wide of the Statute of Frauds. The plaintiff signed this agreement under the notion that the rent specified was paid by the defendant to his landlord. Assume that fact. She undertook it with full knowledge. This is not within the principle upon which the Court permits a written agreement to be varied by parol. The meaning of that rule is, that the writing must differ from the intention of the party when signing it. This plaintiff intended, and knowing it, bound herself to pay, 73*l.* 10*s.* per annum. She does not insist that she signed the agreement by mistake, but she contends, upon the suppression of the fact, not merely that she is to be discharged from the written agreement, which might be done if the case was made out, but beyond that, to set up another agreement, existing only in parol. That is the distinction. If she meant only to pay a rent of 63*l.*, and the other by fraud inserted 73*l.*, the Court would correct it; but this is an attempt to repeal the Statute of Frauds. The danger of admitting such evidence must be attended to; persons supporting their own case: and affecting to state the very words, that passed. By the alteration of a word the witness alters the whole conversation. But, admitting the evidence, it by no means supports their case. If the understanding was, that the plaintiff was to stand in the same relation to the

original landlord as the defendant, how was it, that she was to pay 60*l.* in consideration for the lease? He meant nothing more than what he states in his answer, that she should have it upon terms of equal advantage. The supposed fraud consists in this, that, having expended money, he must, therefore, have an increased rent.

Mr. *Romilly*, in reply.—With respect to the statute, I cannot state any case exactly like this; but where a party by a fraudulent representation of the facts has obtained a contract, it has been decided in many instances, that a case of fraud is always an exception out of the statute (*a*). If the party undertakes to show, that by fraud he was induced to sign an agreement different from the actual agreement, he may read evidence to that. This extends to cases of every description, deeds executed with the most solemn form. In *Filmer* v. *Gott* (*b*), evidence was admitted to prove a consideration in the deed different from that stated—a pecuniary consideration: the deed expressing natural love and affection. This was followed by *The King* v. *The Inhabitants of Scammonden* (*c*), and various other cases. *Lord Irnham* v. *Child* and *Portmore* v. *Morris* (*d*), are as strong cases as can be produced, being not only to vary the written agreement, but to have a specific performance of the agreement so varied. There can be no difference whether the party producing the evidence is plaintiff or defendant: the question being as to the rule of evidence, and a positive rule of evidence being equally applicable to both cases. In *Doe* v. *Allen* (*e*), a very strong case, upon a will, evidence was admitted, upon this ground, that if you so rigidly adhere to the statute, it would be, not a statute for the prevention, but for the protection and furtherance of fraud.

In this case the rent of 73*l.* 10*s.* was agreed on, only because the defendant said he paid that rent to his landlord. The defendant, the only person who knew the rent, refused to produce his lease. The sum inserted in the agreement has reference to something, which is substan-

(*a*) See the references in the note, 3 Ves. 38, 39, to *Pym* v. *Blackburn*.

(*b*) 4 Bro. P. C. 230, Toml. edit.

(*c*) 3 T. R., B. R., 474.

(*d*) 2 Bro. C. C. 219.

(*e*) 8 T. R., B. R., 147.

tially the agreement. This is not, as represented, a party with knowledge consenting to pay this rent. She never agreed to pay more than he paid. Suppose a person, owner of the fee, and likewise occupier, contracts to sell the estate at so many years' purchase, telling the party with whom he contracts, that it is 100*l.* a year. Attending to the language of the defendants, "*terms*" can mean nothing else than the rent. The defendant's interpretation is totally impossible.

Sir W. Grant, M.R.—The doubt I have felt during the argument of this case, whether there is any instance of executing a written agreement with a variation introduced by parol, still remains; and, as it is an important question, I wish to consider it.

1802. *June* 3.

Sir W. Grant, M.R.—This bill calls upon the Court for a specific execution of an agreement for a lease, at a rent of 60*l.* a year. There is no agreement in writing for a lease at that rent; the agreement expressing a rent of 73*l.* 10*s.* The plaintiff, contends, however, that she signed that agreement under a belief that such was the rent payable by the defendant: the real agreement being for a lease at the same rent he paid to his landlord. The defendant in his answer admits he might have said, she should have it upon the same terms; not meaning the same rent, but upon terms upon the whole equally advantageous; insisting that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement, that she was to have it upon the same terms as he had it, and to show that nothing could be meant by that expression, but the same rent, nothing being in discussion between them but the amount of the rent. He alleges a particular reason for not stating it—that he had not his own lease at hand. The question is, whether the evidence is admissible; for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can

be received: but I own, my opinion is, that, if received, it will make out the plaintiff's case; for taking the whole together, there is hardly a doubt that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

By the rule of law, independent of the Statute of Frauds, parol evidence cannot be received to contradict a written agreement.

By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply.

Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed; and there are many cases in which parol evidence of such circumstances has been admitted, as in *Buxton* v. *Lister* (*a*), which is very like this case. There, upon the face of the instrument, a specific sum was to be given for the timber; but it was shown by parol that the defendants were induced to give that upon the representation that it was valued by two timber merchants, which was not true. So here by the agreement upon the face of it she is to pay this rent; but by the evidence she was induced to do so, because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree, first

(*a*) 3 Atk. 383.

to falsify the written agreement, and then to substitute in its place a parol agreement, to be executed by the Court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence than I am forced by precedent. There is no case in which the Court has gone the length now desired. But two cases are produced, in which it is said there is an intimation from Lord *Hardwicke* to that effect. Upon that it might be sufficient to say, it was not decided. But it is evident, from the manner in which that great Judge qualifies his own doubts that he thought it impossible to maintain such a proposition as the plaintiff is driven to maintain. In *Walker* v. *Walker* (*a*), it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting anything in the written agreement. It was admitted, that, as far as it went, it stated the true meaning. But it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute before he could have the benefit of the written agreement. It was evidence, too, offered in defence to resist a decree. Lord *Hardwicke*, after stating the ground, expresses himself thus:—

(*a*) 2 Atk. 98.

"The plaintiff, for these reasons, is not entitled to relief in this Court, for supplying the defect of a legal conveyance, but it is rebutted by the equity set up by the defendant. I am not at all clear, whether, if the defendant had brought his cross bill to have this agreement established, the Court would not have done it, upon considering it in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other; and the defendant would have had the benefit of it as an agreement."

So he states the special reason; not being at all clear that the defendant would have been so entitled. There is nothing of admitting parol evidence to contradict a written agreement, and next to set up a parol agreement, to be executed by the Court.

(a) 3 Atk. 388. The other case referred to is *Joynes* v. *Statham* (a), referred to for the opinion expressed by Lord *Hardwicke*:—

"Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the Court."

But the reason is assigned:—

"Because it was an agreement executory only; and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes; and, therefore, the proof offered here is not a variation of the agreement, but is explanatory only of what those taxes were. I am of opinion to allow the evidence of the omission in the lease to be read."

The parol evidence was received for the purpose of resisting performance of the agreement, and received likewise, not to contradict it, but to show, that, as it stood, it did not fully express the meaning and intention of the parties, there being another stipulation agreed upon, but not introduced into the written instrument. And even if that had been a bill by the defendant, to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict anything in it; for he allowed it to contain the intention, as far as it went; but the provision, that the rent was to be clear of taxes, was omitted. And Lord *Hardwicke*, from the particular nature of that stipulation, expresses a doubt whether, if the defendant had been plaintiff, he might not have been permitted to give evidence, it being usual to leave that open; intimating that it would be merely explanatory as to the taxes.

But this is evidence to vary an agreement in a material part; and having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being, that it ought not, I must dismiss the bill, but w ithout cost

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The plaintiff then applied for a decree according to the

written agreement, with a covenant for quiet enjoyment as he had not power to grant such a lease.

The Master of the Rolls said, the bill was not for that purpose; expressly objecting to a lease at the rent of 73*l.* 10*s.*

The bill was dismissed without costs, and without prejudice to another bill for a lease at the rent of 73*l.* 10*s.*

The important distinction, now so well established, between a plaintiff *seeking*, and a defendant *resisting* specific performance, is well laid down by Sir *William Grant* in the principal case. The plaintiff, it will be observed, filed the bill for the specific performance of a written agreement, with a variation supported only by parol evidence, alleging, that by mistake or fraud the written agreement without the variation did not contain the real agreement; the parol evidence, however, was very properly rejected; but his Honor observes, that had the bill been brought by the defendant for a specific performance, he would have been bound by the decisions to have admitted the parol evidence, and to have refused a specific performance.

Lord *Hardwicke*, in *Joynes* v. *Statham*, 3 Atk. 388, which is referred to and commented on in the principal case, seems to have thought, that by possibility, a plaintiff might be permitted to show, by parol evidence, an omission, either by mistake or fraud, in the written agreement. It is, however, by no means improbable that his Lordship has been misreported. Lord *Redesdale*, in commenting upon this case, observes that it is true that Mr. Atkyns makes Lord *Hardwicke* say, "Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the Court." That passage was cited for the purpose of showing that Lord *Hardwicke* thought there might be an addition to the agreement by parol. He had found a reference to a note of the same case by Mr. *Brown*, who was King's counsel in Lord *Hardwicke's* time, and in great business; and the manner in which he had put the case is thus:—"But query, if on a bill for performance of an agreement, and an attempt to add to the agreement by parol, whether plaintiff can do it in that case?" Therefore, Mr. Brown certainly did not understand Lord *Hardwicke* as saying that it could

be done; and, looking attentively at the words used by Atkyns, he did not think they imported anything positive: *Clinan* v. *Cooke*, 1 S. & L. 38.

By the rule of law, as observed by the Master of the Rolls in the principal case, independent of the Statute of Frauds (29 Car. 2, c. 3), parol evidence could not be received to contradict a written agreement, for to admit it for the purpose of proving that the written agreement does not contain the real agreement would be the same as receiving it for every purpose; and it was for the purpose of shutting out that inquiry that the rule of law was adopted. Though, therefore, the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply. This rule, even before the Statute of Frauds, was equally binding in equity upon a plaintiff seeking specific performance: *Parteriche* v. *Powlet*, 2 Atk. 384; *Tinney* v. *Tinney*, 3 Atk. 8; *Binsted* v. *Coleman*, Bunb. 65; *Hogg* v. *Snaith*, 1 Taunt, 347; *Martin* v. *Pycroft*, 2 De G. Mac. & G. 795.

"The foundation of the rule," observes Lord Chief Baron *Eyre*, "in which parol evidence has been holden to be admissible, is in the general rules of evidence, in which writing stands higher in the scale than mere parol testimony; and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Indeed, nothing is so familiar as this idea. At Nisi Prius, when an agreement is spoken of, the first question always asked is, whether the agreement is in writing: if so, there is an end of all parol evidence; for when parties express their meaning with solemnity, this is very proper to be taken as their final sense of the agreement. In the case of a contract respecting land, the general idea receives weight from the circumstance, that you cannot contract at all on that subject but in writing; and this, therefore, is a further reason for rejecting parol evidence. In this way *only* is the Statute of Frauds material, for the foundation and bottom of the objection is in the general rules of evidence. I take this rule to apply in every case where the question is, what is the agreement?" *Davis* v. *Symonds*, 1 Cox, 402.

Accordingly, it will be found that parol evidence on the part of a plaintiff seeking specific performance of a written contract, with a variation supported by such evidence, will, *where there are no acts of part performance*, be invariably rejected, notwithstanding the difference of the written, from the real, agreement, was, as in the principal case, the result of fraud, accident, or surprise. Thus, a

plaintiff cannot adduce evidence to prove that lands comprised in a written agreement were, by parol, agreed to be left out of a lease (*Lawson* v. *Laude*, 1 Dick. 346; *Fell* v. *Chamberlain*, 2 Dick. 484); nor to prove verbal declarations at an auction, in opposition to printed conditions of sale. Thus, in *Jenkinson* v. *Pepys*, cited 1 V. & B. 528, which was a very hard case for the vendor (who clearly intended that a plantation in a nursery should be valued distinctly from the timber which the defendant was to take with the estate), it was given in evidence that, at the auction a distinct statement was made, that there was to be a separate valuation of the nursery, and that the defendant, or his agent, was present, and heard that declaration; but the opinion of the Court was clear, that evidence of that declaration for the vendor could not be received, being offered to supply a defect,—to alter in some respect the written import of the contract: *S. C.*, stated 15 Ves. 521. See also *Higginson* v. *Clowes*, 15 Ves. 516; *Humphries* v. *Horne*, 3 Hare, 276; *Earl of Darnley* v. *The Proprietors, &c., of the London, Chatham & Dover Railway*, 2 L. R. Ho. Lo. 43; *Snelling* v. *Thomas*, 17 L. R. Eq. 303.

Nor is evidence admissible to prove that a written agreement to sell to two jointly was in reality an agreement to sell to one of them, and that the other was to have some interest in the premises by way of security for such part of the purchase-money as he might advance; for that would be to set up a perfectly distinct contract: *Davis* v. *Symonds*, 1 Cox, 402; and see *Lord Townshend* v. *Stangroom*, 6 Ves. 328; *Clinan*, v. *Cooke*, 1 S. & L. 30; *Besant* v. *Richards*, Toml. 509.

Where, however, a parol variation has been in *part performed*, a specific performance of the written agreement with the variation will be decreed: *Anon.*, 5 Vin. Abr. 522, tit. 38; *Legal* v. *Miller*, 2 Ves. 299; *Pitcairn* v. *Ogbourne*, 2 Ves. 375; ante, Vol. i. pp. 831—843.

The jurisdiction, however, to decree specific performance is discretionary, since the refusal to exercise it will not preclude the plaintiff from recovering damages for a breach of contract. Moreover, before the Statute of Frauds, parol evidence was admissible as a defence to a bill for specific performance, and it has not been rendered inadmissible by that statute. "It should be recollected," says Lord *Redesdale*, "what are the words of the statute: 'No person shall be charged upon any contract, or sale of lands, &c., unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.' No person shall be charged with the

execution of an agreement who has not either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, 'That is not the agreement meant to have been signed.' Such a case is left as it was by the statute: *it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind:*" *Clinan* v. *Cooke*, 1 S. & L. 39. And see *Rann* v. *Hughes*, 7 T. R. 350 n.

As a *defence* against proceedings for a specific performance, parol evidence is admissible to show, not only that by fraud, but by mistake, or even surprise, the written agreement does not contain the real terms. In the leading case of *Joynes* v. *Statham*, 3 Atk. 388, a bill was filed by a lessee for the specific performance of a written agreement, for the lease of a house at the rent of 9*l.* a-year. The defendant, who was a marksman, by his answer insisted that it ought to have been inserted in the agreement, that the tenant should pay the rent *clear of taxes:* but the plaintiff, having written the agreement himself, had omitted to make it clear of taxes; and that the defendant, unless this had been the agreement, would not have sunk the rent from 14*l.* to 9*l.*; and offered to read evidence to show that this was part of the agreement. It was insisted for the plaintiff, that the defendant ought not to be admitted to add by parol to the written agreement, which was expressly guarded against by the Statute of Frauds. Lord *Hardwicke*, however, admitted the evidence. "I permitted," said his Lordship, "this point to be debated at large, because it is decisive in the cause; for I am very clear the evidence ought to be read. This has been taken by way of *objection* to the plaintiff's bill. The constant practice of the Court is, that it is in their *discretion*, whether in such a bill they will decree specific performance, or leave the plaintiff to his remedy at law. Now, has not the *defendant* a right to insist, either on account of an *omission*, *mistake*, or *fraud*, that the *plaintiff* shall not have a specific performance? It is a very common *defence* in this Court, and there is no doubt that it ought to be received, and quite equally whether it is insisted on as a *mistake* or a *fraud*."

In *Manser* v. *Back*, 6 Hare, 443, premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place, several of the printed copies were altered

by the vendor's solicitor, who introduced in writing a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction-room, without any remark with regard to the alteration, and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer inadvertently, and by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid and possession given, the purchaser filed his bill for a specific performance of the contract, by a conveyance from the vendor, without a reservation of the right of way. But Sir *J. Wigram*, V.-C., considering that the evidence of the vendor clearly showed the mistake made by the auctioneer, dismissed the bill; but his Honor said, that if the vendors had been plaintiffs asking a decree for specific performance, with an addition to the paper signed by the purchaser, such as they said ought to have been introduced, it was clear that no such decree could have been made. The evidence to prove the additional term would have been inadmissible.

The important case of *Lord Townshend* v. *Stangroom*, 6 Ves. 328, affords a good illustration of the distinction here discussed. In that case, the lessor filed a bill for a specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee also filed a bill for specific performance of the written agreement simply. Lord *Eldon* dismissed both bills; the first, because the parol evidence was not admissible on behalf of the lessor seeking specific performance; the second, because it was admissible when adduced by him as a defendant, for the purpose of showing, that by mistake or surprise, the written agreement did not contain the terms intended to be introduced into it. See *Hosier* v. *Read*, 9 Mod. 86; *Garrard* v. *Grinling*, 2 Swanst. 244; *Lord Gordon* v. *Marquis of Hertford*, 2 Madd. 106; *Clinan* v. *Cooke*, 1 S. & L. 38, 39; *Humphries* v. *Horne*, 3 Hare, 277; *Vouillon* v. *States*, 2 Jur. N. S. 845; *Wood* v. *Scarth*, 2 K. & J. 33; *Barnard* v. *Cave*, 26 Beav. 253; *Webster* v. *Cecil*, 30 Beav. 62; *Price* v. *Ley*, 4 Giff. 235, *S. C.*, affirmed on appeal, 32 L. J. N. S. Ch. 530.

Where the terms of a written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce the agreement. See *Calverley* v. *Williams*, 1 Ves.

jun. 201, n. 48; *Jenkinson* v. *Pepys*, 15 Ves. 521, 1 V. & B. 528, 6 Ves. 330; *Clowes* v. *Higginson*, 1 V. & B. 524; *Neap* v. *Abbott*, C. P. Coop. 333, and cases there collected. In the first three cases, the plaintiff was the author of the ambiguity; but in the last the vendor, the author of the ambiguity, had the benefit of the principle, although it was certain the purchaser supposed he was buying all he claimed: 6 Hare, 447. See also *Callaghan* v. *Callaghan*, 8 C. & F. 374; *Baxendale* v. *Seale*, 19 Beav. 601; *Swaisland* v. *Dearsley*, 29 Beav. 430; *Moxey* v. *Bigwood*, 8 Jur. N. S. 803; 10 Jur. N. S. 597.

So where a purchaser entered into a contract to purchase land under a mistake as to the boundaries caused by a plan which was presented to him, drawn by the vendor's agent, the Court refused to decree specific performance: *Denny* v. *Hancock*, 6 L. R. Ch. App. 1, 12. And see *Watson* v. *Marston*, 4 De G. Mac. & G. 230; there a mortgagee with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale; and on the vendor declining to convey in that form, the purchaser instituted a suit for specific performance, in which the vendor adduced evidence showing that the clause was inserted by inadvertence, and that he never intended to incur the risk of opening the foreclosure by conveying under the power. It was held by the Lords Justices that the misapprehension on the part of the defendant was a sufficient defence to the enforcement of a conveyance under the power. "The Court," said Lord Justice *Turner*, "does not refuse specific performance on the arbitrary discretion of the judge. It must be satisfied that the agreement would not have been entered into if its true effect had been understood."

Sir *Thomas Plumer*, in *Clowes* v. *Higginson*, 1 V. & B. 524, seems to have been disposed to overrule the distinction which the authorities have clearly settled in favour of admitting evidence in defence against specific performance, upon the grounds which have been before mentioned. He admits, indeed, that a defendant is permitted to show fraud, mistake, or surprise, *collateral to and independent of the written contract;* but he thought that there was considerable difficulty in the application of evidence under this head, calling for great caution, especially upon sales by auction, lest under the idea of introducing evidence of mistake, the rule

should be relaxed, by letting it in to explain, alter, contradict, and, in effect, get rid of, a written agreement; that, in sales by auction, the real object of introducing declarations by the auctioneer, or other person, was to explain, alter, or contradict the written contract —in effect, to substitute another contract: and that, independent of authority, he should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously whether offered by a plaintiff seeking a performance, or by a defendant, to get rid of the contract: a distinction which it was, he thought, difficult to adopt, where evidence was introduced to show, that the writing purporting to be the contract was not the contract, and that there was no contract between them, if that which was proved by parol did not make a part of it. See also *Price* v. *Ley*, 4 Giff. 235; *S. C.*, affirmed on appeal by the Lords Justices, 32 L. J. (N.S.) Ch. 530.

It is, however, clear, that, as a *defence*, parol evidence upon the ground of fraud, accident, surprise, or mistake, is admissible not only as collateral to and independent of the written agreement, but in contradiction to it. See *Ramsbottom* v. *Gosden*, 1 V. & B. 165; *Winch* v. *Winchester*, 1 V. & B. 375.

In a recent case a bill was filed for specific performance of a written agreement to grant a lease, but the defendant having proved by evidence in writing that by mistake the agreement did not include a stipulation as to payment of a premium, the bill was dismissed with costs by Sir *W. Page Wood*, V.-C., but without prejudice to an action for damages, and to the costs of the suit being included in such action. "That a person," said his Honor, "shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his real agreement, is well established. Perhaps, no case better illustrates the principle than *The Marquis of Townshend* v. *Stangroom* (6 Ves. 328), which shows that an agreement will not be specifically performed by this Court with a parol variation; and on the other hand, that this Court will not decree specific performance without such variation, if it be relied on as a defence:" *Wood* v. *Scarth*, 2 K. & J. 33.

The refusal, however, of a vendor to perform a parol contract, which, although contemporaneous with the written contract, and relating to the same subject-matter, has been treated by the purchaser himself as a distinct contract; as, for instance, a parol agreement on the sale of a flooded mine to pump it dry (*Phipps* v. *Child*, 3 Drew. 709), is no defence

to the vendor's suit for specific performance of the written contract. See Dart, V. & P. 1040, 5th ed.

Although it will be a good defence to a bill for specific performance to show that a written agreement does not contain a provision in favour of the defendant verbally agreed upon between the parties, nevertheless, if the plaintiff submits to perform the omitted provision, and there has been no fraud or mistake with reference to it, the Court will make a decree in favour of the plaintiff. See *Martin* v. *Pycroft*, 2 De G. Mac. & G. 785, there the defendant agreed in writing to grant the plaintiff a lease at a specified rent, and for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease under which he then held the property, and the plaintiff filed a claim for specific performance, stating the written agreement, and also that it was further agreed verbally that he should pay a premium of 200*l.*, which, by his claim, he offered to do. It was held by the Lords Justices, reversing the decision of Sir *James Parker*, V.-C., that the additional verbal agreement did not render the Statute of Frauds a valid defence to the claim. "Our opinion," said Lord Justice *Knight Bruce*, "is, that when persons sign a written agreement upon a subject, obnoxious, or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud, nor mistake (in the sense in which the term 'mistake' must be considered as used for the purpose), the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document: subject to this, that either of the parties, sued in equity upon it, may perhaps be entitled, in general, to ask the Court to be neutral, unless the plaintiff will consent to the performance of the omitted term." See also *Leslie* v. *Tompson*, 9 Hare, 268; *Barnard* v. *Cave*, 26 Beav. 253.

It will, in fact, depend upon the particular circumstances of each case, whether the evidence, when admitted to prove a variation in the contract, will entirely defeat the plaintiff's title to specific performance, or whether the Court will perform the contract, taking care that the subject-matter of the parol agreement is also carried into effect, so that all the parties may have the benefit of what they contracted for. Thus, in *Ramsbottom* v. *Gosden*, 1 V. & B. 165, where, by the mistake of the solicitor, the written agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the *expense of making out the title*, Sir *W. Grant*, M. R., admitted

parol evidence of the mistake, and held that the plaintiff must either submit to have the agreement performed in the way contended for by the defendant, or his bill, which was for the specific performance of the written agreement, dismissed. And see *The London and Birmingham Railway Company* v. *Winter*, 1 Cr. & Ph. 57, in which suit a parol variation, not set up by answer, came out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses. Lord *Cottenham* seemed to think that it might have been a proper subject for inquiry before the Court finally disposed of the case, but as the plaintiff consented to adopt it as part of the contract, a specific performance of the contract with the parol variation was decreed, with costs. In *Lord William Gordon* v. *Marquis of Hertford*, 2 Madd. 122, where parol evidence was admitted as a defence to specific performance, Sir *T. Plumer*, V.-C., gave the plaintiff the option, either to have specific performance of the agreement, as proved by the parol evidence, or to have an issue, in which the person giving the evidence might be examined, or to have his bill dismissed. And see *Gerrard* v. *Grindling*, 2 Swanst. 244; *Flood* v. *Finlay*, 2 Ball. & B. 9; *Clarke* v. *Grant*, 14 Ves. 519. *Micklethwait* v. *Nightingale*, 12 12 Jur. 638.

A mere suspicion that the plaintiff has been guilty of fraud—fraud not having been proved against him, *Lightfoot* v. *Heron*, (3 Y. & C. Exch. Ca. 586), a mere mistake in law (*Cooper* v. *Phibbs*, 2 L. R. Ho. Lo. 149, 170), or as to the legal effect of the contract (*Powell* v. *Smith*, 14 L. R. Eq. 85), or of the legal consequences of an act (*Great Western Railway Com-Company* v. *Cripps*, 5 Hare, 91), or a mistake as to the interest which the purchase will enable a person to acquire (*Mildmay* v. *Hungerford*, 2 Vern. 243), cannot be set up as a defence against proceedings for specific performance. See also *Marshall* v. *Collett*, 1 Y. & C. Exch. Ca. 232, 238.

Where, moreover, mistake on the part of a defendant is set up as a defence to specific performance, it must be clearly proved; but for such purpose parol evidence is sufficient. See *Webster* v. *Cecil*, 30 Beav. 62; *Clay* v. *Rufford*, 14 Jur. 803; *Monro* v. *Taylor*, 8 Hare, 56; 1 *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; *Earl of Darnley* v. *London, Chatham, and Dover Railway Co.*, 2 L. R. Ho. Lo. 43.

Where, moreover, although the written agreement contains the terms agreed upon, and they were understood by the defendant, such agreement was executed by him in reliance upon some misrepresentation by the plaintiff, or upon some stipulation, varying the written agreement, but which he nevertheless refused to fulfil, the defendant can, under such cir-

cumstances, successfully resist specific performance. Thus, when by the contract a specific sum was to be given for the timber, but upon its being shown by parol evidence that the defendants were induced to give that sum upon the false representation that it had been valued by two timber merchants, specific performance was refused: *Buxton* v. *Lister*, 3 Atk. 383, ante, p. 474. See also *Lovell* v. *Hicks*, 2 Y. & C. Exch. Ca. 46; *Harris* v. *Kemble*, 5 Bligh, N. S. 730, 754. So where a person executed an agreement for the lease of a house, upon the faith of a verbal agreement, clearly proved, that certain alterations should be made in the agreement, specific performance of the agreement was refused, except on the terms of the plaintiff executing such a lease as the defendant had submitted he was ready to accept: *Clarke* v. *Grant*, 14 Ves. 519; see also *Hammersley* v. *De Biel*, 12 C. & F. 45, 88; *Micklethwait* v. *Nightingale*, 12 Jur. 638. So where the defendant purchased at a sale an estate, described in the particulars as containing, by estimation, forty-one acres, be the same more or less; whereas it turned out, on admeasurement, to amount only to thirty-five or thirty-six acres. On a bill being filed for specific performance, the defendant stated by his answer, that previous to the sale, the auctioneer publicly told him that the farm was forty-one acres, and if it was less, an abatement would be made, but he submitted to perform the agreement with an abatement. The declaration of the auctioneer having been proved by parol evidence, the bill was dismissed, unless the plaintiff would make an abatement: *Winch* v. *Winchester*, 1 V. & B. 375, 378. The result would be the same where there was an agreement in writing for the sale of an estate, and a parol agreement that the vendor should have a lease thereof: *Vouillon* v. *States*, 2 Jur. N. S. 845, 847. So likewise where there was a parol agreement by the vendor's agent, that certain improvements should be carried out on adjoining property, which the vendor afterwards refused to perform: *Myers* v. *Watson*, 1 Sim. N. S. 523, 529, and see *Rose* v. *Watson*, 10 Ho. Lo. Ca. 672.

The inadvertent omission to propose an intended term to an agreement (*Parker* v. *Taswell*, 2 De G. & Jo. 559, sed vide *Broughton* v. *Hutt*, 3 De G. & Jo. 501), or its purposed omission upon the supposition that it was illegal (*Lord Irnham* v. *Child*, 1 Bro. C. C. 92; 6 Ves. 332, cited) is not a sufficient reason for the Court declining to grant specific performance.

Where, moreover, an agreement is drawn up without inserting therein certain stipulations, negotiated by a party who deliberately and without any fraud or surprise being suggested, executes such

agreement, the omission of such stipulations will be no bar to specific performance: *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 350; *Rich* v. *Jackson*, 4 Bro. C. C. 514, 518.

In *Croome* v. *Lediard*, 2 My. & K. 251, by a written agreement between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant agreed to purchase, a certain property called the Leigh estate; and by the same agreement the defendant agreed to sell and the plaintiff agreed to purchase, another estate called the Haresfield estate; both estates were to be valued by the same person, and both purchases were to be completed on the same day; but *it was not expressed that the two contracts were to be dependent on each other*. It was held by Lord *Brougham*, C., affirming the decision of Sir *John Leach*, M. R., that the plaintiff was entitled to a specific performance of the contract as to the Leigh estate, although the defendant was unable to make a good title to the Haresfield estate, and he refused to admit evidence on the part of the defendant, to show that an exchange was intended. "Parol evidence," said his Lordship, "of matter collateral to the agreement might be received, but no evidence of matter dehors was admissible to alter the terms and substance of the contract."

Lord *St. Leonards* has remarked, that though the decision in this case was probably well founded, it is not, perhaps, placed altogether upon its true grounds; that the evidence was inadmissible, not because it was not to enforce a collateral stipulation, but because it did not prove that by *fraud, mistake, or surprise, the agreement did not state the alleged real contract*, viz., for an exchange between the parties: Sugd. V. & P. 163, 14th edit.; *Lloyd* v. *Lloyd*, 2 My. & Cr. 192; *Green* v. *Low*, 2. Jur. N. S. 848: 22 Beav. 625.

A parol waiver of a written contract, amounting to a complete abandonment, and clearly proved, will bar a specific performance: *Price* v. *Dyer*, 17 Ves. 356; *Inge* v. *Lippingwell*, 2 Dick. 469. And see *Jordan* v. *Sawkins*, 1 Ves. jun. 404; *Rich* v. *Jackson*, 4 Bro. C. C. 519; *Filmer* v. *Gott*, 6 Ves. 337, n.; *Coles* v. *Trecothick*, 9 Ves. 250; *Robinson* v. *Page*, 3 Russ. 119; *Legal* v. *Miller*, 2 Ves. 299.

Where a written agreement is *afterwards* varied by parol, upon proceedings being taken for specific performance with or without the variation, the Court will, it seems, put the defendant to his election, and, if he declines to elect, will decree specific performance of the written agreement without the variation: *Robinson* v. *Page*, 3 Russ. 114. And see *Price* v. *Dyer*, 17 Ves. 356. But it seems that if an agreement is correctly put into writing, and at the *same time* the parties add a term by parol, evidence of it is not admissible even as a defence to specific

performance: *Ormerod* v. *Hardman*, 5 Ves. 722; see *Jenkins* v. *Hiles*, 6 Ves. 654, 655.

Although, however, parol variations of a written agreement verbally agreed upon, are not sufficient to prevent the execution of the written agreement, they clearly will, if the parol variations are so acted upon, that the original agreement could be no longer enforced without injury to one party, who, as before observed, will be entitled to specific performance, with the parol variations: *Anon.*, 5 Vin. 522, pl. 38, 4 Geo. 1; *Legal* v. *Miller*, 2 Ves. 299; *Pitcairn* v. *Osbourne*, 2 Ves. 375. And see *Price* v. *Dyer*, 17 Ves. 356; *Van* v. *Corpe*, 3 My. & K. 277.

Where a person who has by contract in writing agreed to purchase an estate, enters into a verbal contract to transfer to another the benefit of the contract upon certain terms favourable to himself, but afterwards at the instance of the subvendee executes a written contract, omitting such terms on the faith that the subvendee would carry them out, upon the subvendee afterwards refusing to do so, and repudiating such terms, the subvendor may file a bill, either against the original vendors, or (if a conveyance has been made to him) against the subvendee, to enforce specific performance of the original contract without regard to the latter. See *Jervis* v. *Berridge*, 8 L. R., Ch. App. 351. There Jervis agreed to purchase an estate from the Law Life Assurance Society, and to pay a deposit on signing the contract. Before it had been signed Jervis verbally agreed with Berridge to make it over to him on certain terms. In order to enable Berridge to deal with the Law Life Assurance Society, Jervis signed and gave to him a memorandum, making over the contract to him in consideration of his paying to the society the deposit, and engaging to pay a certain sum to Jervis. The other terms of bargain between Jervis and Berridge, which were in favour of Jervis, being at Berridge's request omitted from the memorandum. On the same day the contract between Jervis and the society was signed, and the part signed by the society was given to Berridge, who paid the deposit. Berridge afterwards repudiated all the stipulations in favour of Jervis, which had not been inserted in the memorandum. Jervis then filed his bill against Berridge, and the Society asking to have the memorandum between Berridge and Jervis cancelled, and for a conveyance from the society on payment of what was due to them. The defendant Berridge having demurred generally for want of equity, it was held by the Court of Appeal in Chancery, affirming the decision of Sir *R. Malins*, V.-C., that the demurrer ought to be overruled. "The Solicitor-General," observed Lord *Sel-*

borne, L.-C., "argued that the bill was an attempt either to enforce a verbal contract contrary to the Statute of Frauds, or to vary, in the plantiff's favour, the effect of a written contract by the introduction of terms agreed upon by parol, and designedly omitted from the writing. In my view of the bill, it asks neither of these things. It certainly does not ask for specific performance of the verbal agreement which has been repudiated by the defendant. It does not seek to enforce any hybrid agreement, compounded of the written instrument and some terms omitted therefrom; but it asks the Court to say that, under the circumstances alleged, the written instrument does not constitute such a binding contract between the plaintiff and the defendant Berridge as can be allowed to be set up in Equity by Berridge to prevent the performance, in the plaintiff's favour, of the contract between themselves and the Law Life Society. To the question so raised, the Statute of Frauds (which is a weapon of defence, not offence, and which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties) is wholly irrelevant."

Upon the principle that the exercise of the jurisdiction to decree specific performance is discretionary, unless the plaintiff comes with perfect propriety of conduct (*Harnett* v. *Yielding*, 2 S. & L. 554; *Cadman* v. *Horner*, 18 Ves. 10; *Robinson* v. *Wall*, 10 Beav. 61; 2 Ph. 372), clear from all circumvention and deceit (*Davis* v. *Symonds*, 1 Cox, 407; *Reynell* v. *Spyre*, 8 Hare, 222; 1 De G. Mac. & G. 660), and the agreement is certain (*Tillett* v. *The Charing Cross Bridge Hospital*, 26 Beav. 419; *Darbey* v. *Whittaker*, 4 Drew. 134), fair, and just in all its parts (*Underwood* v. *Hitchcox*, 1 Ves. 279; *Buxton* v. *Lester*, 3 Atk. 383, 386; *Ellard* v. *Lord Llandaff*, 1 Ball & B. 241; *Martin* v. *Mitchell*, 2 J. & W. 413; *Stanley* v. *Robinson*, 1. Russ. & My. 527; *Warde* v. *Dickson*, 10 W. R. (V. C. K.) 148; 28 L. J. N. S. (Ch.) 315), or if the conditions of sale be misleading or erroneous (*Harnett* v. *Baker*, 20 L. R. Eq. 50), specific performance will not be decreed.

And where an agreement between two parties is on general principles fair, as between them, it is not invalid merely because it may have been concocted and brought about by a third party, with the fraudulent intention of benefiting himself: *Bellamy* v. *Sabine*, 2 Ph. 425.

If a definite representation be made, affecting the value of the subject of the contract, and it turn out to be untrue, the person deceived, especially if he had no means of ascertaining the truth of the representation, will be en-

titled to resist the specific performance of the contract. Thus, in *Lord Brooke* v. *Rounthwaite*, 5 Hare, 296, a vendor filed a bill for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood "with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet," and in the particulars of the lot, described it only as "sixty-five acres, two roods, and twelve perches of growing timber." It appeared on the evidence for the plaintiff, that the average size of the trees was about thirty-five feet, but on that for the defendant, that it was only about twenty-two feet, and the defendant moreover alleged, that it was sold at a time when he had no means of seeing the wood, and that he relied on the particulars of sale. It was held by Sir *J. Wigram*, V.-C., that, as the representation on the particulars of sale had proved to be incorrect, and as it was not shown that the defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events, enforce the specific performance of the contract without compensation; and that (inasmuch as the particulars of sale did not express what number of trees or quantity of timber the wood contained), it was not a case in which the Court could measure the extent of the deficiency, or ascertain the amount of compensation; and that the bill must therefore be dismissed. And see *Brealey* v. *Collins*, Younge, 317; *Lowndes* v. *Lane*, 2 Cox, 363; *Stewart* v. *Alliston*, 1 Mer. 26; *Harris* v. *Kemble*, 1 Sim. 11; 5 Bligh, N. S. 730; 2 D. & C. 463; *Cox* v. *Middleton*, 2 Drew. 209; *Price* v. *Macaulay*, 2 De G. Mac. & G. 339; *Rawlins* v. *Wickham*, 1 Giff. 355; 3 De G. & Jo. 304; *Higgins* v. *Samels*, 2 J. & H. 460; *Farebrother* v. *Gibson*, 1 De G. & Jo. 602; *Leyland* v. *Illingworth*, 2 De G. F. & Jo. 248. But see *Johnson* v. *Smart*, 2 Giff. 151; *Cook* v. *Waugh*, 2 Giff. 201; *Caballerno* v. *Henty*, 9 L. R. Ch. App. 447.

A party obtaining an agreement by a partial misrepresentation, is not entitled to a specific performance on waiving the part affected by the misrepresentation, as the effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the person who has practised it: *Lord Clermont* v. *Tasburgh*, 1 J. & W. 112. In *Cadman* v. *Horner*, 18 Ves. 10, where the purchaser was plaintiff, specific performance was resisted by the vendor, on the ground that the plaintiff, who was his agent, had misrepresented the value of the estate, and also represented to him that the houses had been injured by a flood, and would require between 50*l.* and 60*l.* to repair them, whereas, in

truth, the premises at the time of the contract required no more than 40*s.* to put them in complete repair. Sir *W. Grant*, M. R., although he thought the evidence of the inadequacy of the price considerably shaken by the defendant's admission of the clear rent of the premises, dismissed the bill, observing that, upon the evidence, the plaintiff had been guilty of a degree of misrepresentation, operating to a certain, though a small extent; this misrepresentation disqualified him from calling for the aid of a Court of Equity, where he must come, as it is said, with clean hands. He must, to entitle himself to relief, be liable to no imputation in the transaction; that it was not a case where the Court was called upon to rescind an agreement, and to decree the conveyance executed in pursuance of it to be delivered up to be cancelled, which would admit a different consideration. See 1 J. & W. 120.

But a mere indefinite misrepresentation, such as ought to put a person upon inquiry, will not be a sufficient ground for his resisting specific performance of a contract. Thus, a representation that only a small fine was payable upon the renewal of leaseholds, and that they were of nearly equal value with freeholds, was held not to be a sufficient defence to a suit for specific performance, as it ought to have put the purchaser upon inquiry, though, connected with certain circumstances, such representation might have been fraudulent, and therefore a good ground for rescinding the contract: *Fenton* v. *Browne*, 14 Ves. 144; and see *Lowndes* v. *Lane*, 2 Cox, 363; *Scott* v. *Hanson*, 1 Sim. 13; 1 Russ. & My. 128; *Trower* v. *Newcome*, 3 Mer. 704; 5 Russ. 215; *Abbott* v. *Sworder*, 4 De G. & Sm. 448; *Colby* v. *Gadsden*, 34 Beav. 416. And this will especially be the case where the purchaser has equal means of acquiring knowledge with the vendor, even though he may not avail himself of them. *Attwood* v. *Small*, 12 C. & F. 232; *Clapham* v. *Shilleto*, 7 Beav. 149; *Pulsford* v. *Richards*, 17 Beav. 96; *Jennings* v. *Broughton*, 5 De G. Mac. & G. 126.

Not only where there has been actual misrepresentation, but also where there has been a suppression of the truth, specific performance will not be decreed. See *Young* v. *Clerk*, Prec. Ch. 538; *Maddeford* v. *Austwick*, 1 Sim. 89; *Bonnett* v. *Sadler*, 14 Ves. 526; *Drysdale* v. *Mace*, 2 Sm. & G. 225; 5 De G. Mac. & G. 103, and *Shirley* v. *Stratton*, 1 Bro. C. C. 440, in which case, a bill was filed for the specific performance of an agreement for the purchase of an estate in marsh land at Barking in Essex, and for payment of a sum of 1000*l.*, the purchase-money. The defence was, that the estate being represented to the defendant as clear-

ing a nett value of 90*l.* per annum, and no notice was given to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an outgoing of 50*l.* per annum, and it appearing that there had been an *industrious concealment* of the circumstance of the wall during the treaty, Lord *Thurlow* dismissed the bill. In *Bascombe* v. *Beckwith*, 8 L. R. Eq. 100, the owner of an estate put up the whole estate, except a small piece of land, for sale in lots, subject to conditions, which provided that no public-house should be built and no trade carried on upon the property. In the particulars of sale, the property was described as the "Manor House Estate," and there was nothing to show that any part of the vendor's estate was not included, and in the plan annexed to the particulars the different lots were coloured, and the excepted piece of land was uncoloured, but was not marked with the vendor's name, though the names of the adjoining owners were printed. It was improbable that a public-house would be built on any of the adjoining estates. It was held by Lord *Romilly*, M. R., that a purchaser of one of the lots, consisting of a mansion-house, a hundred yards distant from the excepted piece of land, who had purchased in the belief that the whole of the vendor's estate was included in the particulars of sale, and consequently would be subject to the restrictive conditions, could not be compelled to complete his purchase unless the vendor would enter into restrictive covenants as to the excepted piece of land. "It is," said his Lordship, "of the greatest importance that it should be understood, that the most perfect truth and the fullest disclosure should take place, in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the Court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly." And see *Lucas* v. *James*, 7 Hare, 410; *Denny* v. *Hancock*, 6 L. R. Ch. App. 1.

But the mere suppression of acts having been done by the plaintiff when the defendant must have known that they were done by somebody, is not a sufficient reason for refusing specific performance. See *Haywood* v. *Cope*, 25 Beav. 140. There the plaintiff had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The Colliery turned out to be worthless. It was held by Sir *John Romilly*, M. R., that the defendant could not resist a specific performance, on the ground of

the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable.

Specific performance of an agreement made by a person in a state of intoxication will not be decreed, although the plaintiff may neither have drawn him in to drink nor have taken advantage of his situation (*Cragg* v. *Holme*, cited 18 Ves. 14); but it may be so, if although the defendant had drank freely he knew what he was doing (*Lightfoot* v. *Heron*, 3 Y. & C. Exch. Ca. 586), especially as against a second purchaser taking with notice of the first agreement: *Shaw* v. *Thackray*, 1 Sm. & G. 537.

Where, however, a plaintiff has by contrivance induced the defendant to take too much drink, and afterwards taken advantage of his condition by entering into an agreement with him, not only would specific performance be refused, but the agreement would be rescinded: *Cooke* v. *Clayworth*, 18 Ves. 12. And see *Say* v. *Barwick*, 1 V. & B. 95; *Nagle* v. *Baylor*, 3 D. & War. 60.

Although in the absence of fraud or undue advantage, except formerly in the case of the sale of reversionary interests (*Playford* v. *Playford*, 4 Hare, 546; *Chesterfield* v. *Janssen*, ante, vol. i., p. 592, and note; before The Sales of Reversions Act (31 & 32 Vict. c. 4), specific performance would not be refused merely because the price was inadequate or the contract improvident (*Sullivan* v. *Jacob*, 1 Moll. 477), yet, as specific performance is discretionary, a contract will not be enforced where it would subject a person to great *hardship*, but the plaintiff will be left to obtain damages, which might, under the circumstances, be very small. Thus, in *Wedgewood* v. *Adams*, 6 Beav. 600; 8 Beav. 103, trustees joined their cestui que trust in a contract for sale, and personally agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency. Lord *Langdale*, M. R., refused to decree a specific performance against the trustees, so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages. "After consideration," said his Lordship, "I think I cannot order a specific performance of the agreement; and with regard to its being a mere money objection, I could not, when this case was argued, call distinctly to my mind a case of that sort, of which I had some recollection, and which came before Lord *Hardwicke*. It is a case not actually reported, but is cited in the argument in *Ramsden* v. *Hylton* (2 Ves. 307). There a person being entitled to a small estate under the will of his father, on

condition, that, if he sold it within twenty-five years, half the purchase-money should go to his brother, sold it within the time, and the question was, whether the agreement should be specifically performed; Lord *Hardwicke* thought not, because, by the specific performance of it, he would lose half the purchase-money. I think that comes very nearly to a case of mere pecuniary objection." And see *Faine* v. *Brown*, cited 2 Ves. 307; *Pope* v. *Harris*, cited Lofft, 791; *Howell* v. *George*, 1 Madd. 1; *White's case*, 3 Swanst. 108, n.; *Coote* v. *Coote*, 1 Sauss. & Scul. 393; *Kimberley* v. *Jennings*, 6 Sim. 340; *Talbot* v. *Ford*, 13 Sim. 173; *Ryan* v. *Daniell*, 1 Y. C. C. C. 60; *Webb* v. *The Direct London and Portsmouth Railway Company*, 1 De G. Mac. & G. 521; 9 Hare, 129; *Watson* v. *Marston*, 4 De G. Mac. & G. 230, 239; *Browne* v. *Coppinger*, 4 Ir. Ch. Rep. 72; *Williamson* v. *Wooton*, 3 Drew. 210. So where the defendant agreed to take from the plaintiff a lease of an unfinished house, containing covenants on the part of the defendant to repair and keep in repair, and the plaintiff agreed to finish the house. Sir *John Romilly*, M. R., refused to compel the defendant to take the lease upon the ground that the house had been finished in such a defective manner as to make it unreasonable so to do: *Tildesley* v. *Clarkson*, 30 Beav. 419. See and consider *Oxford* v. *Provand*, 2 L. R. P. C. 135.

Upon the same principle a decree will not be made for specific performance of an agreement of which the consequence would be a forfeiture: *Faine* v. *Brown*, 2 Ves. 307, cited; *Peacock* v. *Penson*, 11 Beav. 355.

But when a defendant sets up the consequence of forfeiture as a defence to a bill for specific performance, the Court must be well satisfied before it admits the validity of such a defence, that forfeiture will follow from specific performance of the agreement, and it must look also at the fact by whose act and conduct the forfeiture would be occasioned. The Court will not permit a defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture, and then to turn round and say that the plaintiff shall not have a specific performance of the agreement, because the defendant has by his own act enabled the landlord to enter, upon the agreement being performed: *Helling* v. *Lumley*, 3 De G. & Jo. 463, 498, 499.

In general, in order that hardship may be a sufficient defence against specific performance, it ought to be proved that it existed at the date of the contract (*Webb* v. *London and Portsmouth Railway Co.*, 9 Hare, 129); mere ignorance, however, of the nature of the property, which turns out

to be worthless for the purpose for which it was sought, will not be such a hardship as will prevent the specific performance of a contract respecting it. As, for instance, where a person contracts to take a lease of an abandoned colliery which turns out to be worthless (*Haywood* v. *Cope*, 25 Beav. 140, ante, p. 492). Nor will a person upon the ground of hardship be able to resist specific performance who has purchased property merely as agent for an undisclosed principal: *Saxon* v. *Blake*, 29 Beav. 438; and see *Chadwick* v. *Maden*, 9 Hare, 188.

But it has been held that where a mortgagor has contracted to grant a lease, he cannot be compelled to pay off the mortgage, in order to give effect to the contract: *Costigan* v. *Hastler*, 2 S. & L. 160; and see *Howe* v. *Hunt*, 31 Beav. 420; *Franklinski* v. *Ball*, 33 Beav. 560; *Watson* v. *Marston*, 4 De G. Mac. & G. 230. So likewise where a person, supposing himself to be absolute owner of an estate, entered into an agreement to sell the fee simple, but it turned out that he was only tenant for life under a settlement, in which there was a proviso empowering him to purchase "an estate in fee simple in possession in some convenient place or places in England of equal or better value," and to settle the same to him in lieu of the settled estate, which was then to be his in fee, it was held by Sir *T. Plumer*, V.-C., that the Court ought not to decree specific performance through the medium of the proviso: *Howel* v. *George*, 1 Madd. 1; *Southwell* v. *Nicholas*, Ib. 9, n.; *Hood* v. *Oglander*, 34 Beav. 513, 519; 11 Jur. N. S. 498.

Nor will specific performance be decreed where there is uncertainty (*Swaisland* v. *Dearsley*, 29 Beav. 430; *Tillett* v. *The Charing Cross Bridge Company*, 26 Beav. 419; *Morrison* v. *Barrow*, 1 De G. F. & Jo. 633; *Taylor* v. *Portington*, 7 De G. Mac. & G. 328; *Price* v. *Salusbury*, 32 Beav. 446; 32 L. J. (N. S.) Ch. 441; *Pearce* v. *Watts*, 20 L. R. Eq. 492), or a mistake as to what forms the subject-matter of the contract. See *Harnett* v. *Yielding*, 2 S. & L. 549, 554; *Neap* v. *Abbott*, C. P. Coop. 333; *Butterworth* v. *Walker*, 13 W. R. (M. R.) 168; *In re Tottenham's Estate*, 15 Ir. Ch. Rep. 308; *Hood* v. *Oglander*, 34 L. J. (N. S.) Ch. 528; *Denny* v. *Hancock*, 6 L. R. Ch. App. 1; *Bray* v. *Briggs*, 26 L. T. Rep. (N. S.) 817; 20 W. R. (M. R.), 962, and *Malins* v. *Freeman*, 2 Kee. 25, where a person who had purchased an estate at an auction, under a mistake as to the lot put up, was not compelled to complete his contract; and in *Colyer* v. *Clay*, 7 Beav. 188, where, at the time of the sale of a sum of money as a reversionary interest, neither of the parties were aware that it had fallen into possession by the death of the tenant for

life, Lord *Langdale*, M. R., held, that as both of the parties had entered into the contract under a common mistake, it would be manifestly unjust to enforce it as it stood. So, when a vendor, believing by mistake that he had given the auctioneer a discretion to sell, but not to let the property go under a reasonable sum, and in consequence of such belief told a friend not to bid for him; and the property sold for a less sum than he intended to accept, specific performance was refused: *Day* v. *Wells*, 30 Beav. 220. And see *Cochrane* v. *Willis*, 34 Beav. 359; 1 L. R. Ch. App. 58.

So specific performance will not be decreed when from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged (per Lord *Redesdale*, in *Harnett* v. *Yielding*, 2 Scho. & Lef. 554, and see *Lehmann* v. *M'Arthur*, 3 L. R. Ch. App. 496), or if the parties cannot be put into the condition for which they stipulated when the agreement was entered into: *In re The Mercantile and Exchange Bank*, 12 L. R. Eq. 268.

Surprise is a ground upon which specific performance may be refused: *Willan* v. *Willan*, 16 Ves. 72; 19 Ves. 590; 2 Dow, 275; *Magrave* v. *Archbold*, 1 Dowl. 107; *Blakeney* v. *Baggott*, 1 D. & C. 405; 3 Bligh, N. S. 237. In *Twining* v. *Morrice*, 2 Bro. C. C. 326, the vendor's agent bid, and purchased the property for the plaintiff, but specific performance was refused by Lord *Kenyon*, as the transaction was a surprise upon third parties; for it might appear to the persons present as a bidding for the vendor, and as that might damage the sale, it proved such an impediment to specific performance, that the party should be left to law. See 6 Ves. 338; 10 Ves. 313; and *Mason* v. *Armitage*, 13 Ves. 25; *Hill* v. *Buckley*, 17 Ves. 394.

If an agent contract to sell property in a manner not authorised by his principal, the contract will not be enforced. Thus, where an agent had authority to sell by auction, and he sold by private contract, although for more than the price required, it was held that the purchaser could not compel specific performance: *Daniel* v. *Adams*, Amb. 495. And although the mere improvidence of a contract is ordinarily no sufficient defence against proceedings for specific performance (*Sullivan* v. *Jacob*, 1 Moll. 472, 477), the omission by an agent of all usual specific stipulations in favour of his principal may be so: *Helsham* v. *Langley*, 1 Y. & C. C. C. 175; *White* v. *Cuddon*, 8 C. & F. 766; *Dawson* v. *Brinckman*, 3 De G. & S. 376; *Manser* v. *Back*, 6 Hare, 443.

Where, moreover, mere instructions are given to an agent to find a purchaser for landed property, he not being instructed as to the

conditions to be inserted in the contract as to title, he will not be considered as authorized to sign a contract on the part of the vendor, and if he enters into a contract to sell, specific performance thereof will be refused: *Hamer* v. *Sharp*, 19 L. R. Eq. 108.

So, likewise, where one of two executors erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate, it was held by the Lords Justices, affirming the decision of Sir *W. Page Wood*, V.-C., that the purchaser could not enforce a specific performance of the contract: *Sneesby* v. *Thorne*, 7 De G. Mac. & G. 399.

Nor will specific performance of a contract be decreed which was entered into for an illegal purpose (*Thomson* v. *Thomson*, 7 Ves. 470; *Knowles* v. *Haughton*, 11 Ves. 168; *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53, 85; *London and Brighton Railway Co.* v. *London and South-Western Railway Co.*, 4 De G. & Jo. 389; but see *Aubin* v. *Holt*, 2 K. & J. 66; *Carolan* v. *Brabazon*, 3 J. & L. 200); or which would be against public policy, (*Cooth* v. *Jackson*, 6 Ves. 12, 30), or would involve a breach of trust (*Mortlock* v. *Buller*, 10 Ves. 292; *Ord* v. *Noel*, 5 Madd. 438; *Bridger* v. *Rice*, 1 J. & W. 74; *Turner* v. *Harvey*, Jac. 169; *Neale* v. *Mackenzie*, 1 Kee. 474; *Wood* v. *Richardson*, 4 Beav. 174; *Thompson* v. *Blackstone*, 6 Beav. 470; *Bellringer* v. *Blagrave*, 1 De G. & S. 63; *The Shrewsbury and Birmingham Railway Company* v. *The London and North-Western Railway Company*, 4 De G. Mac. & G. 115; *Maw* v. *Topham*, 19 Beav. 576; *Law* v. *Urlwin*, 16 Sim. 377; *Rede* v. *Oakes*, 4 De G. J. & S. 505, and the remarks thereon in *Morris* v. *Debenham*, 2 Ch. D. 540,) render a person liable for a devastavit (*Sneesby* v. *Thorne*, 7 De G. Mac. & G. 399), or which would give a benefit to a person in a fiduciary position, or to a firm of which he is member, as against the persons or company in relation to whom he stands in such position: *Flanagan* v. *Great Western Railway Company*, 7 L. R. Eq. 116.

Nor, it seems, will specific performance be decreed, when it may by possibility injure a third person by creating a title with which he might have to contend (per Lord *Redesdale*, in *Harnett* v. *Yeilding*, 2 S. & L. 554), and, although a purchaser may obtain a decree for specific performance against a person who has made a voluntary settlement of land (*Buckle* v. *Mitchell*, 18 Ves. 101), the settlor himself cannot do so against a purchaser in derogation of a voluntary settlement, he had previously made: *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; *Campbell* v. *Ingilby*, 1 De G. & Jo. 393.

A mere contract between a

trustee for sale and himself as a purchaser, to sell with one hand and buy with the other, is not such a contract as can be specifically enforced at the instance of his heir-at-law, for the purpose of converting his personal estate into real estate, and thus altering the mode of descent: *Ingle* v. *Richards*, 28 Beav. 361, 365. See vol. i. p. 916.

Nor will a person be compelled specifically to perform an act which he is not lawfully authorised to do, otherwise he would be exposed to a new action of damages at the suit of the person injured by such act: and, therefore, if proceedings be taken for a specific performance of an agreement entered into by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such title as he can give: and that only in cases where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give: *Harnett* v. *Yeilding*, 2 S. & L. 554; *Lawrenson* v. *Butler*, 1 S. & L. 19; *Ellard* v. *Lord Llandaff*, 1 Ball & B. 241; *Peacock* v. *Penson*, 11 Beav. 355; *Howe* v. *Hunt*, 31 Beav. 420.

Nor will a contract be enforced where, though the Court considers the title good, yet considers it sufficiently doubtful, that it might reasonably give rise to litigation at a future time between the purchasers, and persons not bound by the decree of the Court in the suit for specific performance: per Sir *John Romilly*, M. R., in *Parkin* v. *Thorold*, 16 Beav. 67. And to force a title upon a purchaser, the opinion of the Court must be so clear that it does not apprehend that another judge would form a different opinion: *Rogers* v. *Waterhouse*, 4 Drew. 329. And see cases collected, Dart, 5th ed., p. 1137, n.; *Dowson* v. *Solomon*, 1 Drew. & Sm. 1; *Collier* v. *M'Bean*, 1 L. R. Ch. App. 81.

Upon the same principle specific performance will not be decreed of the contract for the purchase of a lease, where from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation: *Pegler* v. *White*, 33 Beav. 403.

So, where a person having a contract for an underlease, entered into possession of the premises, and committed acts which would have been a forfeiture of the original lease, specific performance of the contract to grant the underlease was refused: *Lewis* v. *Bond*, 18 Beav. 85.

Nor will specific performance be decreed of a contract which it is impossible to perform (*Green* v. *Smith*, 1 Atk. 573), or the material terms whereof the Court has it not in its power to enforce:

Waring v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 7 Hare, 492. See also *Downs* v. *Collins*, 6 Hare, 437; *South Wales Railway Company* v. *Wythes*, 5 De G. Mac. & G. 880; *Ford* v. *Stuart*, 15 Beav. 493; *Counter* v. *Macpherson*, 5 Moo. P. C. C. 83.

And, as a general rule, all agreements must be considered as entire. And, generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it, is the performance of the whole of it by the other, and if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part, or any of the agreement: per Sir *G. Mellish*, L. J., in *Wilkinson* v. *Clements*, 8 L. R. Ch. App. 110; and see *Blackett* v. *Bates*, 1 L. R. Ch. App. 117, reversing S. C., 2 H. & M. 270, 610; *Gervais* v. *Edwards*, 2 D. & War. 80; *Hills* v. *Croll*, 2 Ph. 60; *Firth* v. *Ridley*, 33 Beav. 516.

Where, however, an agreement is divisible, that is to say, it is so worded as to constitute two or more separate agreements, specific performance may be decreed of one of such separate agreements, although the party seeking specific performance has not, and possibly never will, perform the rest of the whole agreement. And the assignee of the whole agreement is entitled to the same relief. See *Wilkinson* v. *Clements*, 8 L. R. Ch. App. 96. There Clements agreed to let to Wood several plots of ground for ninety-nine years, at one given rent, to be apportioned as thereinafter mentioned. Wood agreed to build on plot P. twenty houses, on plot B. eight, on plot G. ten, and on plot Y. five, and it was agreed that a separate lease of plot B., at a given rent, should be granted as soon as four of the houses on that plot, and two of the ten houses on plot G. were covered in, and that a separate lease of plot G. should be granted as soon as five of the ten houses on that plot were covered in. Wood mortgaged this contract to the plaintiff, and afterwards became insolvent. The plaintiff covered in the requisite number of houses on plots B. and G., and applied for leases of them, denying at the same time his liability to take upon himself the other parts of the agreement, upon the performance of which the granting of the leases of plots B. and G. did not by the terms of the contract depend. Sir *J. Wickens*, V.-C., held that the plaintiff could have no relief, except on his assuming Wood's obligations under the original contract, and that, as the Court could not enforce these obligations, relief could not be granted. The Lords Justices, however, on reversing the decision

of the Vice-Chancellor, held that, as by the terms of the contract the right to have leases of plots B. and G. depended only upon conditions which had been fulfilled, the plaintiff, as assignee of Wood, was entitled to have leases of these plots granted to him, without assuming Wood's obligations under the entire contract. "The questions," observed Lord Justice *James*, "resolves itself into this: Is the decision of the Vice-Chancellor correct that the plaintiff, being assignee of the whole of the contract, is unable to obtain specific performance in this Court without putting himself under an obligation to perform the whole of what the agreement bound Wood to perform? I am of opinion that there is no authority, and I am unable to find any principle, for imposing that term as a condition precedent upon a person in the plaintiff's position in respect of a contract of this kind. The contract is made in its terms a divisible contract. It is made separable with respect to the leases, and it is so made, as it appears to me, for the very purpose of avoiding the application of any such rule. In truth, if that rule were held to apply in this case, all contracts of this nature would come to an end—a landlord could not enter into a building agreement of this kind with any chance of its being carried into effect. It is well known that a builder is seldom a person with money enough to complete the whole of the buildings which by a contract of this sort, he undertakes to erect; in order, therefore, to enable him to raise funds for the purpose, the contract is made divisible, and provides that as soon as he has built to a certain extent on certain portions of the land, he shall have separate leases of them, which he can take into the market for the purpose of raising money to enable him to complete the rest of the contract; that as soon as he has built upon other portions he shall have a lease of them; and that when he has completed the whole he shall have leases of the remaining part, all distinct and separate leases, the lessees in which would be under no obligation whatever to perform the obligations of the others."

Amongst other defences to suits for specific performance may be mentioned want of mutuality in the contract, or that it is *ultra vires*. See Fry on Specific Performance.

SETON *v.* SLADE.
HUNTER *v.* SETON.

July 2nd and 3rd, 1802.

[REPORTED 7 VES. 265.]

SPECIFIC PERFORMANCE WITH COMPENSATION.]—*Specific performance decreed, the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit with interest, if the title should not be made out and possession delivered by the time of payment, having been received and kept without objection; and the vendee, upon the construction and the circumstances, not being entitled to insist on the time, as the essence of the contract.*

An agreement signed by one party only, good to charge him within the Statute of Frauds.

THE plaintiff in the first of these causes being entitled to an estate called Kilorough, in the county of Glamorgan, under a contract entered into in 1799, by the trustees of the Marquis de Choiseul, to convey to him and his heirs, in consideration of 8500*l.*, employed Josiah Phipps to sell the estate by auction or private contract: and the following memorandum, in writing, dated the 12th of April, 1800, was signed by the defendant Robert Slade, but not by the plaintiff, or any one on his behalf:—"I Robert Slade, of Doctors' Commons, in the city of London, Esquire, have this day purchased of Josiah Phipps, the estate described in the within particular, at and for the sum of 10,000*l.*, including the timber and underwood growing thereon, have paid a deposit of 1000*l.*, do hereby undertake and agree to pay the remainder of the purchase-money, and complete my purchase, within two months from the date hereof, the proprietor making a

good title thereto at his own expense, and executing a proper conveyance, to be prepared at my expense; and I do further agree to pay for the fixtures, household furniture, at a fair valuation, and for the growing crops, seeds, fallows, &c., in the same way, according to the custom of the country; and possession to be given upon the completion of the contract, to which time all outgoings are to be cleared up, and I am entitled to the rents and profits. Upon failure of my complying with the terms and conditions before mentioned, the deposit money shall be forfeited, the proprietor shall be at full liberty to re-sell the estate, and the deficiency, if any there shall be by such second sale, together with all charges attending the same, shall be made good at my expense."

The bill in the first cause prayed a specific performance of this agreement, which was resisted under the following circumstances, appearing by the answer and the evidence.

The defendant, the day after he signed the agreement, (the 13th of April), wrote to Phipps from Brighthelmstone, stating objections to the title, and that, if the title should not be made out, and possession delivered to him by the 12th of June then next, he should insist upon having the deposit money returned to him with interest. Phipps's letter in answer, dated the 19th of April, stated the plaintiff's answer, as given verbally by his solicitor, thus:—"Mr. Seton desired I would inform you, that he accedes to your request respecting the interest as a matter of course." The defendant, about the beginning of May, informed Phipps he had sold out stock for the purpose of being ready with his purchase-money, and expressed his surprise that no abstract had been delivered. He afterwards pressed Phipps for the abstract, and proposed that Phipps should copy and send in his name, to the plaintiff, a note written by the defendant, expressing, that, finding no progress made in the delivery of the title, he called to remind Phipps, that, in the event of its not being completed at the expiration of the

two months, he expects, in compliance with the promise the plaintiff made, in answer to his letter from Brighthelmstone, to have his deposit-money returned with interest, and requesting authority to fulfil the engagement on the plaintiff's part. Phipps declined writing that letter. On Saturday, the 7th of June, the abstract was left at the defendant's solicitors, with a note, stating that the plaintiff had only a title under an agreement, but all necessary parties were ready to convey, and making a proposal for that purpose. On Monday, the 9th, the plaintiff's solicitor called there to say, that he would not vouch for the authenticity of the abstract, as it was not prepared by him, but by the solicitors for the trustees of the Marquis de Choiseul. Nothing farther passed till the 13th of June, on which day the defendant wrote to Phipps, demanding his deposit with interest, and stating his reasons, that the two months within which the plaintiff agreed to complete the contract were expired, and the defendant's solicitors had not received an abstract till within these few days; and so far from showing a right in the plaintiff to convey, it states merely a contract for purchase by him, without noticing a suit in Chancery against the trustees of the Marquis and Marchioness de Choiseul, previous to the contract for purchase by the plaintiff, which renders it impossible for the plaintiff to carry into effect his agreement with the defendant within the time limited.

The defendant afterwards recovered his deposit with interest, in an action.

Several objections were taken to the abstract, the principal of which (mentioned in the defendant's letter of the 13th of April) were, the suit instituted by the Marquis de Choiseul and his creditors to remove his trustees, and for an account of their conduct; and a prior contract with a person named Darby, who gave notice of his claim. He was made a defendant, and put in an answer, amounting, on the whole, to a disclaimer. Afterwards, being examined as a witness, by his depositions he renewed his claim. The Lord Chancellor held, that he could not get

rid of the disclaimer upon the record without a strong case upon affidavit ; and, therefore, he was a good witness ; but the defendant reading his depositions, must admit that he has no interest. The defendant then declined reading his evidence.

The second cause was instituted upon a bill by the trustees of the Marquis de Choiseul, praying a specific performance of their contract with Seton.

Mr. *Romilly* and Mr. *Bell*, for the plaintiff Seton.—The question is, whether the vendor was bound to make out his title by a certain day; and farther, whether, if he could make a title at a subsequent time, that would not be sufficient in this Court. In all the decisions upon this point, time has been considered a circumstance merely, not of the essence of the agreement. It is true, in modern cases parties have been discharged, where in former times they would have been bound, the late decisions having restrained the unlimited extent of the older cases. But they have never gone the length, that, if the agreement is not performed at the particular day, it shall be at an end. In the common case of relief against the penalty of a bond, prior to the statute (*a*), could any declaration of the parties have prevented that? The result is, that the non-performance at the day is a circumstance to show abandonment, but only a circumstance. In *Gregson* v. *Riddle* (*b*), the agreement was for a particular day, with a proviso, that in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose, to have the legal estate conveyed. The defendant resisting, a reference was directed, to see whether a good title could be made, Lord *Loughborough* expressing an opinion, that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord *Thurlow*, the performance was still resisted. Lord *Thurlow* said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent

(*a*) Stat. 4 & 5 Ann. c. 16.

(*b*) In Chancery, before the Lords Commissioners, 12th June, 1783; before Lord *Thurlow*, 12th June, 1784; cited by Mr. *Romilly*, from his own note.

was to hold it evidence of a waiver of the agreement, but it never was held to make it void. Mr. *Mansfield*, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that, notwithstanding the decision of the Court of Chancery, it should be void. Lord *Thurlow* said, such a clause might be inserted, and the parties would be just as forward as they were then.

That case is much stronger than this. Here there was no necessity for performance at the day.

Mr. *Richards* and Mr. *Leach* for the defendant Slade.—The general principle is, that in equity, as at law, the plaintiff must show that he has performed everything incumbent on him. There is no instance of a decision treating the time as immaterial, without circumstances amounting to a waiver, though the language of the Court has been more extensive. Upon the face of the agreement, it is to be performed within two months: and there are no circumstances showing a waiver. Under this express engagement, would this Court have restrained an action against the auctioneer for the deposit of 1000*l.*, or have prevented the vendor from setting up the estate again if the vendee had made default? No authority goes to that extent; and it is to avoid this that the clause is introduced. Then, the vendee has an equal right to hold the vendor to the time. It is idle to say the time is not material; if it is not adhered to, it may be the ruin of the party acting upon that, contracting debts, &c. A decision always referred to upon this subject is *Gibson* v. *Patterson* (*a*), the report of which is corrected in *Lloyd* v. *Collett* (*b*), and *Harrington* v. *Wheeler* (*c*). *Lloyd* v. *Collett* is a direct decision for this defendant; differing only in the circumstance that no abstract was there delivered within the time. In all these cases, and *Pincke* v. *Curteis* (*d*), and *Fordyce* v. *Ford* (*e*), the language of the Court is directly opposite to what it was formerly—that time is material. In *Spurrier* v. *Hancock* (*f*) the time was extended by the tacit consent of both parties. It is important that this defendant, the very day after he

(*a*) 1 Atk. 12.
(*b*) 4 Bro. C. C. 469; 4 Ves. 689, n. (*b*).
(*c*) 4 Ves. 686; *Wynn* v. *Morgan*, 7 Ves. 202.
(*d*) 4 Bro. C. C. 329.
(*e*) 4 Bro. C. C. 494.
(*f*) 4 Ves. 667.

signed the agreement, expressly stated his title to insist upon the time ; and Phipps, in his answer, assents to that.

[Lord Chancellor Eldon.—There have been several very hard cases under the description of the specific performance of agreements, upon the principle of compensation ; that, for instance, where a person contracted for an estate in Essex, with the object of becoming a freeholder of that county, and it turned out to be in Kent; yet he was held to it (*a*). So, in a case before Sir *T. Sewell*, upon an agreement for a leasehold house with a wharf, the object of the purchaser being to be a wharfinger, he was compelled to take the house without the wharf. So, where the object was to purchase an estate tithe-free, and he was compelled to take it subject to tithe (*b*). The value of the tithe is not a compensation. I incline much to think, notwithstanding what was said in *Gregson* v. *Riddle*, that time may be made the essence of the contract : but I do not recollect a case where an abstract was delivered for the purpose of preparing a conveyance ; at the delivery no objection made that it was delivered too late ; and between the delivery and the time for the execution of the conveyance, no objection stated, either to the time of the delivery or the nature of the title. The abstract certainly was delivered very late; but it is upon the party to say it was too late. If he receives the abstract without objection, does he not authorise the other to suppose he is, during the currency of the rest of the time, preparing his conveyance, and the thing is to go on ?]

(*a*) *Shirley* v. *Davis*, in the Court of Exchequer, cited 6 Ves. 678.

(*b*) *Lord Howland* v. *Norris*, 1 Cox, 59.

For the defendant.—The delivery of the abstract was a mere mockery. It could not possibly be imagined that it could be looked through in time. It was incumbent upon the vendor to have some communication with the vendee, to do away the effect of his letter. It would be a new decision, that the delivery of the abstract to the solicitor, the vendee having declared absolutely that he would not let it go beyond the time, shall amount to a

new contract. No diligence could have enabled the vendor to perfect his title by the 12th of June, on account of the claim of Darby, and the suit in this Court.

Mr. *Romilly*, in reply.—This agreement is not the same as if the vendor had undertaken expressly to make out his title in two months. The defendant's undertaking is conditional, to pay his purchase-money. There is no such principle, that time is essential here as well as at law, and that it is always dispensed with upon the conduct of the party. That would exclude Courts of equity from a great part of their jurisdiction. The only ground for the redemption of a mortgage is, that the time is essential at law; yet, in equity, as the real transaction is a loan of money, and the party may be put in as good a situation, it shall not be so considered. In those cases, a dictum of Lord *Thurlow* has been frequently alluded to—that, if a clause was inserted, excluding the jurisdiction of this Court, if the mortgagor should not redeem within a year, still the mortgagor would be entitled to redeem. There are no words in this agreement showing the parties meant this time strictly. It was inserted merely because it is usual to fix a time. The vendor could not have re-sold at the end of two months, and charged the defendant with the deficiency. The defendant's letter shows he did not understand the period of two months to be binding, desiring a fresh agreement for that purpose. Phipps's letter proves nothing. He was not agent for any such purpose, and the information was given to him only, and the answer is merely that Seton acceded to his request as to the interest, as a matter of course, as it certainly was: not that if the contract should not be performed within two months, there should be an end of it. The objection that it was impossible that the conveyance could be prepared in time, should have been made when the abstract was delivered. But suppose the title perfect; that it had received the sanction of eminent conveyancers; that many estates had been sold under that abstract; and that the person to whom it was sent was already conversant with the title; in that case, the con-

veyance might have been prepared in time. The defendant held the vendor bound till the 12th of June.

Lord Chancellor Eldon.—If it were necessary, for the decision of this case, to express myself with great accuracy upon the principle of the Court as to suits for specific performance, as far as objections are to be founded upon what the Court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But in the view I have of this case, I incur no hazard of making a decree in its principle inconsistent with any authority that can be stated.

Time is not regarded in equity as at law; for instance, the case of the redemption of a mortgage, which cannot be prevented even by special agreement.

To say time is regarded in this Court as at law is quite impossible. The case mentioned, of a mortgage, is very strong—an express contract under hand and seal. At law, the mortgagee is under no obligation to reconvey at that particular day; and yet this Court says, that, though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground, that the contract is, in this Court, considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import, at law, that once a mortgage always a mortgage. But equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord *Thurlow*, that the agreement of the parties will not alter it; for I take it to be so, in the case of a mortgage, that you shall not, by special terms, alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. So, in the instance of a mortgage, with interest at 5*l.* per cent., and a condition to take 4*l.*, if regularly paid; or at 4*l.* per cent., with a condition for 5*l.*, if not regularly paid. At law you

might, in that case, recover the 5*l.* per cent., for it is the legal interest. But this Court regards the 5*l.* per cent. as a penalty for securing the 4*l.*: and time is no further the essence than that, if it is not paid at the time, the party may be relieved from paying the 5*l.* per cent. by paying the 4*l.* per cent., and putting the other party in the same condition as if the 4*l.* per cent. had been paid; that is, by paying him interest upon the 4*l.* per cent. as if it had been received at the time (*a*). So in this Court, before Courts of law dealt with a bond under a penalty, as they do now, time was the essence there; but this Court relieved against the penalty long before a Court of law; and there are many other instances.

(*a*) See *Thompson* v. *Hudson*, 2 L. R. Eq. 612; 2 L. R. Ch. App. 255; 4 L. R. Ho. Lo. 1.

But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate from the sealing of the contract, is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question whose it is, is not to be discussed merely between the vendor and vendee, but may be to be discussed between the representatives of the vendee. Therefore, I do not take a full view of the subject upon the question of time, unless that is taken into consideration: and many very nice and difficult cases may be put, in which the question would be to be discussed between the representatives, founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also.

From the execution of the contract, the estate is, in equity, the property of the vendee, descendible and devisable as such.

The cases seem to have varied a good deal. The cases before Lord *Thurlow* proceed upon this, that in the nature of the thing there must be a degree of good faith between the parties, not to turn round the contract upon frivolous objections. As to the contract of the party, the slightest objection is an answer at law. But the title to an estate requires so much clearing and inquiry, that, unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the

thing, or objections arising out of circumstances, not merely as to time, but the conduct of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing that the objection cannot be maintained: even the latter cases, which have given great weight to the objection, particularly *Harrington* v. *Wheeler* (4 Ves. 686), referring to older cases, particularly two in the House of Lords (*a*), the objection was not put merely upon the conduct in not making the title in time, but upon the circumstances connected with the thing and the value of it.

(*a*) *Hayes* v. *Caryll*, 1 Bro. P. C. 126, Toml. See *Wingfield*, v. *Whaley*, 1 Bro. P. C. 209, Toml. edit.

But I need not address myself to the consideration of what is the precise principle, with much industry; for no authority would support me in saying, that, under the particular circumstances of this case, the defendant can resist a decree, if a good title can be made. This agreement is signed by the defendant Slade only; but that makes him within the statute (*b*) a party to be charged. I do not say whether terms might or might not be introduced, that would make time expressly of the essence of the contract (*c*). It is enough to say, that, if this agreement has that effect, there never was an agreement that would not; for, upon that point, the agreement is as loose as possible. There is no passage in it *eo intuitu;* not that sort of passage in *Gregson* v. *Riddle*. The clause as to liberty to resell, &c., is not considered of much importance in this Court; but in this instance it is a clause against the vendee, having no corresponding clause against the vendor. That clause expresses little more than would be the legal effect if that was not inserted. But it is enough to say upon that, the objection relied upon in the argument, that the plaintiff might have sold after the two months were expired, admits of this answer, —that it is assuming the whole question. If you make out that he would have been at liberty to resell, that does not make out that he lets the other off; but, under the circumstances he would not have been at liberty to resell. The evidence clearly imports that the defendant did not

(*b*) 29 Car. 2, c. 3.

(*c*) They clearly might. See *Hudson* v. *Bartram*, 3 Madd. 440; *Boehm* v. *Wood*, 1 J.&W. 410.

understand it to have bound them in that mutual respect in which he seems in his letter to think it reasonable they should be bound. But I will construe it, for the purpose of this case, as if it had mutually bound them; and that, if the title was not made out by the day, then the defendant should be at liberty to say he was off; for if that clause had been in this agreement he might have waived the benefit of it; and it must have been made out that his conduct did not occasion the non-fulfilling the agreement. Take it, that there was the mutual clause. The moment after the sale, the auctioneer was no longer the agent of the plaintiff. He was his agent only to sell, not to deal with the terms upon which a title was to be made. The defendant must show the auctioneer had acquired a character to bind the plaintiff in that respect. There is no evidence of that: on the contrary, the defendant applies to the auctioneer as such agent, and he refuses to act as such, and refers him to the plaintiff. But he applies again to the auctioneer, and never to the plaintiff. One clause of this letter is very important, marking the knowledge of the title in the law-agent of the vendee, and that he was able, in the first instance, the day after, to state the material objections, viz., the proceeding in Chancery, and Darby's claim. That is distinct evidence that the defendant did not then understand that he had entered into an agreement, by force of which he thought he had a right to say, the time of two months was absolutely of the essence of the contract. Whether that was misunderstanding or not, that was his understanding. By the last words, he seems desirous of having an agreement, which would for the first time give a mutuality as to time. But he does not choose to give up the one till he gets the other, reserving to himself the power to deal with the first agreement as he thinks fit, though he may not get the stipulation he wishes. If the plaintiff acceded to that proposition, he would be bound. But what is the evidence that he did? There is a good deal of reasoning in support of the argument, that Phipps's letter is not merely a statement that he would pay in-

terest, but, with regard to some circumstances, that the contract was to be off, viz., the deposit money to be returned with interest, connected with the dissolution of the agreement, which might either be within or after the expiration of the two months; but, if the former, it ought to be shown to be clearly the effect of something that passed subsequently, and was acceded to. The letter of Phipps in answer is no evidence of the facts stated in it. Does the defendant conceive the matter as resting on that letter, and consider it as an undertaking to the extent he proposed, or as completely settling that mutuality he desired, giving him a right to insist upon the time as the essence of the contract? No; for afterwards he goes again to Phipps, not an agent, to bind the plaintiff for this purpose, and, not being able to prove the date further than that it was between the 13th of April and the 5th of June. This proves that the defendant, by repeated inquiries addressed to his solicitors, who knew a good deal of the title, was informed from time to time that the abstract was not delivered. The proof is complete as to that. This is a complete waiver of any objection from the non-delivery of the abstract at the time the defendant proposed that Phipps should write that letter. Being told Phipps would not write that letter, he does not write himself, or direct his solicitors to apply; but, upon the 7th of June, by his solicitors, he receives the abstract, they knowing the history of the title and the estate, and stating the two grounds of objection the day after the contract took place. There was a note at the bottom of the abstract, stating distinctly that the plaintiff had only a title under an agreement, but that all necessary parties were ready to convey, and making a proposal for that purpose, which might or might not be completed within the time. The abstract was delivered on the 7th of June. No objection was made to receiving it. It was kept till the time expired, without objection. Ought not the objection to have been made on the 7th? The plaintiff was bound till the 12th. He could not sell to another: and if the solicitors had returned the abstract upon the objec-

tion, the plaintiff was at liberty to say he had undertaken to remove all objections, or to tender a conveyance; and he might have proceeded to prepare a conveyance, which, under the circumstances, was to be prepared by the defendant; and he might have tendered that conveyance so as to have a right to an action, or to file a bill, as upon an agreement which he had undertaken to make good within the time.

This case is not like *Lloyd* v. *Collett* (4 Bro. C. C. 469; 4 Ves. 689, n.), in which the defendant immediately sent the abstract back, and would not look at it. What right had this defendant to read the abstract if it came too late? He had either an intention to execute the contract, or a hope that he had time to get through the abstract, in order to carry it into execution; but the evidence in this respect is totally silent; and it is clear, upon the objections stated in the solicitor's depositions, that at some period or other he had gone into the abstract.

As to the other circumstances stated by the defendant, his selling out stock, &c., there is no evidence whatsoever. As to his intention of making this place his residence, there is nothing in the contract having the least reference to that; and upon an intention, not disclosed in the contract, or afterwards, as essential, this Court has never been in the habit of acting.

Under the circumstances, therefore, whether the time is or is not an objection, founded upon the authorities the Reports of this Court furnish,—which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff,—there is no authority that has not some reference to the conduct of the party in the mean time; and upon the conduct, this defendant has no right, under the circumstances, to say this contract was not performed within the two months.

There must, therefore, be a decree for a specific performance; and as to all the rest, a reference to the Master, to see whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very important as to the

costs, but not whether he shall take the title or not. According to old cases, it was sufficient if the title was made by the time of the report (*a*).

(*a*) See *Jenkins* v. *Hiles*, 6 Ves. 646.

"A Court of equity," says Lord *Redesdale*, "frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case:" *Davis* v. *Hone*, 2 S. & L. 347. See also *Lennon* v. *Napper*, 2 S. & L. 684: *Parkin* v. *Thorold*, 2 Sim. N. S. 6, 8; *Roberts* v. *Berry*, 3 De G. Mac. & G. 284, 289.

Where, for instance, some of the steps towards the completion of the contract have not been taken, or, as in the principal case, the contract itself has not been completed at the time agreed upon by the parties, or where the vendor had not the same interest in the estate as that which he had contracted to sell, or there was some deficiency in the quality or quantity of it, the party not able strictly to perform the contract on his part, could formerly, at law, have had no remedy by way of damages against the other; but in equity, in many cases, he would be able to obtain specific performance, if adequate compensation could be made for the non-literal performance of the contract.

It is purposed to consider in this note—I. Those cases where, although the time fixed for the completion or the steps towards the completion of the contract are not kept, specific performance may nevertheless be decreed. II. Those cases where, although the vendor has not the same interest in the estate as he has contracted to sell, or there is some deficiency in the quantity or quality thereof, a decree for specific performance with compensation may be made.

It must, however, be borne in mind, that the doctrines of equity by which the strict performance of certain stipulations in contracts has not been considered essential, have been extended by the Judicature Act, 1873 (36 & 37 Vict., c. 66) to all the divisions of the High Court of Justice; for it is thereby enacted that "stipulations in contracts, *as to time*, or *otherwise*, which would not, before the passing of this act (1 November, 1875), have been deemed to

be, or to have become, of the essence of such contracts in a Court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity." Sect. 25, sub-s. 7. See Trower's Prevalence of Equity, 65.

This alteration of the law may often render it unnecessary for a vendor in an action for damages for breach of the contract, to show, as he was always obliged to do formerly, in an action for damages at common law, that he was ready and willing to complete on the day named, and that he had a title on that day. See *Noble* v. *Edwardes*, 5 Ch. D. 393.

I. *As to the steps towards completion, or the Contract itself not having been completed, at the Time agreed upon.*]—In the old Courts of law, previous to the passing of the Judicature Act, 1873, in all cases, time was considered as of the essence of the contract. "As to the contract of the party," Lord *Eldon* observes, in the principal case, "the slightest objection is an answer at law. But," he adds, "the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the time*, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances, *not merely as to time*, but the *conduct* of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing that the objection cannot be maintained."

The objection as to delay in the completion of the contract may be considered, 1st, as arising from the conduct of the parties; 2nd, as arising from the state of the title.

1st. *As to delay arising from the conduct of either party.*

In ordinary cases, where there was nothing special in the nature of the property, or of the purposes for which it was intended to be purchased, although a particular day might be fixed for the completion of the contract, the Court of equity (whose doctrines upon this subject, as we have before seen, have been extended to all the divisions of the High Court by the Judicature Act, 1873), seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named was merely formal, and that the stipulation meant, in truth, that the purchase should be completed within a reasonable time, regard being had to all the circumstances of the case, and the nature of the title to be made.

Upon the same principle, in the case of a mortgage, the Court, looking at the real contract, which is the pledge of the estate for a debt, treated the time mentioned in the mortgage deed as only a formal part of it, and decreed accordingly; taking it to be clear,

that the general intention should override the words of the particular stipulation: *Hipwell* v. *Knight*, 1 Y. & C. Exch. Ca. 415, 416.

A Court of equity has relieved against, and enforced, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for the completion, or for the steps towards completion, if it could do justice between the parties, and if, as Lord Justice *Turner* said in *Roberts* v. *Berry* (3 De G. M. & G. 284), there was nothing "in the express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right. This is what is meant and all that is meant, when it is said that in equity time is not of the essence of the contract. *Tilley* v. *Thomas*, 3 L. R. Ch. App. 67. The steps towards the completion of the contract being the delivery and return of the abstract of title, objections and requisitions of the purchaser, payment of the deposit or purchase-money, and delivery of possession. Trower on Prevalence of Equity, 65; Dart, V. & P. 427, 5th ed.

At *law*, unless the vendor had his abstract and title-deeds ready at the appointed time, his remedy was gone, and the purchaser might recover back his deposit: *Berry* v. *Young*, 2 Esp. Ca. 640, n.

In *equity*, however, the rule was, that it was not solely incumbent upon the vendor to move by making a tender of the abstract, but it was also incumbent upon the purchaser to ask for it at the appointed day (*Guest* v. *Homfray*, 5 Ves. 818, 823), or on such other day as would leave sufficient time for the completion of the contract (*Jones* v. *Price*, 3 Anstr. 924); otherwise equity would consider the time as waived.

So, if the abstract were delivered to the purchaser *after* the day appointed, and he made no objection to the delay, he would be considered as having waived it: *Smith* v. *Burnam*, 2 Anstr. 527; *Pincke* v. *Curteis*, 4 Bro. C. C. 329; *Paine* v. *Meller*, 6 Ves. 349.

If a vendor did not deliver the abstract of title within the time specified in the conditions of sale, he could not hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated, in the condition for sending in the objections, that time in that respect should be of the essence of the contract (*Upperton* v. *Nickolson*, 6 L. R. Ch. App. 436). In such a case, the time within which objections would be considered as waived, would depend upon the general principles of the Court, and the conduct of the parties. (*Ib.*)

Where, however, a vendor had taken no steps whatever to complete the contract, and the pur-

chaser had immediately, when the time elapsed, insisted upon his deposit and refused to perform his agreement, equity would not decree specific performance of the contract, or grant an injunction to restrain the purchaser from proceeding at law to recover his deposit (*Lloyd* v. *Collett*, 4 Bro. C. C. 469; *S. C.*, 4 Ves. 689; *Ormerod* v. *Hardman*, 5 Ves. 737; *Warde* v. *Jeffrey*, 4 Price, 294); *secus*, if he has endeavoured to make out his title, and has not been guilty of gross laches or negligence (*Fordyce* v. *Ford*, 4 Bro. C. C. 495; *Radcliffe* v. *Warrington*, 12 Ves. 326); and although, after the period at which the contract ought to have been completed, some time elapses before the completion of the repairs of a house described as being in good repair (*Dyer* v. *Hargrave*, 10 Ves. 805); or before the expiration of a lease of property, when it was stated that the purchaser would, several months before, be entitled to possession (*Hall* v. *Smith*, 14 Ves. 426; and see 13 Ves. 225); the purchaser will not be able to resist specific performance unless he can show that he wanted the house for his own occupation before the time when the repairs would be completed, or the lease would expire.

Even in equity it must be remembered that unreasonable delay will of itself be a bar to either party obtaining a decree for specific performance. It is true that Lord *Hardwicke*, in *Gibson* v. *Patterson* (1 Atk. 12), is reported, though, perhaps, incorrectly (see 4 Bro. C. C. 497; 4 Ves. 630, n.), to have said, that the vendor's negligence in not producing his title-deeds, &c., within the time limited for that purpose, was no objection to specific performance, but that doctrine has since been clearly overruled. In *Milward* v. *Earl of Thanet*, 5 Ves. 720, n., where the parties, differing as to the construction of the agreement, delayed the bill for specific performance for seven years, it was dismissed by Lord *Alvanley*, M.R., who observed, that Lord *Kenyon* was the first who set himself against the idea that had prevailed, that, when an agreement was entered into, either party might come at any time; but that it is now perfectly well known, that *a party cannot call upon a Court of equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager*. See also *Lloyd* v. *Collett*, 4 Bro. C. C. 469; 4 Ves. 690, n.; *Harrington* v. *Wheeler*, 4 Ves. 686; *Guest* v. *Homfrey*, 5 Ves. 818; *Alley* v. *Deschamps*, 13 Ves. 225; *Walker* v. *Jeffreys*, 1 Hare, 252; *Southcomb* v. *The Bishop of Exeter*, 6 Hare, 213, 218; *Dorin* v. *Harvey*, 15 Sim. 49; *Alloway* v. *Braine*, 26 Beav. 575; *Sharp* v. *Wright*, 28 Beav. 150; *M'Murray* v. *Spicer*, 5 L. R. Eq. 527, 537. And a continual claim without any active steps in

support of it, will not keep alive a right which would otherwise be barred by laches: *Lehmann* v. *McArthur*, 3 L. R. Eq. 496.

"In these cases," observes Lord *Romilly*, M.R., "where one person says, 'I will have nothing more to do with the contract,—I put an end to it,'—if the other party to the contract, who insists on its being carried into execution, does not file his bill speedily—a time which is not very accurately fixed, though the cases have determined that it must not exceed a year—he shall not be allowed to insist that the contract shall be carried into execution:" *Colby* v. *Gadsden*, 34 Beav. 418.

But this rule will be relaxed where the strict application of it would work injustice: *Walker* v. *Jeffreys*, 1 Hare, 353; *Jones* v. *Jones*, 12 Ves. 188. In *Shepheard* v. *Walker* (20 L. R. Eq. 659), at the expiration in July, 1857, of a lease under which by assignment he was in possession of the property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of 600*l.* on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval, but was not returned; and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the 600*l.* or interest was ever made or demanded. In 1871 A. died. A bill having been filed by his legal representative, it was held by *Bacon*, V.-C., that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the 600*l.* from the 1st of August, 1857.

But specific performance of a contract will not be decreed when the purchaser has lain by and delayed completing it, even although he may have paid part of the purchase-money (*Harrington* v. *Wheeler*, 4 Ves. 686); for it would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and, according to the event, either to abandon it, or, considering time as nothing, to claim a specific performance, which is always the subject of discretion: *Per* Lord *Erskine*, C., in *Alley* v. *Deschamps*, 13 Ves. 223. And see *South-Eastern Railway Company* v. *Knott*, 10 Hare, 122; *Firth* v. *Greenwood*, 1 Jur. N. S. 866; *Alloway* v. *Braine*, 26 Beav. 575.

Nor will a purchaser be aided who has taken trifling and vexatious objections to the title, and has shown a disinclination to perform the contract, especially when

the value of the property has increased by the dropping of lives, or otherwise (*Hayes* v. *Caryll*, 1 Bro. P. C. 126, Toml. edit.; *Spurrier* v. *Hancock*, 4 Ves. 667; *Pope* v. *Simpson*, 5 Ves. 145; *Main* v. *Melbourne*, 4 Ves. 720; *Burke* v. *Smyth*, 3 J. & L. 193); or where the purchaser was in reality unable to pay the purchase-money (*Gee* v. *Pearse*, 2 De G. & Sm. 325; *Aberaman Iron Works* v. *Wickens*, 5 L. R. Eq. 485, 507, 508); and, where either the vendor or purchaser has not completed the contract on his part at the appointed time, if the contract be inequitable, or the price unreasonable,—that is to say, inadequate in one case, or exorbitant in the other,—equity will not afford its aid by decreeing specific performance: *Whorwood* v. *Simpson*, 2 Vern. 186; *Lewis* v. *Lord Lechmere*, 10 Mod. 503.

2nd. *As to Delay arising from the State of the Title.*—Where delay may be accounted for upon the ground of the state of the title, it will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material; that is to say, where time has not been made by the contract of the parties, or is not, from the nature of the property of the essence of the contract. In such a case, if a vendor commence an action for specific performance, it is sufficient if he can procure a good title at the time of the decree. *Langford* v. *Pitt*, 2 P. Wms. 630, is a leading case on this subject: there it was urged by the defendant's counsel, that, even by the plaintiff's own showing, he had not, at the time of entering into the articles for sale, a good title. But Sir *Joseph Jekyll*, M.R., said, "It is sufficient if the party entering into articles to sell, has a good title at the time of the decree, the direction of the Court being in all these cases to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement:" see *Jenkins* v. *Hiles*, 6 Ves. 646; *Wynn* v. *Morgan*, 7 Ves. 202; *Eyston* v. *Simmonds*, 1 Y. & C. C. C. 608; *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54; *Sidebotham* v. *Barrington*, 3 Beav. 524; 4 Beav. 110; 5 Beav. 261; *Chamberlain* v. *Lee*, 10 Sim. 444; *Phillipson* v. *Gibbon*, 6 L. R. Ch. App. 428.

The title, however, ought generally to be made out in time for the certificate of the Chief Clerk, which corresponds with the report formerly made by the Masters (since abolished) (*Kirwan* v. *Blake*, cited 2 Moll. 581, 582; *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. Exch. Ca. 377); but a purchaser will not in all cases be discharged if a title cannot be made at that time. "Where," says Lord *Eldon*, "the Master's report is, that the vendor, getting in a term, or getting administration, &c., will

have a title, the Court will put him under terms to procure that speedily: " see *Coffin* v. *Cooper*, 14 Ves. 205; in which case it was held, that the purchaser could not insist on being discharged from the contract, the vendor having procured a good title by means of an Act of Parliament, although upwards of a month after the Master's report. See also *Lord Stourton* v. *Sir Thomas Meers*, stated 2 P. Wms. 631; *Clay* v. *Rufford*, 5 De G. & Sm. 784; *Devenish* v. *Brown*, 26 L. J. N. S. (Ch.) 23.

A purchaser, by buying up the title of a third party which might, had it remained outstanding, have constituted a valid objection to the vendor's title, will not, on the ground that the vendor has not got that title in himself, be able to object to specific performance. See *Murrell* v. *Goodyear*, 1 De G. F. & Jo. 432; there the assignees of an insolvent put up for sale an estate which had been impressed with the character of personalty, and which, if it retained that character, belonged absolutely to the insolvent. A purchaser, upon investigation of the title, discovered that there was good reason to contend that a prior owner had elected to take the estate as realty, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the curtesy. The purchaser, after some correspondence, in which he required the concurrence of the heir abruptly gave notice to determine the contract, and immediately afterwards bought up the title of the heir. It was held by the Lords Justices, affirming the decision of Sir *John Stuart*, V.-C., that he could not avail himself of this purchase to defeat his contract, and that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir.

But where the vendor does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up to the time when he showed title (*Long* v. *Collier*, 4 Russ. 269; *Scoones* v. *Morrell*, 1 Beav. 251; *Wilkinson* v. *Hartley*, 15 Beav. 183); *secus*, where the suit was occasioned solely by the conduct of the purchaser, as where he simply disputes the authority of the vendor to sell, and does not ask for his title (*Peers* v. *Sneyd*, 17 Beav. 151); or where the requisitions were not made until after the bill filed (*Lyle* v. *The Earl of Yarborough*, Johns. 70), and also where, although the requisitions were made before the bill was filed, the noncompliance of the vendor was attributable to the circumstance of the purchaser having claimed abatement or compensation, in respect of which his bill had been dismissed with costs. *Ib.*

But in a recent case, although

the vendor had been right on all points on which objections had been taken before the bill was filed, yet, as he might with reasonable diligence have informed himself before selling of a defect in the title, discovered before the certificate approving of the title was signed, the Court of Appeal directed that no costs should be given on either side except the costs of the original hearing before the Vice-Chancellor, which costs the vendor was to pay to the purchaser: *Phillipson* v. *Gibbon*, 6 L. R. Ch. App. 428.

There is a disinclination to extend the rule which the Court has adopted, of compelling a purchaser to take the estate although a title is not made out till after the time fixed by the contract, to any case to which it has not already been applied, since the rule has in many instances been productive of great hardship: accordingly it has been held that a purchaser will not be bound where a new suit is necessary, or an account of debts remains to be taken in a suit. See *Lechmere* v. *Brasier*, 2 J. & W. 289; *Dalby* v. *Pullen*, 3 Sim. 29; 1 Russ. & My. 296; *Coster* v. *Turnor*, 1 Russ. & My. 311; *Mayennis* v. *Fallon*, 2 Moll. 566, 580; *Chamberlain* v. *Lee*, 10 Sim. 444; *Blacklow* v. *Laws*, 2 Hare, 40. So, in *Fraser* v. *Wood*, 8 Beav. 339, the defendant in 1842 contracted to purchase an estate. A suit for specific performance having in the same year been instituted by the vendors, it appeared that they claimed under a testator who died in 1809, and subject to his debts: that a creditors' suit had been instituted in 1813, and a decree for an account made in 1817, since which time nothing effectual had been done in the suit, and no report of debts had been actually confirmed. After so great a delay, no further time was given to the vendors to complete their title, and the bill for specific performance was dismissed with costs.

As to when a title is made, see *Parr* v. *Lovegrove*, 4 Drew. 170.

Compensation for Delay].—In all cases where specific performance has been decreed notwithstanding the time for completing the contract has elapsed, care has been taken that proper compensation should be made, and the parties, in fact, put in the same situation as if the contract had been strictly fulfilled. Thus, ordinarily, the purchaser has been held entitled to the profits of the estate from the time when the contract ought to have been completed (*De Visme* v. *De Visme*, 1 Hall & T. 418; 1 Mac. & G. 346); and the vendor, whether the estate be in possession or reversion, has been held to be entitled to interest upon the purchase-money from the same time (*Sir James Lowther* v. *Countess Dowager of Andover*, 1 Bro. C. C. 396; *Davy* v. *Barber*, 2 Atk.

490; *Owen* v. *Davis*, 1 Ves. 82; *De Visme* v. *De Visme*, 1 Hall & T. 418; 1 Mac. & G. 346; *Monro* v. *Taylor*, 8 Hare, 70; 3 Mac. & G. 713; *Grove* v. *Bastard*, 1 De G. Mac. & G. 69; *Bailey* v. *Collett*, 18 Beav. 179); even if the money were lying dead, if the delay had arisen from the fault of the purchaser (*Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Enraght* v. *Fitzgerald*, 2 Ir. Eq. Rep. 87); *secus*, if the fault had been with the vendor (*Howland* v. *Norris*, 1 Cox, 59): but the purchaser should give notice that the money was not making interest (*Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Powell* v. *Martyr*, 8 Ves. 140; *Roberts* v. *Massey*, 13 Ves. 561; *M'Cann* v. *Forbes*, 1 Hogan, 13; *Dyson* v. *Hornby*, 4 De G. & Sm. 481; *Kershaw* v. *Kershaw*, 9 L. R. Eq. 56; and see *Regent's Canal Company* v. *Ware*, 23 Beav. 375,—a case where notice was given by a railway company); but even then, if he had not appropriated it for the vendor, or had in any way benefited by it, he must pay interest: *Winter* v. *Blades*, 2 S. & S. 393).

Where a purchaser makes default in payment of the purchase-money, until payment of which the vendor is not bound to give up possession, and the vendor, who occupies the property for the purpose of his business, continues the business not on account of the purchaser, but on his own behalf, under a pressure arising from the purchaser's default; he will not be compelled to pay the purchaser an occupation rent from the time when the purchase ought to have been completed—although the purchaser will be ordered to pay interest on the purchase-money from that day: *Leggott* v. *Metropolitan Railway Company*, 5 L. R. Ch. App. 716.

In ordinary contracts, where no time is fixed for completion, interest will generally be payable by the purchaser from the time he takes possession (*Ex parte Manning*, 2 P. Wms. 410; *Birch* v. *Joy*, 3 Ho. L. Ca. 565; and see *Smith* v. *Dolman*, 6 Bro. P. C. 291, Toml. edit., where a receiver had been appointed); especially if he has received the rents and profits: 8 Ves. 148, 149; and see *Fludyer* v. *Cocker*, 12 Ves. 25; *Binks* v. *Lord Rokeby*, 2 Swanst. 222, 226; *Att.-Gen.* v. *Christ Church*, 13 Sim. 214; but see *Blount* v. *Blount*, 3 Atk. 636.

But where there is a weighty objection to the title, the purchaser is not bound to take possession, nor, consequently, to pay interest until it is cleared up: *Forteblow* v. *Shirley*, cited 2 Swanst. 223; *Carrodus* v. *Sharp*, 20 Beav. 56.

Upon a sale of a reversion, interest is payable from the time appointed for completing the purchase. For "upon the sale of a reversion, the time at which the purchaser takes possession has nothing to do with the question

of interest on the purchase-money. The advantage obtained by the delay, and wearing out of the prior life interest, is equivalent to the receipts of the rents of a property in possession:" *Bailey* v. *Collett*, 18 Beav. 179, 182. And see *Davey* v. *Barber*, 2 Atk. 490; *Owen* v. *Davies*, 1 Ves. 82.

In *Kershaw* v. *Kershaw*, 9 L. R. Eq. 56, a purchaser contracted for the purchase of certain real estate at the price of 38,500*l.*, which was to carry interest at 5 per cent. until payment, and he was let into possession. Afterwards difficulties having arisen in completing the purchase, he paid 38,000*l.* into a bank to a separate account, and gave notice to the vendors, that this sum was appropriated for the purposes of the purchase, and that he would refuse to pay interest under the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum paid in was deficient by 500*l.* On discovering the deficiency, the purchaser paid into the bank 500*l.*, with interest at 5 per cent. up to that time. It was held by Lord *Romilly*, M.R., that the purchaser was not liable for interest subsequently to the time when he paid 38,000*l.* into the bank.

In the case of sales *by the order of the Court*, if the estate be in *possession*, the purchaser will be entitled to the rents and profits from the quarter day preceding his purchase, he paying his money before the following one (*Mackrell* v. *Hunt*, 2 Madd. 34, n.); but he will not be allowed to deduct the property tax (*Holroyd* v. *Wyatt*, 1 De G. & Sm. 125). If the estate be *reversionary*, the purchaser will be entitled to any benefit from the dropping of lives, from the time of confirming the report absolute, and will, consequently, be liable to pay interest from that time: *Ex parte Manning*, 2 P. Wms. 410; *Davy* v. *Barber*, 2 Atk. 489; *Child* v. *Lord Abingdon*, 1 Ves. jun. 94; *Champernowne* v. *Brooke*, 3 C. & F. 1; 4 C. &. F. 589; 2 Y. & C. Exch. Ca. 510; 3 Y. & C. Exch. Ca. 505; *Wallis* v. *Sarel*, 5 De G. & Sm. 429. The case of *Blount* v. *Blount*, 3 Atk. 636, appears to be misreported; and in *Trefusis* v. *Lord Clinton*, 2 Sim. 359, interest was, contrary to the ordinary practice, ordered to be paid from the time of the purchase. See *Robertson* v. *Skelton*, 13 Beav. 91.

Where the interest is more in amount than the rents and profits, even if there be an express stipulation, "that interest is to be paid on the purchase money, *from whatever cause the delay may have arisen*," if the delay in completing the contract is attributable to fraud or wilful delay on the part of the vendor, he will be left in possession of the rents and profits until a good title be shown; and from that period only will he become entitled to interest, and

the purchaser to the rents and profits: *Vickers* v. *Hand*, 26 Beav. 630.

Where, however, the delay in such a case is occasioned by the *state of the title*, and is not attributable to the fraud or wilful default of the vendor, the vendor will be entitled to interest according to the express terms of the stipulation: *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Rowley* v. *Adams*, 12 Beav. 476; *Sherwin* v. *Shakspeare*, 5 De G. Mac. & G. 517; *Bannerman* v. *Clarke*, 26 L. J. N. S. (Ch. 77; *Lewis* v. *South Wales Railway Company*, 10 Hare, 113; *Vickers* v. *Hand*, 26 Beav. 630, overruling *De Visme* v. *De Visme*, 1 Mac. & G. 336; *Lord Palmerston* v. *Turner*, 33 Beav. 524; *Williams* v. *Glenton*, 34 Beav. 528; 13 W. R. (M. R.) 1030; 1 L. R. Ch. App. 200.

If there has been delay in making out the title, and the property has deteriorated by dilapidations or mismanagement and unhusbandlike conduct, a compensation will be allowed to the purchaser (*Foster* v. *Deacon*, 3 Madd. 394; *Lord* v. *Stephens*, 1 Y. & C. Exch. Ca. 222; and see 3 Y. & C. Exch. Ca. 508; *Carrodus* v. *Sharp*, 20 Beav. 56; *Phillips* v. *Silvester*, 8 L. R. Ch. App. 173; and if he has paid his purchase-money, under an order into Court, he will be entitled to interest on the amount fixed for compensation, from the time of his making such payment (*Ferguson* v. *Tadman*, 1 Sim. 530); but a purchaser will not be entitled to compensation for deterioration after the time when he actually did take, or ought to have taken possession (*Binks* v. *Lord Rokeby*, 2 Swanst. 226; *Minchin* v. *Nance*, 4 Beav. 332; *Phillips* v. *Silvester*, 8 L. R. Ch. App. 173); or if he has himself occasioned the deterioration, as, by causing the tenant to quit before the completion of the contract: *Harford* v. *Purrier*, 1 Madd. 532.

Timber blown down after the contract will belong to the purchaser (*Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273); and if common timber be felled after that time by the vendor, a pecuniary compensation must be made to the purchaser (*Magennis* v. *Fallon*, 2 Moll. 588); but where the timber is ornamental, such act would be a ground for rescinding the contract (*Magennis* v. *Fallon*, 2 Moll. 584, 585).

If the vendor, after he has agreed to sell property to another, lays out money in improving it, he cannot call upon the purchaser to repay him the money for the improvement. See *The Master of Clare Hall* v. *Harding*, 6 Hare, 296; *Monro* v. *Taylor*, 8 Hare, 60; *Sherwin* v. *Shakspeare*, 5 De G. Mac. & G. 517.

In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendors, down to the time when the purchaser could

prudently take possession, that is to say, down to the time when a good title was shown: *Carrodus* v. *Sharp*, 20 Beav. 56.

The vendor of a manor is entitled to the fines paid for the admission of any new tenants in the room of the tenants described in the particulars of sale who may happen to die after the contract, but before the day fixed for the completion of the purchase, although the fines are not in fact paid till after that day: *Cuddon* v. *Tite*, 1 Giff. 395.

Where time is of the Essence of the Contract in Equity.]—There are two important exceptions to the rule of equity which treats time as unessential. 1st. Where the Court has, from the nature of the property, considered time of the essence of the contract: 2nd. Where the parties have by their agreement between themselves made it so.

Time considered of the Essence of the Contract from the Nature of the Property.]—Time has always been considered more peculiarly of the essence of the contract, if the thing sold were of greater or less value, according to the effluxion of time; and it was necessary in such cases that the ordinary stipulation as to time should be complied with in equity as well as at law; for instance, in the case of a contract for the sale of reversionary interests; "for no man," says Lord *Rosslyn*, "sells a reversion who is not distressed for money, and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay;" *Newman* v. *Rogers*, 4 Bro. C. C. 393. See also *Spurrier* v. *Hancock*, 4 Ves. 667; *Wycill* v. *Bishop of Exeter*, 1 Price, 292, 298; *Hipwell* v. *Knight*, 1 Y. & C. Exch. C. 401, 416; *Patrick* v. *Milner*, W. N. (C. P. D.), 1877, p. 145.

Time also has been considered of the essence of the contract in contracts with ecclesiastical corporations; as, for instance, in the case of a contract for a concurrent lease, in which case the lapse of every day changed the value and nature of the thing to be granted, and changed also the persons who were to participate in the sum to be paid (*Carter* v. *Dean of Ely*, 7 Sim. 211); also, where the property was of a fluctuating value (*Doloret* v. *Rothschild*, 1 S. & S. 590); as a mining lease (*Macbryde* v. *Weeks*, 22 Beav. 533); or of a wasting or determinable character, as a life estate or a life annuity (*Withy* v. *Cottle*, Turn. & R. 78); or a leasehold, a short time of which only is unexpired (*Hudson* v. *Temple*, 29 Beav. 536, 543); or the estate was wanted for commercial purposes (*Parker* v. *Frith*, 1 S. & S. 199, n.; *Wright* v. *Howard*, 1 S. & S. 190; *Coslake* v. *Tilt*, 1 Russ. 376; *Seaton* v. *Mapp*, 2 Coll. 556; *Walker* v. *Jeffreys*, 1 Hare, 348; *Macbryde*

v. *Weeks*, 22 Beav. 533); or with a view to immediate residence (*Tilley* v. *Thomas*, 3 L. C. Ch. App. 61, 67; *Levy* v. *Lindo*, 3 Mer. 84; *Gedye* v. *Duke of Montrose*, 26 Beav. 45; but see *Webb* v. *Hughes*, 10 L. R. Eq. 281); or for some other immediate purpose in view (*Wright* v. *Howard*, 1 Sim. & St. 180; *Parker* v. *Frith*, *Ib.* 199); or if the estate were sold for the purpose of paying off the debts of the vendor, bearing a higher rate of interest than he would get for the unpaid purchase-money (*Popham* v. *Eyre*, Lofft. 786; see, also, *Anon.* 2 S. & L. 603, cited); but not where the land had been purchased for the purpose of building a house for a residence: *Wells* v. *Maxwell*, 32 Beav. 408.

Upon the sale of a public-house, as a going concern, time is of the essence of the contract, and in the absence of express stipulation to the contrary, the licence of the house must be transferred under sect. 11 (since repealed by 35 & 36 Vict. c. 94, s. 75) of the General Licensing Act (9 Geo. 4, c. 61), and not under sect. 14. See *Day* v. *Luhke*, 5 L. R. Eq. 336; there upon the day fixed for the completion of a sale of a public-house as a going concern, the vendors were not in a position to procure a transfer of the licence under sect. 11, it was held by Lord *Romilly*, M.R., that the purchaser was entitled to repudiate the contract. See also *Coslake* v. *Till*, 1 Russ. 376; *Seaton* v. *Mapp*. 2 Coll. 556; *Claydon* v. *Green*, 3 L. R. C. P. 511; *Cowles* v. *Gale*, 7 L. R. Ch. App. 12.

An option under a right of pre-emption to purchase (which is always construed strictly) must be exercised at the time prescribed (*Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & Jo. 62, 66). See also *Alderson* v. *White*, 2 De G. & Jo. 97; 3 Jur. N. S. 1316; *Rowlands* v. *Evans*, 8 Jur. N. S. 88; *Lord Ranelagh* v. *Melton*, 10 Jur. N. S. 1141; *Austin* v. *Tawney*, 2 L. R. Ch. App. 143.

Where time is of the essence of the contract, and the purchaser obtains a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been given to him according to the contract. See *Gedye* v. *The Duke of Montrose*, 26 Beav. 45. In that case there was an agreement for the sale of a lease "with *possession* on the 1st of December, the rent to commence at Christmas." Possession was not given until the 31st of January, through the default of the vendor. It was held, by Sir *John Romilly*, M.R., that the purchaser was entitled to compensation, and an inquiry was directed.

Time made of the Essence of the Contract by Agreement between the Parties.]—It was at one time the doctrine of the Court of equity,

that the parties could not make time of *the essence of the contract*. Thus, in *Gregson* v. *Riddle*, 1784, cited by Sir *Samuel Romilly*, in the principal case, from his own note (ante, p. 504), the agreement was for a particular day, with a proviso, that, in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose, to have the legal estate conveyed; the defendant resisting, a reference was directed, to see whether a good title could be made, Lord *Rosslyn* expressing an opinion that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord *Thurlow*, the performance was still resisted. Lord *Thurlow* said, it had been often attempted to get rid of agreements upon this ground, but never with success; the utmost extent was to hold it evidence of a waiver of the agreement, but it never was held to make it void. Mr. *Mansfield* for the defendant, said, the intention was clearly to make it void, and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord *Thurlow* said, such a clause might be inserted, and the parties would be just as forward as they were then.

This doctrine seems to have been founded upon a supposed analogy between an agreement for sale and a mortgage, in which, according to the well-known maxim, "*once a mortgage, always a mortgage*," the express contract of the parties, even under seal, will not take away the power of redemption.

In the principal case, however, Lord *Eldon* said, he was much inclined to think, notwithstanding *Gregson* v. *Riddle*, that time might be made the essence of the contract; and it has since been clearly determined, that if by the contract it clearly appears to be the intention of the parties that time should be of the essence of the contract,—if, for instance, the parties stipulate that the agreement shall be void unless the purchase be completed on a certain day, it will be considered essential in equity: *Hudson* v. *Bartram*, 3 Madd. 440; *Boehm* v. *Wood*, 1 J. & W. 419; *Williams* v. *Edwards*, 2 Sim. 78; *Lloyd* v. *Rippingale*, cited 1 Y. & C. Exch. Ca. 410; *Hipwell* v. *Knight*, 1 Y. & C. Exch. Ca. 401, 416; *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444; *Parkin* v. *Thorold*, 16 Beav. 59; *Gedye* v. *The Duke of Montrose*, 26 Beav. 45; *Hudson* v. *Temple*, 29 Beav. 536; *Oakden* v. *Pike*, 34 L. J. (Ch.) N. S. 620.

But it requires a very strict stipulation to effect that object (*Webb* v. *Hughes*, 10 L. R. Eq. 286); hence a mere statement in

the conditions of sale that the abstract will be delivered on or before a particular day, will not, it appears, be sufficient to render the time of its delivery of the essence of the contract: *Roberts* v. *Berry*, 16 Beav. 31, 3 De G. Mac. & G. 284, 292.

A mere stipulation that possession is to be given on a certain day, by which is meant, "possession after such a previous manifestation of title as would show that possession could be safely taken," will not of itself, unless there is something in the nature of the property to make it so, render time of the essence of the contract: *Tilley* v. *Thomas*, 3 L. R. Ch. App. 61, 66; *Webb* v. *Hughes*, 10 L. R. Eq. 281.

A stipulation that time shall be of the essence of the contract with regard to one of the steps towards completion, raises a presumption that it was not intended to be so with reference to others. If, for instance, time were made of the essence of the contract as to the delivery of objections to title, it would be presumed that it was not essential with regard to the completion of the purchase: *Wells* v. *Maxwell*, 32 Beav. 403.

And it seems that where the contract for sale evidently contemplates that the time might extend beyond the day fixed for completion, as, for instance, where there is a proviso that interest is to be paid upon the purchase-money until the completion of the purchase, time will not be of the essence of the contract: *Webb* v. *Hughes*, 10 L. R. Eq. 286.

Though time be not originally of the essence of a contract, where there has been great and improper delay on one side, the other party has a right to fix a *reasonable* time within which the contract is to be completed. That time will then be considered by a Court of equity as having become of the essence of the contract; and in case the party makes default in doing what is right and proper on his part, within the time so fixed, it will be a reason why the Court will not afterwards interfere in his favour to compel the execution of the contract: *King* v. *Wilson*, 6 Beav. 126; *Heaphy* v. *Hill*, 2 S. & S. 29; *Watson* v. *Reid*, 1 Russ. & My. 226; *Walker* v. *Jeffreys*, 1 Hare, 341; *Benson* v. *Lamb*, 9 Beav. 502; *Pegg* v. *Wisden*, 16 Beav. 239; *Parkin* v. *Thorold*, 16 Beav. 59; *Macbryde* v. *Weeks*, 22 Beav. 533; *Gordon* v. *Mahony*, 13 Ir. Eq. Rep. 404; *Morgan* v. *Gurley*, 1 Ir. Ch. Rep. 482, 495; *Eads* v. *Williams*, 4 De G. Mac. & G. 674; *Nott* v. *Riccard*, 22 Beav. 307. See *Taylor* v. *Brown*, 2 Beav. 183.

The notice to complete must be *reasonable*, otherwise it will be altogether ineffectual. Thus in a recent case it was held that the purchaser was not justified, while negotiations were going on for the removal of his objections to the title, in giving

the vendor notice to complete within a month, or that the contract would be rescinded: *Wells* v. *Maxwell*, 32 Beav. 408, affirmed on appeal, 11 W. R. (L. J.), 842; *King* v. *Wilson*, 6 Beav. 124; *Pegg* v. *Wisden*, 16 Beav. 239; *Parkin* v. *Thorold*, 16 Beav. 59; *M'Murray* v. *Spicer*, 5 L. R. Eq. 527; *Webb* v. *Hughes*, 10 L. R. Eq. 281.

Assuming that time has been made of the essence of the contract either generally or by a reasonable notice during the progress of negotiations, it may be enlarged or waived by subsequent agreement, or by conduct of the parties amounting to a waiver. Thus, if the time is once allowed to pass, and the parties go on negotiating for the completion of the purchase after the time fixed by the contract, or limited by the notice, it will amount to a waiver, and then time is no longer of the essence of the contract (*Boyes* v. *Liddell*, 6 Jur. 725; *Flint* v. *Woodin*, 9 Hare, 618; *Ex parte Gardner*, 4 Y. & C. Exch. Ca. 503; *King* v. *Wilson*, 6 Beav. 124; *Pegg* v. *Wisden*, 16 Beav. 239; *Webb* v. *Hughes*, 10 L. R. Eq. 286); unless the negotiations were *without prejudice*. *Tilley* v. *Thomas*, 3 L. R. Ch. 61.

But if, as in the principal case, a purchaser is aware of the objections to the title, or he receives the abstract after the day appointed (*Pincke* v. *Curteis*, 4 Bro. C. C. 329; *Hipwell* v. *Knight*, 1 Y. & C. Exch. Ca. 401); or proceeds with the purchase, although the time fixed for the completion of the contract may have elapsed, and a much longer period may be requisite in order to make a good title (*Wood* v. *Bernal*, 19 Ves. 220; *Smith* v. *Barnam*, 2 Anst. 527; *Paine* v. *Meller*, 6 Ves. 349; *Ward* v. *Jeffery*, 4 Price, 294; *Smith* v. *Sir Thomas Dolman*, 6 Bro. P. C. 291, Toml. edit; *Ex parte Gardner*, 4 Y. & C. Exch. Ca. 503; *Wood* v. *Machu*, 5 Hare, 158), he will be held to have waived his right to object to the delay, and not be enabled to resist specific performance. And see *Hoggart* v. *Scott*, 1 Russ. & My. 293.

Lord Chancellor *Hart* however thought, that if a purchaser proceeded with the purchase *under protest*, he could not be held to have waived his right to object, on account of the delay: *Magenis* v. *Fallon*, 2 Moll. 576.

If a vendor receives and entertains the requisitions of the purchaser after the time specified, he will, unless he reserves his right under the conditions, be considered to have waived it. *Oakden* v. *Pike*, 11 Jur. N. S. 666.

If one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party, to whom the notice is so given, makes no prompt assertion of his right to

enforce the contract, it will be considered that he has acquiesced in the notice, and abandoned any right he might have had to enforce the performance of the contract: *Guest* v. *Homfray*, 5 Ves. 818; *Heaphy* v. *Hill*, 2 S. & S. 29; *Watson* v. *Reid*, 1 Russ. & My. 236; *Walker* v. *Jeffreys*, 1 Hare, 341.

The time within which objections are to be made to a title may be enlarged by the consent of the vendor: *Cutts* v. *Thodey*, 13 Sim. 206.

Where a vendor turns a purchaser out of possession of a house, where actual possession by residence in the house was an essential part of the contract, he will be held to have abandoned, and will be unable to enforce, the performance of the contract (*Knatchbull* v. *Grueber*, 3 Mer. 124); but where a purchaser was let into the receipt of the rents and profits, under a contract which was to be completed at a definite period, from which time the purchaser was to receive the rents and profits, and, on the other hand, pay interest on the purchase-money, and the purchaser, finding that he could get neither the purchase-money nor the interest, gave notice to the tenants to pay no more rent to the purchaser, it was held upon a bill filed by him against the purchaser for specific performance of the contract, that he had not by giving such notice abandoned it: *Colby* v. *Gadsden*, 34 Beav. 416, 420.

The vendor may, it seems, insist upon the contract being rescinded, where such circumstances exist as render it improbable that the purchase-money can be paid for a long time, as the bankruptcy of the purchaser, or his death, and the inability of his representatives to get in his assets (*Mackreth* v. *Marlar*, 1 Cox, 259; *Whittaker* v. *Whittaker*, 4 Bro. C. C. 31; *Sir James Lowther* v. *Lady Andover*, 1 Bro. C. C. 396; *Rome* v. *Young*, 3 Y. & C. Exch. Ca. 199); and the omission to require repayment of the deposit will not deprive the party of his right to insist that the contract is rescinded, where he has taken other sufficient steps for that purpose: *Watson* v. *Reid*, 1 Russ. & My. 236; *Southcomb* v. *The Bishop of Exeter*, 6 Hare, 224.

Where the vendor's bill for specific performance has been dismissed on the ground of his laches in instituting the suit, and without any decision on the question of title, the Court has declined to order the deposit to be returned to the purchaser, and left both parties to their legal remedies: *Southcomb* v. *The Bishop of Exeter*, 6 Hare, 225.

It is not sufficient for a party who intends to rely upon a waiver of title to allege upon his pleading the facts constituting the waiver: he must show how he means to use the facts, by alleging that the title has been waived thereby: *Clive* v. *Beaumont*, 1 De G. & S. 397.

But although time may be made of the essence of the contract, as, for instance, in taking objections to the title, in reference to any matter appearing upon the abstract, an exception from the ordinary rule in such case will take place, and time will not be considered essential for taking such objection, where there has been unfair dealing, and a plain want of *bonâ fides* on the part of the vendor, as where the conditions were so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title. *Boyd* v. *Dickson*, 10 I. R. Eq. 239, 255.

II. *Where the vendor has not the same interest in the estate as he has contracted to sell, or there is some deficiency in the quantity or quality thereof.*]

In examining these cases, it will be more convenient to consider, 1st, Where the vendor seeks specific performance; 2nd, Where the purchaser seeks specific performance.

1st. *Where the Vendor seeks Specific Performance.*]—Formerly at *law*, where a person contracted to sell an interest, for instance, a term of years, and it appeared that the term of years was of less duration than what the vendor represented it to be, the vendee might recover any deposit which he may have paid, even although the vendor might offer compensation: *Farrer* v. *Nightingale*, 2 Esp. Ca. 639; *Hibbert* v. *Shee*, 1 Camp. Ca. 113; *Duffell* v. *Wilson*, 1 Camp. Ca. 401; see, however, *Belworth* v. *Hassell*, 4 Camp. 140, where the strict rule of law seems to have been relaxed.

In *equity*, however, if the purchaser could get substantially what he contracted for, specific performance would be decreed against him at the suit of the vendor, but he would be allowed *compensation* for the difference in value between what he would get and what he contracted for. "Equity," says Lord *Erskine*, "does not permit the forms of law to be made instruments of injustice; and will interpose against parties attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where, therefore, advantage is taken of a circumstance that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-seven years, he must be nonsuited in an action: but equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced

the principle of compensation, now so well established—a principle which I have no disposition to shake:" *Halsey* v. *Grant*, 13 Ves. 77; see also *Guest* v. *Homfray*, 5 Ves. 818; *Mortlock* v. *Buller*, 10 Ves. 306; and see *Vignolles* v. *Bowen*, 12 Ir. Eq. Rep. 194.

But if the failure to perform the contract were substantial, and such as did not admit of compensation, as where the vendor contracted to sell a term of sixteen years, whereas he had only a term of six years, not only would equity refuse to interfere in favour of the vendor, but would even assist the purchaser in recovering his deposit. See *Long* v. *Fletcher*, 2 Eq. Ca. Ab. 5, pl. 4; and *Spunner* v. *Walsh*, 11 Ir. Eq. Rep. 597.

A purchaser, moreover, could not be compelled to take an underlease instead of an original lease. *Madeley* v. *Booth*, 2 De G. & Sm. 718.

It has, however, never been decided that if a person having a clear title as lessee for eighty years, makes another lease for sixty years, and then the underlessee sells by auction the underlease for sixty years, *simply describing it as a lease*, and subject to a condition of sale, that the lessor's title is not to be inquired into, and the lessor's title is perfectly good, but is not freehold, but only a term of years, this alone would be a reason for resisting specific performance: per *Wood*, V.-C., in *Darlington* v. *Hamilton*, Kay, 558.

A purchaser, however, would not be bound to accept land of a different tenure from that which he contracted for (as, leaseholds instead of freeholds), although the leaseholds might be held for so long a term as to make them nearly equal in value to freeholds; for although, when a party gets substantially that for which he contracts, any small difference might be remedied by compensation, that will not be the case where it extends to the whole estate. See *Drew* v. *Corp*, 9 Ves. 368; 1 S. & S. 201, n.; *Wright* v. *Howard*, 1 S. & S. 190; *Barton* v. *Lord Downes*, 1 Flan. & K. 505.

Nor would a purchaser, unless forced to do so by the conditions (*Price* v. *Macaulay*, 2 De G. Mac. & G. 339), be compelled to take copyhold instead of freehold, because the party buying might particularly wish for a freehold estate: *Twining* v. *Morrice*, 2 Bro. C. C. 33; *Hick* v. *Phillips*, Prec. Ch. 575.

Where a person contracted to purchase an estate as copyhold he would not be compelled to take it if it turned out to be partly freehold: *Ayles* v. *Cox*, 16 Beav. 23.

It seems, however, that specific performance could not be successfully resisted if an estate, represented as copyhold, equal in value to freehold, should turn out to be freehold (*Twining* v.

Morrice, 2 Bro. C. C. 326); unless there were an express stipulation that the contract should be void if it should appear that any part of the estate was freehold: *Daniels* v. *Davidson*, 16 Ves. 249.

Nor could a person be compelled to take a perpetual rent-charge instead of an estate in fee simple. See *Prendergast* v. *Eyre*, 2 Hogan, 81, there a person having contracted for the purchase of an estate in fee simple, subject to a perpetual rent-charge, it was held that he could not be compelled to take a perpetual rent-charge upon the estate, which, as it turned out, was the only interest which the vendor had.

Objections to tenure may be waived by the conduct of the purchaser; as by his proceeding with the treaty for the purchase, after becoming acquainted with the nature of the tenure: *Fordyce* v. *Ford*, 4 Bro. C. C. 494; *Burnell* v. *Brown*, 1 J. & W. 168; *Martin* v. *Cotter*, 3 J. & L. 496. But if he object to the tenure, although he be compelled to fulfil his contract, he will be entitled to compensation: *Calcraft* v. *Roebuck*, 1 Ves. jun. 221.

A purchaser of the entirety would not be compelled to take an undivided share of an estate (*Attorney-General* v. *Day*, 1 Ves. 218; *Roffey* v. *Shallcross*, 4 Madd. 227; *Dalby* v. *Pullen*, 3 Sim. 29; *Casamajor* v. *Strode*, 2 My. & K. 726); nor would a purchaser be compelled to take a remainder expectant upon the determination of a previous life interest, instead of an estate in possession (*Collier* v. *Jenkins*, You. 295; *Nelthorpe* v. *Holgate*, 1 Coll. 203); nor an estate which is subject to a right of sporting not mentioned in the particulars of sale; but he might waive the objection, as by taking possession after notice of it (*Burnell* v. *Brown*, 1 J. & W. 168); nor would a purchaser be compelled to take an estate if it were subject to an undisclosed right of digging for mines (*Barton* v. *Lord Downes*, 1 Flan. & Kel. 505; *Seaman* v. *Vaudrey*, 16 Ves. 390), or an undisclosed reservation of minerals to the lord of the manor on enfranchisement; (*Upperton* v. *Nicholson*, 6 L. R. Ch. App. 436); nor if it were a mere sheep-walk and not a freehold (*Vancouvre* v. *Bliss*, 11 Ves. 458; nor if it were liable to the repairs of a chancel: *Horniblow* v. *Shirley*, 13 Ves. 81, cited as *Fortcblow* v. *Shirley*, 2 Swanst. 223.

Where redeemed land-tax was sold, described as being charged on three houses, whereas it turned out that it consisted of three separate sums charged on three houses separately, it was held that specific performance could not be enforced against the purchaser, as the misdescription was not susceptible of compensation (*Cox* v. *Coventon*, 31 Beav. 378); but it seems that if there were undisclosed quit-rents, and

rent-charges—at any rate, if they were of small amount—specific performance with compensation might be decreed (*Esdaile* v. *Stephenson*, 1 S. & S. 122; *Bowles* v. *Waller*, 1 Hayes, 441; *Prendergast* v. *Eyre*, 2 Hog. 94; *Portman* v. *Mill*, 1 Russ. & My. 696). So also, if lands sold as tithe-free, turned out to be liable to a rent-charge in lieu of tithes, it would be a subject for compensation: *Howland* v. *Norris*, 1 Cox, 59. If quit-rents were sold, a mistake in their amount would be immaterial, and compensation would be allowed (*Cuthbert* v. *Baker*, cited Sugd. V. & P. 354, 11th edit.; Reg. Lib. A. 1790, fol. 442); although the objection would (previous to the Judicature Act, 1875) have been fatal at law: *Johnson* v. *Johnson*, 3 B. & P. 162. And see *Hughes* v. *Jones*, 3 De G. F. & Jo. 307, where it was held that a purchaser who entered into a contract without knowing of the existence of leases for lives at a low rent, could not be compelled to take the title without compensation.

Although the vendor could not make a good title to a small portion of the estate, if compensation could be made for the deficiency, in consequence of such portion not being material to the possession and enjoyment of the estate, specific performance would be decreed: *M'Queen* v. *Farquhar*, 11 Ves. 467; *Knatchbull* v. *Grueber*, 1 Madd. 153; *Bowyer* v. *Bright*, 13 Price, 698; *Carver* v. *Richards*, 6 Jur. (N. S.) 667. This doctrine was carried to a great extent in former times. Sir *Thomas Sewell*, M.R., in *Shirley* v. *Davis*, cited in the principal case (ante, p. 506), went so far as to compel a man who had contracted for a house and wharf to take the house alone, although it appeared that he wanted the wharf for the purpose of carrying on his business. This case has, however, been strongly disapproved of. See 1 Cox, 61, 62; 6 Ves. 679; 13 Ves. 78, 228, 497; *Stewart* v. *Alliston*, 1 Mer. 26. And it may be considered as settled, that where a good title could not be made to a portion of the estate contracted to be sold, if it were material to the possession and enjoyment of the rest, specific performance would be refused. Thus, in *Peers* v. *Lambert*, 7 Beav. 546, A. contracted to sell a wharf on the banks of the river Thames, with a jetty. The jetty turned out to be liable to be removed by the Corporation of London if they thought fit. Lord *Langdale*, M.R., held that the jetty was essential to the beneficial occupation and enjoyment of the premises contracted to be sold, and that a specific performance could not be decreed. And see *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *Perkins* v. *Ede*, 16 Beav. 193.

In the case of *Stewart* v. *The Marquis of Conyngham*, 1 Ir. Ch. Rep. 534, the particulars of sale

stated that the timber on the estate would be included in the purchase. The title was not made out to the timber in a small portion of the lands. There being no misrepresentation, the Court directed an inquiry as to whether the timber on that portion of the estate was material to its possession and enjoyment. See also *Magennis* v. *Fallon*, 2 Moll. 590.

Upon the same principle, if a purchaser in the same contract agrees to purchase an estate for a fixed price, and also something else which is *not* essential to the enjoyment of the estate, and is but a small adjunct to it, if a good title cannot be made to the adjunct, specific performance will be decreed of the contract to purchase the estate alone. Thus, in *Richardson* v. *Smith*, 5 L. R. Ch. App. 648, by the contract for the sale of an estate, it was agreed that the purchase should be 24,000*l.*; and it was further agreed, amongst other things, that certain furniture and other articles on the estate, the value of which were about 2000*l.*, should be valued by valuers mutually agreed upon, and that the purchaser should take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and refused to complete. It was held by the Court of Appeal in Chancery, affirming with a variation the decree of Sir *John Stuart*, V.-C., that the purchaser was entitled to specific performance of the contract, except so far as related to the furniture and articles.

It may be here mentioned, that in a recent case where a house was sold at a fixed price, and the fixtures and furniture therein at a valuation to be fixed by a valuer, and the vendor refused to allow the valuer to enter upon the premises for the purpose of making the valuation, he was compelled to do so by mandatory injunction: *Smith* v. *Peters*, 20 L. R. Eq. 511.

Where the adjunct *was essential* to the enjoyment of the property, as in the case of fixtures in a public-house, specific performance of the contract to purchase the property without the adjunct, though with compensation, has not been enforced: *Darbey* v. *Whittaker*, 4 Drew. 134; *Jackson* v. *Jackson*, 1 Sm. & G. 184. And see *Milnes* v. *Gery*, 14 Ves. 400.

Where, however, vendors who by the contract bound themselves to make out a good title to *all* the lands included in the contract, but were unable to show a title to one three hundred and thirtieth part not necessary to the enjoyment of the other parts included in the contract, which provided for compensation for errors in dimensions in the land, the bill averring that they could make title to *all*, it was held that it was not competent to the vendors

at the hearing to seek specific performance with compensation: *Ashton* v. *Wood*, 3 Sm. & G. 436.

There is no case of the sale of two distinct estates for one entire sum, in which the Court has undertaken, upon a failure of the title as to one estate, to decompose the sum, and fix a standard for adjusting the relative value of the two estates, which would bind the purchaser without regard to his views or estimate of relative value: *Prendergast* v. *Eyre*, 2 Hogan, 89. But it seems, that if an estate is sold by auction, and a good title cannot be made to some of the lots, a specific performance will be decreed as to the lots to which a good title can be made, if they are not complicated with the others. Thus in *Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; a good title could not be made to two of the lots. Lord *Kenyon*, M.R., said, that he must take it for granted that the two lots were not so complicated with the other lots as to entitle the purchaser to resist the whole. But his Lordship added:—"If a purchase was made of a mansion-house in one lot, and farms, &c., in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract." See also *Lewin* v. *Guest*, 1 Russ. 325; *Harwood* v. *Bland*, 1 Flan. & Kel. 540; *Casamajor* v. *Strode*, 2 My. & K. 724. The same rule seems to have prevailed at law: *Gibson* v. *Spurrier*, Peake's Add. Cas. 49; *Dykes* v. *Blake*, 4 Bing. N. C. 463; but see *Chambers* v. *Griffiths*, 1 Esp. Ca. 149.

Where the vendor, having a title to an estate, misrepresented the acreage, whether the estate be sold at so much the acre (*Sir Cloudesley Shovel* v. *Bogan*, 2 Eq. Ca. Ab. 688, pl. 4) or not (*Hill* v. *Buckley*, 17 Ves. 394), the purchaser has been held to be entitled to compensation for a deficiency. See also *In re Gore's Estate*, 3 I. R. Eq. 260.

Where lands were described as "of or about" a certain acreage, or a certain acreage, "be the same more or less," it seems, that if the lands had been actually *conveyed*, the purchaser would not be entitled to an abatement, though they should turn out to be considerably less (*Twyford* v. *Wareup*, Rep. t. Finch, 310; *Anon.*, 2 Freem. Ch. Rep. 106; *Lord Townshend* v. *Stangroom*, 6 Ves. 328); but that, where an agreement in which the acreage had been so described had not been carried out by a conveyance, the purchaser would be entitled to an abatement for a deficiency, unless it were trifling (*Hill* v. *Buckley*, 17 Ves. 394; *Portman* v. *Mill*, 2 Russ. 570; *Day* v. *Finn*, Owen, 133: *In re Egan's Estate*, 6 Ir. Jur. N. S. 90; *In re Browne's Estate*, 6 Ir. Jur. N. S. 185); but see *Winch* v. *Winchester*, 1 V. & B. 375, where lands were described

as containing by *estimation* forty-one acres, be the same more or less, and it turned out that they were five acres and a fraction less than that quantity. Sir *W. Grant*, M.R., held the purchaser not entitled to an abatement out of the purchase-money.

If, however, the vendor knew the true quantity, he would not, by the use of such phrases, be protected from the obligation of making a deficiency good: *Winch* v. *Winchester*, 1 V. & B. 377; *The Duke of Norfolk* v. *Worthy*, 1 Camp. Ca. 337.

In a recent case where, on the sale of some collieries, the vendors had misrepresented the amount of the income as being greatly in excess of what it really was, and specific performance of the contract had been decreed by reason of the purchasers having taken possession of the collieries and prosecuted works thereon upon a large scale, it was held that the latter were entitled to compensation, by a deduction from their purchase-money, bearing the same proportion to the whole purchase-money as the excess bore to the income stated: *Powell* v. *Elliot*, 10 L. R. Ch. App. 424.

It seems that no inference would arise from the intimate acquaintance of the purchaser with the estate (*Winch* v. *Winchester*, 1 V. & B. 975), or even from the fact of his being the occupier of it, that he was acquainted with its exact admeasurement, so as to disentitle him to an abatement. Thus, in *King* v. *Wilson*, 6 Beav. 124, a tenant in possession purchased the property, which was represented to be forty-six feet in depth; it turned out to be thirty-three only: it was held, by Lord *Langdale*, M.R., that he was entitled to an abatement.

If lands are purchased with the usual condition for compensation for misdescription, although upon the lands turning out to be of much greater extent than they were described as being, the purchaser could enforce the contract on payment of compensation, the vendor, who was in fault by the misdescription, could not compel the purchaser to complete, on payment of a proportionately larger sum: *Price* v. *North*, 2 Y. & C. Exch. Ca. 620.

Where a decree is made for specific performance of a contract for sale, and an inquiry is directed in general terms, whether the vendor can make a good title, it must be understood to mean a good title having *regard to the terms of the contract;* and if the vendor wishes to prevent objections, which have been waived before the suit, from being renewed under the inquiry, that point should be considered at the hearing, and noticed in the decree: *Upperton* v. *Nicholson*, 6 L. R. Ch. App. 436, explaining *Curling* v. *Austin*, 2 Dr. & Sm. 129.

2nd. *Where the Purchaser seeks Specific Performance.*]—It may be laid down as a general rule subject, however, to some few exceptions, *that a purchaser may, if he choose, compel a vendor who has contracted to sell a larger interest in an estate than he has, to convey to him such interest as he is entitled to, with compensation.* "If," observes Lord *Eldon*, "a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole:" *Mortlock* v. *Buller*, 10 Ves. 315; see also *Lord Bolingbroke's case*, 1 S. & L. 19, n. (*a*).

Thus, if a tenant for life (*Mortlock* v. *Buller*, 10 Ves. 315); or *pour autre vie* (*Barnes* v. *Wood*, 8 L. R. Eq. 424) or a tenant in fee subject to a life estate (*Nelthorpe* v. *Holgate*, 1 Coll. 203; and see *Barker* v. *Cox*, 4 Ch. D. 464) or a right to dower (*Wilson* v. *Williams*, 3 Jur. N. S. 810) contract to sell the fee simple in possession, the purchaser can compel the vendor to convey such interest as he has with compensation, that is to say, with an abatement of the purchase-money. See also *Hughes* v. *Young*, 3 De G. F. & Jo. 307, 315; *Barrett* v. *Ring*, 2 Sm. & G. 43.

Even where a person contracts to sell a fee simple, and has only a term of years, the purchaser has a right to have an assignment of the term if he thinks fit. *Wood* v. *Griffith*, 1 Wils. Ch. Ca. 44.

If a landlord, from the limited extent of his estate or power, is unable to give, in point of duration, a lease for the whole of the interest which he agreed to give, then if the intended lessee is willing to take—for it cannot be forced upon him—the interest which the landlord can give, the latter must grant a lease to the full extent which his estate or power authorises, and compensation will be made by the Court to the lessee for any loss that he may have sustained by reason of the agreement not being carried out to the full extent: *Leslie* v. *Crommelin*, 2 I. R. Eq. 134, 140.

In *Dale* v. *Lister*, cited 16 Ves. 7, a bill was filed against the vendor for the specific performance of an agreement for the sale of leaseholds held under the Dean and Chapter of Norwich, to which the defendant represented himself to be absolutely entitled. As to

twenty-four acres, part of the leaseholds, he was not absolutely entitled; the same were in effect limited to him for life, with remainder to his sons and daughters in tail. To this part the vendor could not make a good title beyond his own life; he admitted that the plaintiff might put an end to the contract, but insisted that he, the vendor, ought not to be compelled to take less than the stipulated price. However, specific performance, with a reduction of the purchase-money, was decreed. But see Lord *Eldon's* remarks in *Milligan* v. *Cooke*, 16 Ves. 1, on this decision. See also *Hanbury* v. *Lichfield*, 2 My. & K. 629; *Neale* v. *M'Kenzie*, 1 Kee. 474; *Graham* v. *Oliver*, 3 Beav. 124; *Painter* v. *Newby*, 11 Hare, 26.

So likewise, although, as before observed, a person purchasing the entirety cannot, upon a failure to make a title to the whole, be compelled to take a part only of the estate, a purchaser may, in general, if he wishes it, elect to take what he can get, with compensation, *Attorney-General* v. *Day*, 1 Ves. 218; and see 1 V. & B. 353; *Western* v. *Russell*, 3 V. & B. 187; *Hooper* v. *Smart*, *Bailey* v. *Piper*, 18 L. R. Eq. 683.

The principle upon which these cases were decided seems to have been departed from in the case of *Wheateley* v. *Slade*, 4 Sim. 126, there a person being entitled to nine-sixteenths of an estate—a lace manufactory—agreed, by mistake, to sell the entirety, Sir *L. Shadwell*, V.-C., was of opinion that a specific performance could not be decreed as to the nine-sixteenths, with an abatement out of the purchase-money, especially as another person had a lien on the estate for a debt, which would nearly exhaust the whole purchase-money. Lord *St. Leonards* thought that this decision might be referred to the nature of the property, otherwise that it would be difficult to support it, 1 Sug. V. & P. 512, 10th ed. And see and consider *Maw* v. *Topham*, 19 Beav. 576; *Jones* v. *Evans*, 12 Jur. 664; *Price* v. *Griffith*, 1 De G. Mac. & G. 80, 85; *Reynell* v. *Sprye*, 8 Hare, 222; 1 De G. Mac. & G. 660.

Where it turns out that land is subject to some undisclosed right, such as a right to dig for mines, although that would effectually bar the vendor from insisting upon his contract, the purchaser might demand specific performance, with compensation: *Seaman* v. *Vaudrey*, 16 Ves. 390; see also *Peacock* v. *Penson*, 11 Beav. 355; *Painter* v. *Newby*, 11 Hare, 26.

Where the title of the vendor is doubtful or defective, the purchaser cannot compel a conveyance of such interest as he has, with compensation, *Williams* v. *Higden*, 1 C. P. Coop. 500.

Where the purchaser, at the time of the contract, knows of the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest, with

compensation: *Lawrenson* v. *Butler*, 1 S. & L. 13; and see *Emery* v. *Wace*, 5 Ves. 846; *Mortlock* v. *Buller*, 10 Ves. 292; *Nelthorpe* v. *Halgate*, 1 Coll. 203, 215; *Colyer* v. *Clay*, 7 Beav. 189. In *Harnett* v. *Yielding*, 2 S. & L. 549, a tenant for life, with power to make leases for twenty-one years, at the best improved rent, contracted to execute a lease for twenty-one years, and a further lease for twenty-one years, during his life; consequently, to execute a further lease for twenty-one years, whatever might be the increased value of the property at the time such further lease was granted. Lord *Redesdale* held the contract a fraud upon the power, and that the lessee was not entitled to specific performance. To obviate this difficulty, the lessee offered to take a lease for twenty-one years, &c., if the defendant should so long live; but Lord *Redesdale* dismissed the bill, observing, that nothing could be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when what is objected to, to say, "I will take the best you can give me."

Upon the same principle, where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being *aware that the estate belonged* to the wife, and the wife afterwards refused to convey. It was held by the Court of Appeal in Chancery, that the purchaser could not compel the husband to convey his interest, and accept an abated price: *Castle* v. *Wilkinson*, 5 L. R. Ch. App. 534; see also *Emery* v. *Wace*, 5 Ves. 846.

The neglect of a purchaser to make inquiries, may disentitle him from claiming compensation for some defect which with ordinary care he might have discovered. Thus, in a recent case, an agreement for the sale of an advowson for a certain sum was made, nothing *being said by either vendor or purchaser as to the income of the living*. The title was accepted, but before completion the purchaser discovered that the income of the living was charged with the repayment of a sum of money, borrowed from Queen Anne's Bounty for rebuilding the parsonage, of which charge the vendor was aware. It was held by Vice-Chancellor *Stuart* that the purchaser, who obtained a decree for specific performance, was not entitled to compensation: *Edwards-Wood* v. *Majoribanks*, 1 Giff. 384. This decision was affirmed by the Lords Justices (3 De G. & Jo. 329), and by the House of Lords (7 Ho. L. Ca. 806).

In *James* v. *Lichfield*, 9 L. R. Eq. 51, a vendor contracted to sell certain property which the purchaser knew to be in the occupation of a tenant, and it was afterwards discovered by the purchaser

that the tenant had an agreement for a lease. Upon a bill being filed by the purchaser seeking specific performance it was held by Lord *Romilly*, M.R., that the purchaser being affected with notice of the lease, was not entitled to specific performance with compensation. "If," said his Lordship, "the purchaser, knowing of the tenancy, is bound to inquire, as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be bound as regards the vendor? And if the purchaser chooses to bind himself by agreement with this vendor, knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think, also, that no distinction can properly be drawn in a Court of equity, on the ground that the matter rests in contract, and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flowed from, and were incidental to, that notice. He knew that Allen was tenant of this land; he was bound to inquire what the tenancy was, unless he was willing to be bound by the tenancy, whatever it was. The bill must be dismissed with costs, unless the plaintiff elects to take the property without compensation."

Although the *dicta* of Lord *Romilly*, in *James* v. *Lichfield*, laid it down too broadly that the doctrine of constructive notice, arising from tenancy, applies generally as between vendor and purchaser, whilst the matter still rests in contract, and may in fact be considered as overruled in *Caballero* v. *Henty*, 9 L. R. Ch. App. 447, nevertheless the case itself of *James* v. *Lichfield*, the bill having been filed by the purchaser, may perhaps have been rightly decided. If the vendor in such a case had filed a bill for specific performance, it ought, in accordance with the principle laid down in *Caballero* v. *Henty*, to have been dismissed. See ante p. 63.

The distinction which appears now to be established is this, that if a purchaser has, from his knowledge of a tenancy constructive notice of a right of the tenant affecting the subject-matter of the purchase, upon proceedings being taken by the purchaser, specific performance will be decreed, but only upon the terms of his electing to take the property without compensation in respect of the right of the tenant; but if proceedings are taken by the vendor

in such a case for specific performance of the contract, it will be refused.

In taking this course, the Courts no doubt have had regard to the injustice that would often be worked by enforcing compensation against vendors, who may with perfect honesty have failed to disclose some particular, and who would rather take back the estate than submit to any reduction of the purchase-money. And it may well be thought that sufficient is done for the purchaser to satisfy justice, if he has the option of escaping from the contract. If the purchaser elects to take the estate (*i.e.* without compensation), it is a fair inference that he is not dissatisfied with his bargain. Per *Amphlett*, B., 10 L. R. C. P. 428; and see and consider *In re Ryan's Estate*, 3 I. R. Eq. 255; *Phillips* v. *Miller*, 10 L. R. C. P. 420, reversing *S. C.*, 9 L. R. C. P. 196, and *Carroll* v. *Keays*, 8 I. R. Eq. 97, where the distinction before mentioned appears not to have been observed, through too close an adherence to the doctrine laid down by Lord *Romilly*, M.R., in *James* v. *Lichfield*, 9 L. R. Eq. 51.

As a general rule, where there is a deficiency in the quantity of land comprised in a contract for sale, the purchaser can demand specific performance, with compensation: *Hill* v. *Buckley*, 17 Ves. 394; *King* v. *Wilson*, 6 Beav. 124.

Where, however, the statement as to quantity was simply a mistake, and it would be unjust to the purchaser to decree specific performance, with compensation, the purchaser has been compelled to elect whether he would perform the contract without compensation, or have his bill dismissed. Thus, in *The Earl of Durham* v. *Legard*, 34 L. J. (Ch.) N. S. 589, where A. agreed to sell B. an estate, which was supposed by both parties, and was stated in the agreement, to contain 21,750 acres, but in fact contained only 11,814 acres, it was held by Sir *John Romilly*, M.R., upon a bill filed by the purchaser, that he was not entitled to specific performance of the contract, with compensation. "In the case," said his Honor, "of *Hill* v. *Buckley*, 17 Ves. 394, which is usually cited upon these occasions, Sir *William Grant* laid it down, that where there is less land than was agreed to be sold, the ordinary mode of settling it is to ascertain the quantity and take it rateably: if that were done here, the plaintiff would get an estate, which he had intended to buy for 66,000*l.*, for about 33,000*l.* If that principle were to be followed in the present case . . . it is clear I should be doing great injustice. I am of opinion that this is a case simply of mistake, and that the purchaser is not entitled to any compensation. The plaintiff must elect whether he will perform the contract without

compensation, or have the bill dismissed. In either case he must pay the costs of the suit."

A purchaser, moreover, will not be entitled to compensation for any deficiency in the quantity of land, if he bought with a knowledge thereof, but such knowledge will not be presumed from his intimate acquaintance with the property (*Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609), nor even of his having been the tenant of the property (*King* v. *Wilson*, 6 Beav. 124).

The right to compensation may be excluded also by express contract. Thus, where one of the conditions of sale was, "That the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way," upon a bill being filed by the purchaser seeking specific performance, with compensation, the Court decreed specific performance, without compensation, and ordered the plaintiff to pay the costs of the suit: *Cordingley* v. *Cheeseborough*, 3 Giff. 496; 31 L. J. Ch. 617. And see *Nicoll* v. *Chambers*, 11 C. B. 996.

But such a condition excluding compensation for errors may be construed so as to extend to small unintentional inaccuracies only. Thus, in *Whittemore* v. *Whittemore*, 8 L. C. Eq. 603, at a sale by auction under a decree, the property sold was stated in the particulars to contain 753 square yards, or thereabouts, and one of the conditions of sale provided, that if any error, misstatement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only. It was held by Sir *R. Malins*, V.-C., that the condition only applied to small errors, and did not cover a large deficiency, and that the purchaser was entitled to compensation.

The purchaser's right to compensation will not be excluded by a mere condition that he shall not object to complete his purchase if the quantity should turn out less than that stated in the particulars: *Frost* v. *Brewer*, 3 Jur. 165. Nor by acts on his part which merely amount to a waiver of objections to the title: *Calcraft* v. *Roebuck*, 1 Ves. Jun. 221.

But the right to compensation may be excluded, by the vendor rescinding the contract, under a condition empowering him to do so, if unwilling or unable to make a title, or if the title do not prove satisfactory (*Williams* v. *Edwards*, 2 Sim. 78; *Mawson* v. *Fletcher*, 6 L. R. Ch. App. 91; 10 L. R. Eq. 213; *Duddell* v. *Simpson*, 2 L. R. Ch. App. 102), and the vendor may, under such condition, rescind the contract, although the title may be good, if the pur-

chaser persists in an objection to it (*Greaves* v. *Wilson*, 25 Beav. 290; *Page* v. *Adam*, 4 Beav. 269). And this appears to be reasonable, because a good title might only be shown after a long and expensive inquiry, whereas, the vendor might find another purchaser, who would be satisfied with the title as then shown. See *Mawson* v. *Fletcher*, 6 L. R. Ch. App. 93.

It seems, however, that the vendor will not be allowed to rescind the contract if he has sold the property, knowing that his title to a part of it is defective (*Nelthorpe* v. *Holgate*, 1 Coll. 203; but see *Thomas* v. *Dering*, 1 Keen, 729), or he has been guilty of wilful misrepresentation (*Price* v. *Macaulay*, 2 De G. Mac. & G. 347), or if the purchaser is willing to waive all objections to the title, and to take the property without compensation: *Page* v. *Adam*, 4 Beav. 269; *Williams* v. *Edwards*, 2 Sim. 78.

The right to rescind may, moreover, be lost by the vendor replying to the purchaser's objections or requisitions (*Tanner* v. *Smith*, 10 Sim. 410; *M'Culloch* v. *Gregory*, 1 K. & J. 294; Dart, 161, 5th ed.), and by acquiescence in, or confirmation of, the contract (*Cole* v. *Gibbons*, 3 P. Wms. 290; *Attwood* v. *Small*, 6 C. & F. 424, 432; *Flint* v. *Woodin*, 9 Hare, 618), unless the replies to requisitions or objections have been made without prejudice: *Morley* v. *Cook*, 2 Hare, 111; Dart, 161, 5th ed.

As to the right of a purchaser under conditions to rescind the sale, upon being "unwilling or unable" to make a title, see *Duddell* v. *Simpson*, 2 L. R. Ch. App. 102, varying *S. C.*, 1 L. R. Eq. 578; *Powell* v. *Powell*, 19 L. R. Eq. 422.

A partial performance of a contract which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, will not be compelled on behalf of a purchaser. Thus, in *Thomas* v. *Dering*, 1 Kee. 729, a person who was tenant for life *without impeachment of waste*, with remainder to his sons in tail, contracted to sell the fee, which it turned out he had no power to do, and the purchaser thereupon required him to convey his life estate and his reversion in fee, subject to the estate tail; but Lord *Langdale*, M.R., refused specific performance, upon the ground, principally, that it would be unreasonable, and prejudicial to persons interested in the property, but not parties to the contract. See also *Graham* v. *Oliver*, 3 Beav. 124; *Beeston* v. *Stutely*, 27 L. J. (Ch.) 156; 6 W. R. (V.-C. W.) 206.

Nor will partial performance be decreed if there has been misrepresentation on the part of the purchaser, even although he be satisfied with a performance of the

contract subject to any outstanding interests, without compensation: *Clermont* v. *Tasburg*, 1 J. & W. 112.

Where any deficiency in certain events arises as to the extent or duration of an interest in an estate contracted to be sold, not admitting of compensation, it may be laid down as a general rule, that except where a special provision provides for it (*Walker* v. *Barnes*, 3 Madd. 247; *Aylett* v. *Ashton*, 1 My. & C. 105; *Paterson* v. *Long*, 6 Beav. 598); a purchaser cannot be compelled to take, nor a vendor to give, an indemnity: *Balmanno* v. *Lumley*, 1 V. & B. 225; *Paton* v. *Brebner*, 1 Bligh, 66; *Aylett* v. *Ashton*, 1 My. & Cr. 105; *Powell* v. *South Wales Railway Company*, 1 Jur. N. S. 773; *Bainbridge* v. *Kinnaird*, 32 Beav. 346; and see *Ridgway* v. *Gray*, 1 Hall & T. 195; 1 Mac. & G. 109; where the particulars of sale described the property purchased, as "let on lease for twenty-one years, to and in the occupation of B. & Son;" the fact being, that the property had been demised for twenty-one years to T., and had been assigned by him, for the residue of the term, to B. *alone*, one of the firm of B. & Son, who were joint occupants thereof. Lord *Cottenham* said, that he could not see how the purchaser could compel the vendor to give compensation in respect of the misdescription, and that he had no power to compel the purchaser to be satisfied with an indemnity. See, however, *Milligan* v. *Cooke*, 16 Ves. 1; *Campbell* v. *Hay*, 2 Moll. 102.

Upon the same principle in a case in Ireland, lands were sold in the Landed Estates Court, but the exception of mines, minerals, and royalties (which had been excepted upon the conveyance of the property to the persons under whose title the lands were sold) was not mentioned on the rental under which he purchased. It was held by *Lynch*, J., that the purchaser, if dissatisfied with his purchase, was entitled to have back his purchase-money and all costs, but that the Court could not entertain his claim for compensation, as no means were afforded by which the Court could fix or ascertain the amount: *In re Bunbury's Estate*, 1 I. R. Eq. 458.

Where it turned out that the vendor could not make out a title, the purchaser's bill for specific performance has been dismissed, without costs, he being left to his remedy for damages: *Thomas* v. *Dering*, 1 Kee. 729; *Malden* v. *Fyson*, 9 Beav. 347. But where the vendor has filed a bill in such a case, he has been ordered to return his deposit with interest: *Lord Anson* v. *Hodges*, 5 Sim. 227.

Although, as a general rule, a purchaser will not be allowed to

pay his purchase-money into Court, and to enter into the possession of the purchased land, until after the acceptance of the title, where he only asks that his claim to compensation may be reserved, an order to pay the purchase-money into Court will be made: *Man* v. *Ricketts*, 5 De G. & Sm. 116.

HUGUENIN *v.* BASELEY.

Nov. 14, 16, 17, 18, 23, 1807.

[REPORTED 14 VES. 273.]

VOLUNTARY SETTLEMENT OBTAINED BY AN AGENT—UNDUE INFLUENCE.]—*Voluntary settlement by a widow upon the defendant, a clergyman, and his family set aside, as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs; upon the principles of public policy and utility, applicable to the relation of guardian and ward.*

THE object of the bill in this cause was to set aside a conveyance, made by the plaintiff Mrs. Huguenin, previously to her marriage with the other plaintiff, her second husband, as having been improperly and fraudulently obtained. The following are the principal circumstances established by evidence and admission, under which this relief was sought.

In 1803, Mrs. Huguenin, then Mrs. Hill, appeared to be entitled in fee simple to the manors of Cleydon and Hampton Gay, and other estates in Oxfordshire, under the ultimate limitation of the reversion by a will, dated 1768, to her father, Richard Hindes, who had gone to Jamaica, where he acquired considerable property, real and personal, which upon his death also descended to her.

After some correspondence with their solicitors in England, she, in September, 1803, returned with her husband from Jamaica. He died in October, 1803; and in November, she being then about the age of forty, first became acquainted with the defendant, Thomas Baseley, a clergyman, who was also connected with the family of

Hindes, and had with other persons, upon the death of the testator in 1798, instituted a suit claiming as heirs-at-law of Richard Hindes; in which cause an inquiry, directed by the Lord Chancellor, produced the title of Mrs. Huguenin as the only child of Richard Hindes.

The bill stated, that the defendant Baseley, with the view of getting the control and management of the said estates, and of getting them ultimately settled upon himself, procured an introduction to Mrs. Huguenin; and having by various means ingratiated himself with her, represented that her solicitors had mismanaged and neglected her property, and induced her, then a stranger, having no friends or relations in England, and being quite ignorant of the value of property, to withdraw her affairs from those solicitors and to place them in the hands of the defendant; who, with such design, wrote the following letter, which she, by his inducement, caused to be copied and signed, and sent to the solicitors:

"Sirs,—Having been so unfortunate as to lose the best of husbands and the sincerest friend by the premature death of Mr. Hill, I feel myself, as it were, left in that unprotected state that I now want the assistance of some friend with whom I can advise in the adjustment of my affairs, and who will kindly interpose in seeing that my property is managed to the best advantage. From reflection, I have the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with facility to myself. Impressed with this agreeable idea, I beg leave to inform you that I commit (subject to my own inspection) the perfect arrangement of my business with you into Mr. Baseley's hands; and hope that you will prepare, without any delay, every account that you have standing against me, with the deeds, &c., of the estate at Hampton. As I wish to leave London at Lady-day next, I must desire that no delay on your part will take place. Mr. Baseley

will be ready to meet you on the business whenever you will appoint a day. With this determination, I remain, &c. "ANN HILL."

The deeds were accordingly delivered to Baseley, and were deposited by him with his solicitor. The bill farther represented, that the defendant artfully dissuaded the plaintiff from residing in the house at Hampton Gay, and letting the estate, as she had proposed, and recommended to her a surveyor, who gave a very unfavourable account of the situation of the estate; and the defendant Baseley soon afterwards offered her 400*l.* a year for a lease of the whole, clear of all expenses, and keeping the premises in repair, representing 420*l.* a year as the utmost value, which was confirmed by his solicitor; that she executed the deeds under the persuasion of the solicitor that they were her will, and the lease to Baseley, and that she had no intention to give away or settle her estate, &c.

By the deed dated the 5th of May, 1804, which was the subject of the bill, the plaintiff Mrs. Huguenin, in consideration of 10*s.*, conveyed the Hampton Gay estates to a trustee, his heirs and assigns, to the use that she and her assigns might, during her life, receive out of the said manor, &c., an annuity of 400*l.*, secured by a trust term of 500 years; and subject thereto, to the use of the defendant Baseley, for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders to his wife for life, to their children, born or to be born, in tail, with cross remainders, and the ultimate remainder to Mrs. Huguenin. The value of that estate was rather more than 400*l.* per annum.

The defendant, Thomas Baseley, by his answer, represented, that from the time of his first acquaintance with the plaintiff, a great intimacy took place, and she expressed great affection for him and his family; that she complained of the conduct of her solicitors, declaring her intention of taking the management of her affairs from them; and upon her application, he recommended to her

his solicitor and a surveyor, and she intimated to the defendant her intention of settling her estates on him and his family, and requested him to write to her solicitors, to acquaint them that she should take her affairs out of their hands; and the defendant at her request did in her presence, and with her sanction, and according to her directions, write the form of a letter for that purpose, which the plaintiff, as he believes, copied, and sent to her solicitors; but the defendant positively denies that such letter was written at his instigation, or by his desire; on the contrary, he wrote the same at the pressing desire of the plaintiff; and though the language of the letter was the defendant's, yet the substance was in fact dictated by her. In another part of the answer, the defendant denied that he induced her to send that letter, stating his belief that it was written by him, but that it was so written at the particular instance and request of the plaintiff, who desired him to draw up such letter, as before mentioned; and he believes he did, upon that occasion, state to the plaintiff, that, if it was her wish to discharge her solicitors, such letter ought to be in her own handwriting, as it would not be so proper for it to appear in his handwriting, and the plaintiff did copy such letter.

The answer farther stated, that the plaintiff frequently expressed to the defendant a wish to settle her affairs, and make a disposition of her property, inquiring whether the defendant was related to her, and who was her heir-at-law; and being informed, expressed a great dislike to that family. And after various conversations, she repeated her determination to settle the Hampton Gay estate on the defendant and his family; and in March, 1805, without any persuasion, suggestion, or influence, she gave instructions accordingly; and the defendant understood her intention to be, to settle the estate, so as to reserve to herself a rent-charge for her life about equal to the reasonable rent; and that it was her wish that the defendant should go and reside there immediately with his family, so that the mansion house might be kept up; declaring, that she would never reside there on

account of the trouble of repairing, &c.; and the defendant denied all the charges of fraud, influence, &c.

The answer of the attorney who prepared the deed, stated, that when instructed by her to prepare the settlement, he recommended to her to make a will, which might be revoked or altered; when she replied, that she would not do it by will, on that account, as, if she should alter her situation, she intended it should not affect the settlement of her property. The defendant, according to the voluntary instructions of the plaintiff, prepared two deeds of settlement; viz. that of the 5th of May, 1804, as to the Hampton Gay estate, in the bill mentioned, and the other, dated the 21st of June, 1804, relating to all her other estates and property. In the former deed, blanks were left for the plaintiff's rent-charge and the names of the trustees, and she made alterations as to the uses among Baseley's children, and as to the ultimate limitation, which originally was to Baseley in fee. That deed was settled, and the other prepared by counsel; and they were voluntarily and deliberately executed, and the blanks filled up by her direction.

This answer farther stated, that, in the deed of the 21st of June, 1804, the defendant Thomas Baseley, and this defendant, and William Sleet, of Jamaica, were named trustees, and the estates and property therein comprised were conveyed and assigned upon trust during the life of the plaintiff Ann Huguenin, to convey, &c., according to her appointment, and to her separate use, notwithstanding coverture; and, after her decease, for any future husband surviving her, for his life, with remainder to her children by any such marriage, as tenants in common in tail, with cross remainders; remainder to her mother and William James Clarke and the survivor, and to the children of Clarke; with remainder to Thomas Baseley and the two other persons named as trustees, as tenants in common; and 5000*l.* was settled on Mary Ann Elliott; and she was directed, during her minority, to be brought up by Mrs. Baseley, who was to receive the interest of her fortune; 2000*l.* on Elizabeth Eleanor Clarke; 100*l.*

a year on Mrs. Hindes; 200*l.* a year on William James Clarke; and by that deed are settled several estates in Jamaica, with the stock; several sums of money due from different persons; a leasehold estate in Middlesex; the manor of Cleydon, in the county of Oxford, and all the estates real and personal, then late the property of Thomas Hindes, not before conveyed and settled by the plaintiff, and other estates real and personal, stated to be mentioned in the schedules.

This answer also denied all the charges of fraud, misrepresentation, &c.

Sir *S. Romilly*, Mr. *Hollist*, and Mr. *Trower*, for the plaintiffs.—The authorities against permitting a transaction of bounty to take effect between persons standing in certain relations are numerous. Among those relations, that of guardian and ward is not for this purpose confined to persons so related in a strict sense—as under an appointment of guardian by will, or by order of this Court; but the rule includes any person placing himself in that situation: *Hylton* v. *Hylton*, 2 Ves. 547; *Pierce* v. *Waring* (*a*), *Griffin* v. *De Veulle* (*b*), *Hatch* v. *Hatch* (*c*), *Proof* v. *Hines* (*d*), *Dixon* v. *Olmius* (*e*), *Wright* v. *Proud* (*f*), *Newman* v. *Payne* (*g*). The last of these cases is perhaps the most applicable to this—one person undertaking to manage the affairs of another. Such a transaction as this, between persons so connected, cannot, upon principles of public policy, or, as Lord *Hardwicke* expresses it, public utility, be permitted.

The law of other countries, however, affords authorities more precisely applying to the circumstances of this case. According to Pothier (*h*), by the ancient law of France, the same doctrine, that by our law prevails as between guardian and ward, is applied to an administrateur—a person managing the affairs of another, who cannot take a bounty either for himself or his children, what is given to the children being, with reference to natural affection, considered as given to the parent; and this, by a singular concurrence with Lord *Hardwicke*, is expressed to be

(*a*) Cited 1 Ves. 380; 2 Ves. 548, stated from the Reg. Lib. in Mr. Cox's note, 1 P. Wms. 121.

(*b*) 3 Wood. App. 16; 1 Bac. Ab. 109, ed. by Gwill.; 3 P. Wms. 131, Mr. Cox's note.

(*c*) 9 Ves. 292.

(*d*) Ca. t. Talb. 111.

(*e*) 1 Cox. 414.

(*f*) 13 Ves. 136.

(*g*) 2 Ves. jun. 199.

(*h*) Poth. Traité des Donations entre Vifs, s. 1.

upon the ground of public utility. This case, however, goes beyond that. This is an instance of a very peculiar species of influence gained over the mind of this lady by no common means; appearing by the letter, written or dictated by the defendant for Mrs. Huguenin to copy, in terms which he cannot be supposed to use in the light and profane way that too frequently occurs. The English Courts of justice do not afford an instance of influence acquired by such means (*a*); but in foreign Courts such instances have occurred. According to Pothier, it has been decided, upon the same principles of public utility that a confessor, or director of the conscience, a person to whom another trusted his spiritual concerns in matters of religion, cannot take any bounty from the person to whom he acts in that character, and the apprehension of the empire which these persons obtain, was carried so far that a gift to the order of which they were members was not allowed to have effect.

(*a*) See *Norton* v. *Relly*, 2 Eden, 286.

Mr. *Richards*, Mr. *Fonblanque*, Mr. *Hart*, Mr. *Martin*, Mr. *Leach*, and Mr. *Wetherell*, for the defendant.—The conduct of persons who placed themselves in situations of confidence, must be examined with the most scrupulous attention; but there is no rule that creates a disability to take a bounty under these circumstances. The result of the authorities is, that the transaction must be fairly sifted; but a voluntary deed, free from any imputation of surprise, or undue influence, spontaneously executed by a person with her eyes open, cannot be set aside in a Court of equity. In *Villers* v. *Beaumont* (*b*) the principle that has constituted the rule ever since, is laid down by Lord *Nottingham*, that, if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish this proposition, that a man can make no voluntary disposition of his estate but by his will, which would be absurd.

(*b*) 1 Vern. 100.

It is not the province of this Court to enable a person

to rescind an absurd disposition of property. The providence or improvidence of it, though an ingredient, with other circumstances, forming the inference that the donor had not the free uncontrolled possession of his mind, will not do alone. The law of this country does not prevent even a prodigal disposition by a person of sound mind and under no duress. The case of *Dixon* v. *Olmius* ended in a compromise, Lord *Thurlow* finding it impossible judicially to act upon his inclination to extend the principle. A deed obtained by duress or by fraud, as where the party is deceived by the substitution of one instrument for another, is void throughout, not only as to the author, but as to all persons claiming under it; but if a person, actuated by motives of gratitude for services received and benefits enjoyed, desirous of requiting those services and benefits, executes a purpose of bounty, and not only to the author of them, but also to his children, and the father, standing in a relation of confidence, is disabled by the rule, founded on general policy or public utility, to take in his own person, the failure of the purpose as to the father, merely by the effect of that rule of general policy, not through any misconduct or vice in the transaction, shall not be extended to the disappointment of the children, as it would, if the disability arose from want of will in the donor, as in the instances of duress or fraud. Upon the ground of general policy, therefore, the interest of the children must be distinguished from that of the parent.

(*a*) 13 Ves. 136.

In the case of *Wright* v. *Proud* (*a*), the transaction was set aside, as the party had been deceived and practised upon, not exercising a fair unbiassed purpose of bounty. The authority cited from the French law is not supported by the civil law, which, prohibiting donations *inter vivos* on the ground of relationship, does not go beyond that of husband and wife; but Pothier (*b*) goes much farther than the case of administrateur, to a physician, a surgeon, a confessor, every one who may have influence, and extends it even to wills. The rule thus extended can stand only upon the principle of the civil law, by which an act of

(*b*) Traité des Donations entre Vifs, s. 1.

improvidence even may be restrained by the Judge. In this country a man has the absolute dominion over his property, and may give it away in any manner he thinks proper. Then, to whom is bounty usually distributed, —to strangers, to persons in whom no confidence is placed? It is the natural effect of habits of intimate connection and friendship. It is not unusual for a gentleman at a certain age to remunerate his tutor by a gift, who has never been deemed incapable of taking in that way; yet that would be within the restriction of the French ordinance, which, singular and severe as it is, does not go the length of prohibiting a present to the minister of a parish or chapel attended by the donor.

Admitting, what is not clear upon the authorities, that the relation of guardian and ward creates an absolute disability in the former, precluding a gift by the latter, without distinction between an act the result of abused confidence, under an impulse preventing the free exercise of judgment, and the spontaneous bounty, springing from affection, of a person emancipated from control, all accounts settled. Admitting also, according to *Griffin* v. *De Veulle* (*a*), that the restriction applies to any person assuming the office and functions of a guardian, though not legally so constituted, is there any case upon the relation of guardian and ward in which youth and inexperience on one side were not ingredients? Was that character ever applied to a confidential intercourse between persons of advanced life and equal age? In those circumstances their intercourse was merely that of mutual kindness and reciprocal esteem. The defendant undertook no office. He never assumed the functions of her attorney,—a relation involving necessary confidence on one side, and probably influence on the other, calling for application of the principle of public policy; but in the capacity of attorney another person was employed by the plaintiff, her own attorney, who prepared the deed from her instructions, without any direction or interference of the defendant. She went alone to the attorney's office, and gave her own instructions, from time to time

(*a*) 3 Wood. App. 16; 1 Bac. Ab. 109, ed. by Gwill.; 3 P. Wms. 131, Mr. Cox's note.

dictating alterations. It is then said, the defendant was her agent. There is no authority that a mere agent, generally employed in receiving rents, &c., is not capable of receiving a gift; and the case of *Gartside* v. *Isherwood* (*a*), where the leases were set aside expressly on the ground of fraud, disproves it. The principle of public policy has no reference to that mere naked relation.

(*a*) 1 Bro. C. C. 558.

This defendant, however, cannot be represented as an agent in that sense, undertaking for remuneration. If he was an agent, every man acting for his friend is so. Can it be stated that a man who goes beyond mere professions, engaging actively in the concerns of his friend, is therefore obnoxious to this principle of public policy? The utmost extent to which this case can be carried is, that the defendant, as a friend, advised the plaintiff as to the management of her affairs. Her purpose was settled to withdraw her affairs from her former solicitors. The letter was obtained from the defendant in pursuance of that, her own purpose. Incapacity being neither proved nor alleged, the only ground for relief between such parties must be a direct fraud. The latter amounts to no more than a warm testimony of her grateful sense of the defendant's friendship.

Sir *Samuel Romilly*, in reply.—This bill puts the relief it prays, directly upon the ground of undue influence, exerted by the means of spiritual ascendency, distinctly charging that the defendant had taken upon himself to be the adviser of this lady, and the manager of her property, and stating the letter as an instance of that influence. But, divesting this case of that relation and influence, and considering it as the case of a stranger, the evidence of fraud or misapprehension is so strong, that this transaction could not possibly stand. Upon all the evidence it cannot be represented that, when she executed the deed, she was apprised of its nature. How is her sudden change in so short a period, from great anxiety about this estate, to be accounted for, but from the effect of a sort of fascination? Of what consequence was it to Mrs. Huguenin what repairs were to be done, what con-

ditions were to be kept, according to the evidence, upon the supposition that she was parting with the estate for ever? The removal of her husband's corpse to be buried at Hampton Gay is another circumstance utterly inconsistent with the defendant's representation that she did not intend to remain the proprietor. Having a mother, a half-brother, and sister, she was not at a loss for an object of bounty. The evidence as to her conversation with the attorney, suggesting to her that a will would be revocable by a change of her circumstances, shows that she looked to the possibility of a second marriage. Her expression of satisfaction at having attained her object cannot be explained upon the supposition that she was giving away her estate, but may be accounted for if she was to get rid of the trouble attending it.

In these cases, one of the strongest circumstances is the appearance by one person of consulting only the interest of another, and neglecting his own. The passage in Cicero (*a*) is most applicable:—

(*a*) Cic. de Off, Lib. 1, s. 13.

"Totius autem injustæ nulla capitalior est quam eorum, qui, cum maximè fallunt, id agunt, ut viri boni esse videantur."

The duty imposed upon the defendant by merely undertaking the concerns of this lady, made it impossible for him to take the whole of her estate; for it is not necessary to go to the extent that he could not accept any bounty. He took upon him the entire management of her affairs—acting as her agent, receiving her rents, attending arbitrations, &c., &c. The rule is not confined to attorneys or persons entitled to reward. *Proof* v. *Hines* (*b*) was the case of a tradesman, who officiously interfered; *the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another* (*c*); and this case discovers one of a very peculiar nature,—influence obtained through the sacred character of a minister of religion. Though there is no case (*d*) in which the Court has proceeded upon such grounds, the general principle has prevailed, where the means of acquiring influence were much less

(*b*) Ca. t. Talb. 111.

(*c*) See *Dent* v. *Bennett*, 4 My. & Cr. 277, where this proposition is approved of by Lord *Cottenham*.

(*d*) See *Norton* v. *Relly*, 2 Eden, 286.

powerful,—the respect of a child or ward for a parent or guardian. Pothier says, that, by a latitude of interpretation, proceeding upon principles of public utility, that ordinance, expressly concerning only a tutor or administrateur has been extended to the master of a school; the director of the conscience; the physician, who is not permitted during his attendance to take a conveyance from the patient; and to other relations, in which authority or influence must be supposed to exist.

For the proper determination of this case, however, it is not necessary to rely on such authorities. The decisions of English Courts of Justice are amply sufficient. The same doctrine, stated by your Lordship in *Hatch* v. *Hatch* (*a*), was laid down by Lord Chief Justice *Wilmot*, in *Bridgeman* v. *Green* (*b*). There was in that case much evidence that the person was perfectly aware of what he was doing, and had repeatedly confirmed it. Upon that, Lord Chief Justice *Wilmot's* observation is, that it only tends to show more clearly the deep-rooted influence obtained over him (*c*). "In cases of forgery, instructions under the hand of a person whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material; but in cases of undue influence and imposition they prove nothing; for the same power which produces one, produces the other; and, therefore, instead of removing such an imputation, it is rather an additional evidence of it."

(*a*) 9 Ves. 292.

(*b*) 2 Ves. 627; Wilm. 58.

(*c*) Wilm. 70.

(*d*) Wilm. 6, 61.

Having before (*d*) mentioned the distinction of the Roman law between liberality and profusion, he says, our laws strike no such boundary—"*stat pro ratione voluntas* is the law with us;" and this Court never did nor ever will annul donations merely as being improvident, and such as a wise man would not have made, or a man of very nice honour have accepted; nor will this Court measure the degrees of understanding, and say, that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But, though this Court disclaims any such jurisdiction, yet where a gift is immoderate, bears no proportion to the circum-

stances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the persons in whose favour it is made; and if it sees that any arts or stratagems, or any undue means have been used—if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him—if there be the least scintilla of fraud, this Court will and ought to interpose; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

The ground, as between guardian and ward, is put upon the danger, either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority, as the relation of husband and wife is guarded from the effects both of indulgence and severity.

If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian, or even parental authority; what are the means of influence, by severity or indulgence, in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work upon the passions; to excite superstitious fears or pious hopes; to inspire, as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness: that good or evil, which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive that can actuate the human mind? Though no direct authority is produced, your Lordship, dispensing justice

by the same rule as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has occurred, upon this ground alone, from its infinite importance to the community.

November 23, 1807.

Lord Chancellor Eldon.—With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained, whether it is not competent to a Court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others. The case of *Bridgeman* v. *Green* (*a*) is an express authority, that it is within the reach of the principle of this Court, to declare that interests so gained by third persons, cannot possibly be held by them; and Lord *Hardwicke* observes justly, that if a person could get out of the reach of the doctrine and principle of this Court, by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. In that instance, therefore, the interest of the son was considered as capable of being affected by the decree as the interest of the father. The case afterwards came before the Lords Commissioners; and Lord Chief Justice *Wilmot* expresses himself thus (*b*):—

A court of equity can take away from third parties the benefits which they have derived from the fraud, imposition, or undue influence of others.

(*a*) 2 Ves. 627; Wilm. 58.

(*b*) Wilm. 64.

"There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out

amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

This was also the doctrine of Lord *Thurlow*, in the case that has been referred to: *Luttrel* v. *Lord Waltham*, sometimes cited as *Dixon* v. *Olmius*; and, though it was not practically acted upon, Lord *Thurlow* was inclined to carry it farther. The object of that bill in that case was, that an estate should be enjoyed as if a recovery had been suffered, upon the ground that Luttrel had, while Lord Waltham was upon his death-bed, engaged in suffering a recovery, prevented it with the view that the estate should devolve upon the person with whom he was connected. The estate was by the law vested in that individual: a much stronger case, therefore, than the acquisition of property through imposition. Lord *Thurlow*, whatever might have been his final decision upon that case, had no doubt that it was against conscience, that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would not have discussed the case so much at large, if it had been no more than that. These plaintiffs, therefore, if entitled to relief against Baseley, are equally entitled against all the branches of his family.

Relief against a fraud, by preventing a recovery affecting the interests of third persons, not parties to the fraud.

Then, as to persons concerned in these transactions, I agree with the argument, that it is not upon the feelings which a delicate and honourable man must experience, hearing these instruments, taken altogether, as I think myself bound to take them, nor upon any notion of discretion in this Court to prevent a voluntary gift, by a man stripping himself entirely of his property, if undue influence is not imputed, that any judge sitting here has ever thought himself at liberty to interpose. I agree, further, that the relief must proceed upon what is alleged and proved by the person complaining; that their complaints must be treated as effectual or ineffectual, according to what they have, not what they could have, represented:

No discretion upon honourable or delicate feelings to relieve against a voluntary gift, even stripping the owner entirely of his property, if there was no undue influence.

also, as to the defence, it may frequently happen that many passages may have taken place in the course of the transaction that are not brought into view; but the case must be dealt with as it is alleged and proved. I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached, if the situation of the parties had enabled them to go through all the difficulties as to amendment; also, that many circumstances might have been brought forward on behalf of the defendants, which I am bound not to look at: but taking the case as it stands, though there is in this bill much foul allegation, which, if not true ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence, to show that this deed cannot stand, if the whole transaction, taken together, cannot stand.

This bill seeks relief only as to the deed of May, 1804. The deed of June relates to other estates; unquestionably has very different provisions, for very different persons; reserving a degree of dominion, and considerable dominion, to Mrs. Huguenin over that property; and I am disposed to think, that deed could not be made the subject of the same bill: at least, that it was not necessary to complicate this cause by making that a subject of the relief prayed. But the view I take of this case is this: that, attending to the effect of the letter, the evidence of the transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a great measure upon this: that the Court is, by the nature of the defence, required to look at this deed, not merely by itself, but as being more or less justified with reference to the whole of the transactions, in the course of which it was executed; and it is much the same as if the defendant had said, he puts his case, not upon that instrument merely, but as part of a general arrangement of the plaintiff's affairs; and that the deed is to be considered with regard not merely to its own contents, but to the whole transaction, of which this deed forms a part.

The great body of evidence shows the alarm of this lady at the trouble of taking possession of an estate dilapidated. Upon the evidence, until November, 1803, she had no acquaintance whatsoever with Baseley. Her age was about forty. She had left in the West Indies a mother; had great regard for a female child, Mary Ann Elliott; and had also a natural half-brother, named Clarke, of the age of sixteen, in whose education she appears to have been much interested. She brought him over to England; placed him with Mr. Baseley at an expense to herself of 200*l.* a year. Her brother-in-law, Benjamin Hill, states, that he, previously to the introduction of Baseley, managed her concerns; and that, until after that introduction, she expressed her entire satisfaction with the care of the solicitors in whose hands her affairs in this kingdom were placed, which is confirmed by another witness. The bill charges Baseley with infusing into her mind great dissatisfaction with the management, and the want of professional skill and care of those solicitors. The inference that this dissatisfaction was created in her mind by Baseley, is too strong: that she entertained that disaffection is clear: that Baseley did not discourage it, that he gave in to it, is in evidence: that he created it, I cannot say: that he participated in, and acted upon it with her, is clearly established.

In October, preceding the month of January when her affairs were taken out of the hands of those solicitors, her husband, who came with her to England, died. She lived with, or was frequently with the two brothers of her deceased husband. The answer, therefore, stating that she was not without friends in this country is material; but in this view only, that it could be supposed she had ever consulted with them. There is, however, no evidence, that either Baseley ever stated to them what she proposed to do, or that the attorney concerned in the transaction, as Lord Chief Justice *Wilmot* says, felt the obligation of talking both with the grantor and the grantee, before this proposition was carried into effect. Benjamin Hill, one of her brothers-in-law, laid aside all the business after the

solicitors were discharged; and as to George Hill, though there is evidence that she did declare her purpose, it was in conversations, in which it was suggested to them both, and that ample provision was to be made for their children, which I fear had some influence with them. No such provision, however, was made.

It is doubtful, upon the report, whether Mrs. Huguenin had the immediate means of acting with the freedom of an affluent person. At the date of the report, the rents remained to be accounted for by Baseley, to the amount of 300*l.* or 400*l.* After the date of that report, small sums were lent to her: she had not even then paid the costs of the deed; she had borrowed 100*l.* from the attorney; and there is one item of 57*l.*, advanced by Baseley after June, 1804, to discharge her husband from an arrest. Certainly, therefore, she was not in a condition of immediate affluence. Under the influence of her dissatisfaction at the conduct of the solicitors, in January, 1803, either she adopted the resolution of dismissing them, and placing the whole management of all her concerns in the hands of Baseley, calling upon him to assist her in executing it, or it was suggested to her by Baseley. My opinion is, that the weight of the evidence, which does not agree upon this, is, that she called upon Baseley, and desired him to assist her in executing that purpose of her own. If the proposition was her own, yet the transaction, in a Court of justice, has this character at least, that it was demonstration to Baseley that she placed confidence in him, as high as one individual ever placed in another. Where the evidence is contradictory, the fairest way to the defendant is to take his own account; and his answer represents it thus, that she called and requested him to write a letter to the solicitors; and at her request he did, in her presence, with her sanction, and by her direction, write the form of a letter, which he believes she copied and sent to them: but he positively denies that it was written at his instigation or by his desire, and says he wrote it at her pressing desire; and though the language was his, the substance was hers. Who dictated that letter is of very little

importance. If at her dictation he wrote it, and permitted her to send it, that is the most direct communication to him of the nature and extent of the confidence she placed in him; and the language of a Court of justice has in all times been, *that, if a man does not choose to act upon the confidence appearing in the course of the transaction to be so reposed in him, he ought to reject it as soon as proposed.* This letter is, therefore, upon the answer, to be taken as expressing her sentiments in his language. The effect of it is, at least, a communication to him of the information that she was unprotected by the death of her husband; that she wanted assistance for the purpose of advising her in the adjustment of her affairs; that she wanted that friend which Providence had raised up for the purpose of kindly interposing in seeing that her property was managed to the best advantage, and her affairs brought into such a plan that she could conduct them with facility to herself.

This letter produced from the solicitors, rather too hastily, a total severance of themselves from the concern; and Baseley entered, to a certain degree at least, upon the management of them. The purposes expressed and alluded to in that letter, cannot mean that all her estate should be given away: that she was to be enabled to conduct her affairs with facility by giving up all her title. The attorney, who states that he was satisfied that she had made up her mind as to all her affairs, prepared in June these two deeds, conveying this estate, worth at that time, at the lowest calculation, 420*l.* a year, which Annesley wished to purchase upon the supposition that it was worth 610*l.* a year, subject to a rent-charge to herself, with a term in trustees to secure it to Baseley for life; with remainders to Mrs. Baseley for life, and to all their children, born or to be born, and the ultimate limitation to Mrs. Hill. A deed was prepared at the same time, which appears intended to be a conveyance of all her property, but which they were very much perplexed to describe, conveying all her freehold estates in the West Indies and everywhere, none of the parties knowing what they were; all the leaseholds for

lives mentioned in the schedule, of which there are none: and all the leaseholds for years, of which there are some, to her for her separate use for life; with remainders to the husband whom she should marry, surviving her, and to Mrs. Hindes, and young Clarke and his children; and the ultimate limitation, for what reasons is not explained, to Baseley and the attorney, and a person resident in the West Indies: this contemporaneous deed permitted to be made by her, having in contemplation a second marriage, which appears upon the deed itself.

To the question, whether these instruments being such as I have represented them, the consequence is, that this Court shall undo them, I answer, no, if they are the pure, voluntary, well-understood acts of her mind; but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind providential interference to which she was looking for the management of her affairs with advantage and facility to herself; if the conveyance was executed under the effect of that, which has always been considered in this Court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence, that they are not the pure, well-understood acts of her mind, this Court will undo them.

Has an instance ever occurred that a person, situated as this lady, was permitted to execute such instruments as these, with a purpose of marriage demonstrated upon one of them, and having a mother, and other persons whom she regarded with affection and anxiety for their welfare in life? Lord *Hardwicke* reasons with great force as to the voluntary deed, upon the same principle which induced me to ask, how it happens that there is no power of revocation in this instrument. There was in that deed a power of revocation: but it was a power to revoke in the presence of three persons, who, perhaps, never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered strong evidence

As to the absence of a power of revocation in a voluntary deed.

that the party did not understand the transaction, whence arose a strong inference of an undue purpose. There is in this case an attempt to show why there was not a power of revocation; and that is a part of the transaction one of the most liable to objection. The evidence and answer of the attorney go to this distinctly, that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will. When she said that this was to be a permanent arrangement, it is too much to say the attorney permitted himself to be surprised into an act depriving her of her property for the benefit of Baseley's family, and for no provident or wise purpose fettering all her other property by the various limitations in the other deed? I do not say instruments are to be set aside by the want of great delicacy in the person who prepared them: but I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of this lady, or, as Lord Chief Justice *Wilmot* says (*a*), go and talk both to the grantor and grantee upon it. What she said to him must have suggested to him a reason for resisting more strenuously. The Court cannot pay attention to such circumstances as are alleged upon this part of the case.

(*a*) Wilm. 69.

The deed, being drawn by the attorney, was laid before a conveyancer, and the simple question put was, whether a fine and recovery were necessary. Why that should be thought of I do not know, as she had the remainder in fee simple vested in possession. Some observation occurs upon the contents of that instrument. Her annuity of 400*l.* is merely reserved, payable quarterly, not secured by any personal obligation. The three trustees and the rent-charge are left in blank before the deed was laid before counsel, and the filling up those blanks is left to Baseley and herself; and the power of changing the trustees does not depend upon her pleasure, but is only given in the cases of inability or refusal to act. The

reason that there is no power of revocation is, that the gentleman before whom the draft was laid thought his business was to execute the intention of the parties. There is a difference of opinion upon that, other gentlemen thinking some observation necessary. Upon the instructions for the other deed, however, they do not intimate that there is to be any power of revocation, or that she is to have any power to alter the uses. Not a word is dropped upon the subject. But by that deed this lady, who was so shocked at the notion of having a provision that was not to be permanent, has the power of making a deed or will to alter completely these uses. Is there any evidence showing why that power should be there?—a power not to revoke the uses, but much less convenient, yet open to all the objections that she could have to a temporary instrument, as not binding herself down.

Semble, conveyancing counsel ought to observe upon the absence of a power of revocation in a voluntary deed.

Other observations occur upon these instruments. This latter deed, in the limitation as to all the estates, provides an interest to a husband surviving, and to her children. According to the instructions, as to all the money property (and they settle property in the funds, though there was none), they omit the provision for the husband and children, which, however, they thought they had inserted, as there is, afterwards a provision upon failure of children. Another circumstance as to the instrument of the 21st of June, 1804, is that the instructions as to the trustees' names mention Baseley, the attorney, Sleet, and Anderson; and the insertion of Anderson is material. It is proved that she frequently visited him, and he is named as a trustee; but his name is afterwards struck out. Clearly, at the time of the instructions, it was not intended that there should be an ultimate limitation to the trustees for their own use; but they were to be trustees for undefined purposes. The deed was originally drawn so expressing the trust to be for such uses as they should think necessary and proper; but that was afterwards struck out, and the use for the benefit of the trustees themselves substituted.

It does not rest there. Suppose these transactions

entirely separate. Proposing to put under the fetters of these limitations all her considerable West India and other property, for the purposes of facility of management, and putting it out of her own reach, she is permitted to place her West India property under the care of a clergyman and an attorney in England, and a person resident in the West Indies. The power of management is certainly stated to be for her life, subject to her control; how efficacious, every one knows, without any control whatsoever after her death. The management is perfectly *ad libitum*, to lease and carve out of the estates other interests; and they have all discretionary powers as to the children, Mary Elliot, and Clarke; and she could not change any of the trustees without executing that power which it is supposed she had determined not to have.

If such is the nature of these deeds, and the defendant, according to the letter that is in evidence, permitted her to suppose that he was to take the management for her benefit, without considering what an agent engaged for reward can do, the known doctrine is, that the fruit of that relation, if it was not absolutely dissolved, cannot be permitted to subsist. Then, was the relation dissolved? Look at the transactions from the date of the letter to the end of the year: possession taken, and her anxious wish that Baseley should be the occupier, proved; her satisfaction expressed at seeing the house repaired; her declarations that she could not possibly think of undertaking that trouble; and that it was with exultation and satisfaction, as some of the witnesses express it, that she got rid of the estate; that it was no object to her; that she had so much property, it was a subject of delight to her that Baseley was to occupy that which was given to him. Take it that she intended to give it to him, it is by no means out of the reach of the principle. *The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which, from their situation, and relation with respect to her, they were bound to exert on*

her behalf. Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to, her husband, a few weeks before, having been relieved from distress by a sum of money advanced by Baseley.

In that view of the case, no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe, further, that the parties to the transaction did not understand it. Repeating, therefore, distinctly, that this Court is not to undo voluntary deeds, I represent the question thus—whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and though, perhaps, they were not aware of the duties which this Court required from them in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had. These parties, therefore, cannot possibly hold the benefit of these instruments.

As to the costs, the same principles of public utility that require me to decree that these instruments shall be delivered up, compel me to make that decree at the cost of the defendant. As to ordering the deeds and papers to be delivered up, I have not, upon this form of the bill, authority to examine here the contents of the rest of the attorney's bill of costs, who, by happening to be engaged in a transaction that cannot be maintained, would not lose his lien upon the papers with reference to other transactions. If, however, Mrs. Huguenin ought not to have been permitted to execute the deed, I am bound by the principle established in *Bridgeman* v. *Green* (*a*), and other cases, to hold, that if an attorney thinks proper to do more than obey the instructions which he ought not to have permitted to take effect, the Court has frequently said that it is not sufficient; and if he has not

(*a*) 2 Ves. 627; Wilm. 58.

only carried into execution an intention which he ought not to have permitted to take effect, but has also taken to himself an advantage with respect to the property, persons not being consulted who ought to have been consulted (alluding to the ultimate limitation to the trustees), it deserves serious consideration whether he shall not pay the costs if the other cannot. If, however, these papers are to be delivered up on payment of the attorney's bill, he cannot be permitted to charge for drawing instruments which the decree says ought not to have been executed.

One circumstance now occurs to me, which I shall notice, that it may not be supposed to have escaped me. If there is anything like consideration, it is the consideration that arises out of the circumstances that Baseley would repair and lay out money upon the estate. If that had been expressed, it would have amounted to so little, as valuable consideration, that the Court would not have been justified in paying much attention to it; but I cannot find in any of these cases in which a deed has been affected on account of undue influence, that the Court has ever attended to anything supposed merely to oblige the parties, if not expressed.

Huguenin v. *Baseley* is a leading case on the very salutary jurisdiction of equity, to set aside, *upon the principle of general public policy*, voluntary donations obtained by persons standing in some confidential, fiduciary, or other relation towards the donor, in which dominion may be exercised over him. Sir *Samuel Romilly*, in his celebrated reply, in the principal case, most ably argues, that undue influence exerted by means of spiritual ascendency comes within the principle on which relief had been granted, in the case of a gift from a child or ward, to a parent or guardian; but he and the other counsel, and the Lord Chancellor, were evidently not aware of *Norton* v. *Relly*, a decision of Lord *Northington's* (since reported in 2 Eden, 286), in which a grant of an annuity obtained by a dissenting minister having a spiritual ascendency over a woman under a state of religious delusion, was set aside upon principles of public policy. See also *Nottidge* v. *Prince*, 2 Giff. 246; and see and consider

Kirwan v. *Cullen*, 4 Ir. Ch. Rep. 322; *Maccabe* v. *Hussey*, 2 Dow & C. 440.

See, as to the validity of gifts from nuns to their convents (*Whyte* v. *Meade*, 2 Ir. Eq. Rep. 420; *M'Carthy* v. *M'Carthy*, 9 Ir. Eq. Rep. 620; *S.C.*, nom. *Fulham* v. *Macarthy*, 1 Ho. L. Ca. 703); or to trustees for religious purposes: *In re Metcalfe's Trusts*, 2 De G. Jo. & Sm. 122, as to which, see article in 10 Jur. N. S. p. 91. There are some interesting cases on this subject in the Pleadings of Agnesseau in his character of Advocate-General. See "*La Cause des Héritiers de la Dame de Vaugermain* contre *les Religieuses du Saint-Sacrement*" (Œuvres d'Agnesseau, tom. 1, pp. 284, 297. Paris, ed. 1819); and "*La Cause des Religieuses Ursulines de Castel-Sarrazin* contre *Guillaume-Gabriel de Charron, intimé, et Jean de Charron, intervenant.*" (Ib. tom. 5, p. 514).

In *Huguenin* v. *Baseley* the donation was set aside, it seems, not merely on the ground of the spiritual ascendency and undue influence obtained by the defendant over the mind of the plaintiff, Mrs. Huguenin, but also on the ground of his having abused the confidence placed in him by her, as an agent managing her affairs. See *Middleton* v. *Sherburne*, 4 Y. & C. Exch. Ca. 390, 391; *Moxon* v. *Payne*, 8 L. R. Ch. App. 881, 887.

The principle upon which Courts of equity have set aside such donations, has been so accurately stated by Sir *Samuel Romilly*, in his argument, that Lord *Cottenham*, in the case of *Dent* v. *Bennett*, fully adopted it. "The relief," observes his Lordship, "as Sir *Samuel Romilly* says in his celebrated reply in *Huguenin* v. *Baseley* (from the hearing of which I received so much pleasure that the recollection of it has not been diminished by the lapse of more than thirty years), the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another:" 4 My. & Cr. 277.

Before entering further into the consideration of the subject of this note, it may be as well to mention that the case of *Villers* v. *Beaumont*, 1 Vern. 100, as is correctly observed in the argument for the defendant in the principal case, clearly establishes the rule, that, in the case of a stranger, that is to say, a person not standing in any confidential or fiduciary relation towards the donor, equity will not *set aside* a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence, and spontaneously executed or made by the donor with his eyes open. And it is equally clear, that in all cases where it has been proved that a mere stranger, connected with the donor by no peculiar or fiduciary

relation from which undue influence can be inferred, has either by fraud, surprise, or undue influence, obtained from him a voluntary donation, a Court of equity will at once set it aside; in such cases, however, the proof of fraud, surprise, or undue influence is completely thrown upon the donor, for *primâ facie* the donation is valid: *Hunter* v. *Atkins*, 3 My. & K. 113; *Toker* v. *Toker*, 31 Beav. 629; *Armstrong* v. *Armstrong*, 8 I. R. Eq. 1.

In the present note, it is proposed to consider, first, that class of cases, in which actual proof of undue influence may not be required, but will, upon grounds of *public policy*, be more readily presumed from the peculiar relation subsisting between parties. Secondly, those cases where, in the absence of any such relation, it is proved to exist.

I. *Where undue influence is presumed from the relation between the parties.—As to the relation of parent and child.*]—Courts of equity, although there may be no very great evidence of undue influence, have always looked with a jealous eye upon donations from a child to a parent, especially where the child has just come of age, and has set them aside if any advantage has been taken by means of the exercise of parental authority: *Cocking* v. *Pratt*, 1 Ves. 401; *Baker* v. *Bradley*, 2 Sm. & Giff. 531; 7 De G. Mac. & G. 597; *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. Mac. & G. 133; *Potts* v. *Surr*, 34 Beav. 543, 552; *Davies* v. *Davies*, 4 Giff. 417; *King* v. *King*, 3 Jur. N. S. 609, 611; *Chambers* v. *Crabbe*, 34 Beav. 457. In *Carpenter* v. *Herriot*, 1 Eden, 338, where a father having advanced a child in his infancy, upon his coming of age took a bond from him to a greater amount than the sums advanced, and which it appears the son was totally unable to pay, Lord Keeper *Henley* held that the bond was obtained by parental influence, and decreed that it should not stand as a security for the sums advanced, but be set aside altogether. "If," said his Lordship, "a bond be given with advice and deliberation, this Court will not set it aside for the obligor, but if a man gives a voluntary bond for more than he is able to pay, the transaction speaks weakness on the one side, and a sort of imposition on the other." See also *Blunden* v. *Barker*, 1 P. Wms. 639; *Young* v. *Peachy*, 2 Atk. 254, 258; *Glissen* v. *Ogden*, cited 2 Atk. 258; *Heron* v. *Heron*, 2 Atk. 167; *S. C.*, Barnard, 430; nom. *Herne* v. *Herne*; *Hawes* v. *Wyatt*, 3 Bro. C. C. 156; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Meadows* v. *Meadows*, 16 Beav. 401; *Bury* v. *Oppenheim*, 26 Beav. 594; *Turner* v. *Collins*, 7 L. R. Ch. App. 329, 342.

The same principles are applicable to a person obtaining a

voluntary gift, who has put himself *in loco parentis* towards the donor. Thus, in the case of *Archer* v. *Hudson*, 7 Beav. 551, a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing *in loco parentis*. Lord *Langdale*, M. R., set aside the security. "Nobody," observed his Lordship, "has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age; but everybody will affirm in this Court that, if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, *the presumption is, that an undue influence has been exercised* to procure that liability on the part of the child; and that it is the business and the duty of the party who endeavours to maintain such a transaction, to shew that that presumption is adequately rebutted; and that it may be adequately rebutted, is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child; but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control." And see *Revett* v. *Harvey*, 1 S. & S. 502; *Dettmar* v. *Metropolitan and Provincial Bank* (*Limited*), 1 H. & M. 641.

If the transaction between parent and child is reasonable, and entered into with good faith, equity will not interfere, as in *Blackborn* v. *Edgeley*, 1 P. Wms. 600, 606, where a son in plentiful circumstances gave his father a bond to pay him an annuity of 120*l.* for his life. Lord *Macclesfield* held, that, as it appeared to have been the free act of the son, and what he thought himself obliged in honour to do, and there being no proof to impeach it, it ought not to be set aside in equity.

So it seems, if a father prevail upon a son, tenant in tail under a settlement, to take an estate for life only, with remainder to his first and every other son, the transaction will not be set aside upon the suggestion of the father's having an undue influence over him: *Tendril* v. *Smith*, 2 Atk. 86; *Jenner* v. *Jenner*, 2 De G. F. & Jo. 359. So, if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not

set it aside. Per Lord *Hardwicke*, C., in *Cory* v. *Cory*, 1 Ves. 19; and see *Hartopp* v. *Hartopp*, 21 Beav. 259. But these cases would come within the nature of family arrangements; as to which see *Stapilton* v. *Stapilton*, and note, post; *Meadows* v. *Meadows*, 16 Beav. 401; *Baker* v. *Bradley*, 2 Sm. & Giff. 531; 7 De G. Mac. & G. 597; *Jenner* v. *Jenner*, 2 De G. F. & Jo. 359.

It has been held in a recent case, that the relation of father and daughter did not of itself render the validity of an arrangement between them respecting a reversionary interest of the daughter so doubtful as to justify a trustee in refusing to transfer a fund in pursuance of the arrangement without the indemnity of the Court. And a trustee so refusing, and who did not shew that he had endeavoured to ascertain the real nature of the transaction, was decreed to pay the costs of a suit rendered necessary by his conduct: *Firmin* v. *Pulham*, 2 De G. & Sm. 99; *In re Cater's Trust*, 25 Beav. 361. But see *King* v. *King*, 27 L. J. N. S. (Ch.) 29.

As to the relation of guardian and ward.]—A donation from a ward to a guardian is looked upon with great jealousy: and if it has been obtained immediately *upon the ward's attaining his majority*, it will be set aside, upon the presumption of undue influence having been used by the guardian; and even a considerable time after that event, upon proof that the influence of the guardian over the ward still existed; and if undue influence can be fairly *presumed* from the relative position of the parties, or *proved*, the trouble or loss of time the guardian may have sustained in fulfilling the duties of his office will not avail him as a defence or excuse for accepting or obtaining such a donation. "Where," says Lord *Hardwicke*, "a man acts as guardian, or trustee, in the nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or cestui que trust coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force—by good usage unfairly meant, or by bad usage imposed—to take such an advantage. And, therefore, the principle of the Court is of the same nature with relief in this Court, *on the head of public utility;* as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokage bonds. All depends *upon public utility;* and, therefore, the Court will not suffer it, though, perhaps, in a particular instance, there may not be *any actual unfairness*. . . . . The rule of the Court as to guardians is extremely strict, and in some

cases does infer some hardship: as where there has been a great deal of trouble, and the guardian has acted fairly and honestly; and yet he shall have no allowance. But the Court has established that on great utility and on necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances:" *Hylton* v. *Hylton*, 2 Ves. 549.

A gift from a ward to a guardian will be the more readily set aside, if, at the time of its being made, the guardianship accounts are not all settled, or the ward's property is retained by his guardian. Thus, in *Pierse* v. *Waring*, 1 P. Wms. 121, Cox's note; *S. C.*, cited 2 Ves. 549, a ward, immediately on coming of age, directed his guardian to retain and invest, in his own name, a sum of money in the purchase of 3000*l.* East India Stock; and afterwards, by a deed of gift, confirmed the 3000*l.* stock to his guardian. After the death of the ward, a bill being filed by parties claiming under him, Lord *Hardwicke* decreed that the 3000*l.* stock having been retained by the guardian out of the estate of his ward, just on his attaining twenty-one, on pretence of reward or present for his trouble in the guardianship, ought not, under the circumstances, to be allowed, and ordered the deed of confirmation to be delivered up to be cancelled. And in *Hylton* v. *Hylton*, 2 Ves. 547, where an uncle, who was trustee and acted as guardian to his nephew, upon coming to an account and delivering up the estate to his nephew, who was then about twenty-two, took from him a general release and written discharge, and also a voluntary grant of an annuity of 60*l.*, Lord *Hardwicke* set the annuity aside, upon a bill filed by the nephew. And see *Dawson* v. *Massey*, 1 Ball & B. 219, where a lease granted to a guardian, and *Aylward* v. *Kearney*, 2 Ball & B. 463, where leases granted to a guardian's son were set aside. See and consider *Cray* v. *Mansfield*, 1 Ves. 379; *Thornber* v. *Sheard*, 12 Beav. 589. In *Hatch* v. *Hatch*, 9 Ves. 292, a guardian, who was incumbent of a living, obtained from his ward, soon after she came of age, a conveyance of the advowson of the living expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, &c.; and of 10*s.* to his brother, who was the attorney who prepared the deed, and one of the attesting witnesses, and who afterwards became her husband. She continued to live with her guardian for about four years afterwards, when she married her guardian's brother; and sixteen years after her marriage, upon the death of her guardian, she and her husband filed a bill to be relieved against the conveyance. Lord *Eldon*, considering that she had never been her own

mistress, being with her guardian till her marriage, and with her husband since, notwithstanding the time which had elapsed, and taking into consideration the nature of the property, ordered the instrument to be delivered up to be cancelled; but as the husband was *particeps criminis*, the order was made without costs.

Another case also may be mentioned, that of *The Duke of Hamilton* v. *Lord Mohun*, 1 P. Wms. 118. There the duke, being about to marry, entered with great deliberation into marriage articles, one of which was, that he should, within two days after the marriage, release his intended wife's mother, who was her guardian, of all accounts of the mesne profits of the estate. Lord Chancellor *Cowper*, admitting that there had been no surprise, held, that the covenant to make such release ought to be set aside, as it seemed to be extorted from the duke by one who had a power over the young lady as a parent, which ought not to have been made use of in that manner; that it was as if the mother should say, 'You shall not have my daughter unless you will release all accounts;' and that, to tolerate such an agreement, would be paving a way to guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian.

So a voluntary settlement, made by a female ward soon after she came of age, under the influence of her guardian, and without the advice of an independent solicitor, and the effect of which was to deprive her of the control over her own property was set aside as improvident, especially as no power of revocation was reserved: *Everitt* v. *Everitt*, 10 L. R. Eq. 405.

The principle applies also to any person assuming the office and functions of a guardian, although not legally so constituted. *Griffin* v. *De Veulle*, ante, p. 555, cited; *Hylton* v. *Hylton*, 2 Ves. 547.

Where, however, the influence, as well as the legal authority of the guardian over the ward, has completely ceased, and the ward has been put into possession of his property, after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian. See *Hylton* v. *Hylton*, 2 Ves. 549; *Hatch* v. *Hatch*, 9 Ves. 296, where Lord *Eldon* says, "There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui que trust, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given."

As to opening the accounts of guardians, see *Wych* v. *Packington*, 3 Bro. P. C. 46, Toml. edit.; *Mellish* v. *Mellish*, 1 S. & S. 138; *Revett* v. *Harvey*, 1 S. & S. 502.

As to the relation of trustee and cestui que trust, to which much the same principles apply as in the above-mentioned relations of parent and child, and guardian and ward, see *Hatch* v. *Hatch*, 9 Ves. 192; *Hunter* v. *Atkins*, 3 My. & K. 113, 135; *Ellis* v. *Barker*, 19 W. R. (M. R.) 963; *S. C.*, 20 W. R. (L. J.) 160; *Barrett* v. *Hartley*, 2 L. R. Eq. 789.

As to the relation of legal adviser and client.]—Courts of equity have always acted strictly up to this rule, that a solicitor can, by act *inter vivos*, take nothing for his own benefit from his client, *pending a suit*, save his demand, or indeed at any time while the connection between them subsists, with the influence attending it: for though the transaction be as righteous as ever was carried on, it is the settled law, that the connection must, as in the case of guardian and ward, be *bonâ fide* dissolved, before he can take anything beyond his regular fees: *Proof* v. *Hines*, Ca. t. Talb. 116; *Walmesley* v. *Booth*, 2 Atk. 25; *Drapers' Company* v. *Davis*, 2 Atk. 295; *Oldham* v. *Hand*, 2 Ves. 259; *Welles* v. *Middleton*, 1 Cox, 112; 4 Bro. P. C. 245; *Newman* v. *Payne*, 2 Ves. jun. 199; *Hatch* v. *Hatch*, 9 Ves. 296; *Wood* v. *Downes*, 18 Ves. 120; and *Strachan* v. *Brandon*, there cited, p. 127; *Moore* v. *Prance*, 9 Hare, 299; *Re Ingle*, 21 Beav. 275; *Walker* v. *Smith*, 29 Beav. 394; *Re Holmes's Estate*, 3 Giff. 337; *O'Brien* v. *Lewis*, 4 Giff. 221; 32 L. J. N. S. (Ch.) 665; *Gardener* v. *Ennor*, 35 Beav. 549. *Morgan* v. *Minett*, W. N. 1877. p. 153; *Morgan* v. *Green*, *Ib.* Parol evidence is admissible to shew that a consideration expressed upon the face of the deed by which a client conveys property to his attorney is fictitious. *Tompson* v. *Judge*, 3 Drew. 306.

Where, however, there was no cause pending, and it was proved that there was no undue influence exercised by the attorney, a gift to him has been held valid: *Oldham* v. *Hand*, 2 Ves. 259; and see *Harris* v. *Tremenheere*, 15 Ves. 34.

A voluntary conveyance to counsel by the client, expressed to be in consideration of the services of counsel, will be set aside on the ground of public policy: *Broun* v. *Kennedy*, 33 Beav. 133; 4 De G. J. & Sm. 217.

Whenever a professional man is called upon to give his services to his client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result therefrom, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit

may arise to himself from the instrument so prepared; and if he fail to do so, a Court of equity will deprive him of it. See *Segrave* v. *Kirwan*, Beat. 157. There a barrister drew a will for a friend, and was made executor, in which character he became entitled to the personal estate; he was held, however, by Lord Chancellor *Hart*, to be a trustee for the next of kin. "The testator's intention," said his Lordship, "was not directed to his personal estate, and he thought he was only disposing of his real estate: it became the bounden duty of the defendant to have informed him, that if he made no disposition of his personal estate, the law, in consequence of his being the executor, would entitle him to retain it for his own benefit. He was bound to inquire of the testator, in plain and distinct terms, whether it was his will that the defendant should so retain the personal estate for his own benefit. . . . . The defendant has stated that he did not know the rule of law which gives to an executor the undisposed residue. Be it so: but in the administration of justice, what ought to result from that ignorance? The testator relied on the defendant's knowledge of law, as well as on his integrity. Will the avowal of ignorance of the law in the legal adviser justify the disinheriting of the testator's relations in favour of that adviser?" See also *Bulkley* v. *Wilford*, 2 C. & F. 102; 8 Bligh, N. S. 111; *Nanney* v. *Williams*, 22 Beav. 452; *Corley* v. *Stafford*, 1 De G. & Jo. 235; Sugd. Prop. 192; and see *Ex parte Collins*, 2 Ir. Ch. Rep. 618; *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

Until recently an attorney could not take a security from his client for *future* costs (*Jones* v. *Tripp*, Jac. 322), though he might for costs *then due;* and if it were for costs *due and to become due*, it has been held valid as to the costs *then due* only (*Williams* v. *Piggott*, Jac. 598; *Pitcher* v. *Rigby*, 9 Price, 79); and where an account was decreed to be taken of the dealings between an attorney and his client, in the course of which the attorney had taken securities from his client, the attorney was obliged not only to prove the securities, but the consideration for which they were given (*Jones* v. *Thomas*, 2 Y. & C. Exch. Ca. 498); and a mortgage bond or judgment given by a client to a solicitor to secure costs was formerly held only to stand as a security for as much as was actually due, and would be set aside after a considerable time: *Newman* v. *Payne*, 4 Bro. C. C. 350; *S. C.*, 2 Ves. jun. 199; *Langstaffe* v. *Taylor*, 14 Ves. 262; *Wood* v. *Downes*, 18 Ves. 120, 127; *Pitcher* v. *Rigby*, 9 Price, 79. See also *Drapers' Company* v. *Davis*, 2 Atk. 295; and *Saunderson* v. *Glasse*, 2 Atk. 296; *In re Moss*, 17 Beav. 346;

Moss v. *Bainbridge*, 17 Beav. 478; *Morgan* v. *Higgins*, 1 Giff. 270; *Shannon* v. *Casey*, 8 I. R. Eq. 307.

If, however, an account had been settled, and a security taken by a solicitor from his client, though it was viewed with jealousy, it would not be treated as a nullity. Where, therefore, a solicitor and client had settled an account, and the client gave a mortgage and a covenant to pay the sum alleged to be due, and the solicitor having sued on the covenant, the client filed a bill impeaching the transaction on the ground of surprise, undue influence, and error, which being denied by the answer, a motion to stay proceedings on the covenant was refused: *Jones* v. *Roberts*, 9 Beav. 419; but see *Pince* v. *Beattie*, 32 L. J. N. S. (Ch.) 734.

And after acquiescence for a long time, although a solicitor might, pending his employment, have taken security from a poor and illiterate client for costs due, *and to become due*, unless actual fraud, such as intentional misrepresentation or concealment on the part of the attorney, were proved, the accounts would not be opened: *Shaw* v. *Neale*, 20 Beav. 157, 180; and see *Blagrave* v. *Routh*, 2 K. & J. 509; 8 De G. Mac. & G. 620.

The law on this subject has been altered by the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 16, whereby an attorney or solicitor may take security from his client for his future fees, charges, and disbursements, to be ascertained by taxation or otherwise.

An agreement by a solicitor to receive a fixed sum for costs for business hereafter to be done, was formerly held not to be binding upon his client, who was notwithstanding payment under it, entitled to an order of the Court for the delivery of a bill of costs and its taxation. *In re Newman*, 30 Beav. 196.

Now, however, by the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, "an attorney or solicitor may make an agreement in writing with his client, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary, or otherwise, and either at the same or at a greater, or at a less rate as, or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of the Act contained." These provisions, which are somewhat stringent, provide (amongst other things) for the taxation in certain cases of amounts, payable under agreements (sect. 4), save the

rights of third persons (sect. 5), exclude further claims on the part of the attorney or solicitor (sect. 6), prevent their relieving themselves from responsibility for negligence (sect. 7), provide for the determination of all questions relating to such agreements, by motion or petition without suit or action (sect. 8), and that agreements may be set aside (sect. 9) or reopened after payment thereunder in special cases (sect. 10).

Since the passing of the Attorneys and Solicitors Act, 1870, it has been held that an agreement by an attorney with his client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in an action" was valid, and need not be in writing: *Jennings* v. *Johnson*, 8 L. R. C. P. 425.

The doctrine of equity, upon the subject of voluntary donations conferred upon persons standing towards the donee in the intimate relations before referred to, has been well summed up by Lord *Brougham*, in his elaborate judgment in *Hunter* v. *Atkins*, 3 My. & K. 135. "There are," said his Lordship, "certain relations known to the law, as attorney, guardian, trustee. If a person standing in these relations to client, ward, or cestui que trust, takes a gift, or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule, rightly considered, is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in; so that he may gain no advantage whatever from this relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor, by whose assistance he has long benefited, and he may fairly and wisely desire to benefit him by a gift; or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease; no law that is tolerable among civilized men, men who have the benefits of civility, without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others, and advantageous to

himself: in a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger, it would lie on those who opposed him) to show that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened which might not have happened had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson* v. *Jeyes* (6 Ves. 277), that attorney and client, trustee and cestui que trust, may deal, but that it must be at arm's length, the parties putting themselves in the situation of purchasers and vendors, and performing, as the Court said (and I take leave to observe, not very felicitously or even very correctly), all the duties of those characters; the authorities mean no more, taken fairly and candidly towards the Court, when they say, as in *Wright* v. *Proud* (13 Ves. 138), that an attorney shall not take a gift from his client while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature: a dictum, reduced in *Hatch* v. *Hatch* (9 Ves. 206) to this, that it is almost impossible for a gift from a client to attorney to stand, because the difficulty is extreme of shewing that everything was voluntary and fair, and with full warning and perfect knowledge; for in *Harris* v. *Tremenheere* (15 Ves. 40), the Court only held, that, in such a case, a suspicion attaches on the transaction, and calls for minute examination."

II. *As to the exercise of jurisdiction where no peculiar relation exists between the donor and donee.*]—The principle upon which equity will give relief as against the persons standing in the above-mentioned relations to the donor, will, as has been before stated, be extended and applied *to all the variety of relations in which dominion may be exercised by one person over another.* And see *Smith* v. *Kay*, 7 Ho. L. Ca. 750. In *Dent* v. *Bennett*, 4 My. & Cr. 262, where a gift, obtained by a medical attendant from his patient, was set aside by Lord *Cottenham*, it was argued, upon the authority of the civil law and some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. "Undoubtedly," observed his Lordship. "they are; but I will not narrow the rule, or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this Court by any enumeration of the description of persons against whom it ought to be most freely used." In *Lyon* v. *Home*, 6 L.

R. Eq. 655, Mrs. Lyon, a widow, aged seventy-five, within a few days after seeing one Home, who claimed to be a "spiritual medium," was induced from the belief that she was fulfilling the wishes of her deceased husband, conveyed to her though the medium of Home, to adopt him as her son, to transfer 24,000*l.* to him; to make her will in his favour; afterwards to give him a further sum of 6000*l.*; and also to settle upon him, subject to her life interest, the reversion of 30,000*l.* These gifts were made without consideration, and without power of revocation. It was held by Sir *G. M. Giffard*, V.-C., that the relation proved to have existed between them implied the exercise of dominion and influence by Home over Mrs. Lyon, and, consequently, that as Home had failed to prove that these gifts were the pure, voluntary well-understood acts of Mrs. Lyon's mind, they must be set aside. See also *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Fowler* v. *Wyatt*, 22 Beav. 232, 237.

So, where a widower married the sister of his deceased wife, it was held by Lord *Campbell*, C., affirming the decision of Sir *J. Stuart*, V.-C. (reported 2 Giff. 279), that the relation thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister, the onus of showing that at the time of entering into the transaction she was fully, fairly, and truly informed of its character and of her legal *status*: *Coulson* v. *Allison*, 2 De G. F. & Jo. 521.

The influence of a man over a woman to whom he is engaged to be married is presumed to be so great, that the Court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used: *Page* v. *Horne*, 11 Beav. 227, 235, 236; *Corbett* v. *Brock*, 20 Beav. 524; *James* v. *Holmes*, 31 L. J. N. S. (Ch.) 567.

In *Harvey* v. *Mount*, 8 Beav. 439, a voluntary settlement by a younger sister of the whole of her present and future property principally in favour of her eldest sister, was set aside upon the same principle as the transaction in the principal case, viz., that the eldest sister had obtained great ascendency and influence over the younger sister, and was allowed to assume the management of *all* her affairs; the circumstances of the transaction moreover being open to suspicion, the settlement being very improvident, and the younger sister not having had the benefit of independent professional advice. And see *Osmond* v. *Fitzroy*, 3 P. Wms. 129, and note; *Bridgman* v. *Green*, 2 Ves. 627; Wilm. 58; *Norton* v. *Relly*, 2 Eden, 286; *Wright* v.

Proud, 13 Ves. 136; *Purcell* v. *M'Namara*, 14 Ves. 91; *Collins* v. *Hare*, 1 Dow. & C. 139; *Cooke* v. *Lamotte*, 15 Beav. 234; *Wilkinson* v. *Fowkes*, 9 Hare, 592; *Custance* v. *Cunningham*, 13 Beav. 363; *King* v. *Smith*, 21 Beav. 522; where deeds, upon proof of undue influence, independent of any fiduciary relation, were set aside.

Perhaps no general rule can well be laid down, as to what amounts to undue influence: that will be a question for the Judge to decide, upon the circumstances of each particular case, and such circumstances as the non-intervention of a disinterested person, or professional adviser on the behalf of the donor; especially if the donor is, from age or weakness of disposition, likely to be imposed upon (*Griffiths* v. *Robins*, 3 Madd. 191; *Dent* v. *Bennett*, 4 My. & Cr. 273; *Harvey* v. *Mount*, 8 Beav. 439; *Page* v. *Horne*, 11 Beav. 227); the statement of a consideration, where there was actually none (*Hawes* v. *Wyatt*, 3 Bro. C. C. 156; *Gibson* v. *Russell*, 2 Y. & C. C. C. 204; *Sharp* v. *Leach*, 31 Beav. 491); the absence of a power of revocation (*Coutts* v. *Ackworth*, 8 L. R. Eq. 558; *Wollaston* v. *Tribe*, 9 L. R. Eq. 44; *Everett* v. *Everett*, 10 L. R. Eq. 405; *Lyon* v. *Home*, 6 L. R. Eq. 655); the improvidence of the transaction (*Harvey* v. *Mount*, 8 Beav. 439), furnish a probable though not always a certain test of undue influence or fraud: *Phillips* v. *Mullings*, 7 L. R. Ch. App. 244; *Hall* v. *Hall*, 8 L. R. Ch. App. 430, reversing *S. C.*, reported 14 L. R. Eq. 365; *Armstrong* v. *Armstrong*, 8 I. R. Eq. 1.

But in such cases, where the intimate relations before-mentioned do not exist between the donor and donee, undue influence must be proved against the donee, in order that the gift may be set aside. See *Hunter* v. *Atkins*, 3 My. & K. 113; *Beanland* v. *Bradley*, 2 Sm. & Giff. 339; *Toker* v. *Toker*, 31 Beav. 629. See, however, the remarks of Sir *John Romilly*, M. R., 15 Beav. 241, on the judgment of Lord *Brougham* in *Hunter* v. *Atkins*.

It may, however, be laid down, that even in the absence of any special relation between the parties, where a person *gains a great advantage over* another by a voluntary instrument, the burden of proof is undoubtedly thrown upon the person receiving the benefit, and he is under the necessity of showing that the transaction was fair and honest; for although the Court never prevents one person from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary, and not produced by any undue influence or misrepresentation (*Hoghton* v. *Hoghton*, 15 Beav. 299; *Blackie* v. *Clark*, 15 Beav. 600; *Cooke* v. *Lamotte*, 15 Beav. 234; *Custance* v. *Cunningham*, 13 Beav. 363;

Billage v. *Sothee*, 9 Hare, 534; *Allen* v. *Davis*, 4 De G. & Sm. 133; *Price* v. *Price*, 1 De G. Mac. & G. 308; *Phillips* v. *Mullings*, 7 L. R. Ch. App. 244); and also that the donor, especially when of weak mind, fully understood the effect of the transaction, otherwise it will be set aside (*Anderson* v. *Elsworth*, 3 Giff. 154); even after the death of the donor and donee: *Phillipson* v. *Kerry*, 32 Beav. 628.

In judging of the validity of transactions between persons standing in a confidential relation to each other, a material point to be considered is, whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of little importance in such cases; they are important only when no such confidential relation exists: *Rhodes* v. *Bate*, 1 L. R. Ch. App. 252. And it seems that where a confidential relation is established the Court will presume its continuance, unless there is distinct evidence of its termination; *Rhodes* v. *Bate*, 1 L. R. Ch. App. 252.

Where one party has acquired undue influence over another by operating on his fears, as for instance by threatening to bring ruin and disgrace upon his son by indicting him for forgery, any agreement executed by the father while under such influence will be set aside with costs; and it seems that even the intervention of other circumstances or collateral advantages to the father will not be sufficient to sustain such an agreement: *Bayley* v. *Williams*, 4 Giff. 638, affirmed nom. *Williams* v. *Bayley*, 1 L. R. Ho. Lo. 200.

An appointment made in exercise of a power by a wife in favour of her husband will be considered good, unless the wife or other persons impeaching the instrument show that it was executed under circumstances sufficient to invalidate it, and the evidence of one of the witnesses that the wife was agitated and distressed and signed the deed in a reluctant manner, has been held to be insufficient: *Nedby* v. *Nedby*, 5 De G. & Sm. 377, 384.

Where a person executes a voluntary deed in the expectation of his immediate death, but not with the intention that it should be operative in case he recovers, such deed will be set aside, even in the absence of undue influence, if no power of revocation has been introduced into the deed: *Forshaw* v. *Welsby*, 30 Beav. 243.

Although, as a general rule, if a voluntary deed does not express the intention of the parties, it cannot be rectified so as to carry out their intentions, and if it be impeached it must wholly stand or wholly fall: *Phillipson* v. *Kerry*, 32 Beav. 628; *Broun* v. *Kennedy*, 33 Beav. 133. See ante, vol.

1, p. 44; nevertheless, when the plaintiff agrees that the deed ought to stand, and takes objection only to part thereof, the Court has jurisdiction to reform the deed, by striking out such part as it may deem objectionable: *Turner* v. *Collins*, 7 L. R. Ch. App. 342.

III. *How far the Court will interfere as against third parties.*]—An interest obtained by undue influence, as Lord *Eldon* decided in the principal case, cannot be held by third parties, although innocent of fraud. "Whoever," to use the expressive language of Chief Justice *Wilmot*, "receives the gift, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it:" *Bridgman* v. *Green*, Wilm. 58, 64; *S.C.*, 2 Ves. 627. And see *Goddard* v. *Carlisle*, 9 Price, 169; *Scholefield* v. *Templer*, Johns. 155; *Smith* v. *Kay*, 7 Ho. L. Ca. 750.

Where a creditor obtains a security from a person likely to be under the influence of his debtor, as, for instance, in the case of a son or younger brother of the debtor's just come of age, the onus will lie upon the creditor of showing that such person understood the transaction, and that he did not act under any undue influence, otherwise the transaction will be set aside: *Berdoe* v. *Dawson*, 34 Beav. 608; *Baker* v. *Bradley*, 7 De G. Mac. & G. 597, 2 Sm. & G. 531; *Sercombe* v. *Sanders*, 34 Beav. 382.

Upon the same principle in *Maitland* v. *Irving*, 15 Sim. 437, Irving and Brown, who were partners as coal-merchants, consented to postpone the payment of 5000*l.* due to them from Maclean, in consideration of his procuring and giving the guarantee of the plaintiff, Miss Maitland, for that sum; and Maclean, at the same time, informed Irving and Brown that Miss Maitland was his niece, and was possessed of considerable property; that she had resided with him for some time, that he had been her guardian, and that she had been of age about a year and a half. Afterwards, another arrangement was made between Irving and Brown and Maclean, in pursuance of which Irving and Brown delivered up the guarantee, and Maclean procured and gave them the plaintiff's cheque for 3000*l.* and her promissory note for 1200*l.*, as securities for his paying them those sums. Sir *L. Shadwell*, V.-C., granted, and afterwards continued, an injunction, restraining Irving and Brown from prosecuting an action against the plaintiff to recover the 3000*l.*;

and notwithstanding they had obtained a verdict, he refused to order the money to be paid into Court. "The case," said his Honor, "has been argued for the defendants as if it were a case in which they had some ground to resist the rule in equity, because of their not being volunteers. But no consideration whatever was given to the young lady; on the contrary, she was induced to do the act upon an application made to her by a person, who, if he had performed his duty, would have advised her not to do that which he applied to her to do. She was influenced by him, or, at least, allowed by him, to give this very guarantee, which was a direct benefit to all the defendants (Maclean was a defendant), in the situation in which they then stood with respect to each other. The facts of the case seem to me to amount to this: that Irving and Brown, knowing the defenceless situation of the young lady, combined with Maclean, who disclosed it to them, in order that advantage might be taken of her defenceless situation, for the benefit of all the three. And my opinion is, that they must all three be considered as standing in the same situation. It is most necessary to consider the transaction in this view, because it is the foundation of the whole case; for, what subsequently took place was nothing more than a substitution of the note and the cheque for the guarantee." And see *Maitland* v. *Backhouse*, 16 Sim. 58; *Archer* v. *Hudson*, 7 Beav. 551; *Espey* v. *Lake*, 10 Hare, 261, *Dettmar* v. *Metropolitan and Provincial Bank (Limited)*, 1 H. & M. 641; *Rhodes* v. *Bate*, 1 L. R. Eq. App. 252; *W.* v. *B.*, 32 Beav. 574; *Kempson* v. *Ashbee*, 10 L. R. Ch. App. 15.

The principles, however, laid down in these cases are not, it seems, applicable to the case of a *bonâ fide* purchase without notice. Thus in *Blackie* v. *Clark*, 15 Beav. 595, a married woman having separate estate, joined with her trustee, who was her confidential medical adviser, in granting annuities secured on her separate estate for his benefit. Upon her filing a bill to set them aside as against the grantees, it was held by Sir *J. Romilly*, M.R., that the burden of proving their invalidity was on her, and as it appeared that she understood the transaction, and that no undue persuasion or coercion had been proved, the annuities could not be impeached, and his Honor, without absolutely determining that the Court would not act in the same way in both cases, thought there was a manifest difference between such a case, and the cases of *Archer* v. *Hudson*, and *Maitland* v. *Irving*, for the latter were neither of them cases of a purchase for valuable consideration. "They were cases," he added, "in which money had been *already* lent, and the creditor, finding his security very imperfect,

obtained from the volunteer, *who gained no benefit at all*, a distinct and manifest advantage. The same observations do not apply to the case of a *bonâ fide* purchase, in the first instance, for valuable consideration, because, if the purchase be a fair one, the purchaser gains no advantage, for he would simply abstain from purchasing if the volunteer did not think fit to join in the transaction."

In *Corbett* v. *Brock*, 20 Beav. 524, a debtor induced a lady, to whom he was engaged to be married, to become security for a debt. After the marriage she insisted that she had been imposed upon. It was held by Sir *John Romilly*, M.R., that the only duty of a creditor (who was aware of the relation between the parties) towards the lady was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security. "I fully adhere," said his Honor, "to what I expressed in the cases of *Cooke* v. *Lamotte* (15 Beav. 234), and *Hoghton* v. *Hoghton* (15 Beav. 278), and if this were a case between the husband and wife I should require him to prove all the requisites I pointed out in those cases as necessary to give validity to the transaction; but when the security gets into the hands of a purchaser for valuable consideration, the case is very different, unless the person obtaining the benefit of it has been guilty of, or privy to, the fraud. The fact of the intended husband saying, 'I am about to marry a lady who will give you security,' does not amount to notice to them that this security could only be obtained by undue influence."

It will be observed that in the principal case, the solicitor who prepared the deeds which were set aside as obtained by undue influence having been made a party to the suit, Lord *Eldon* observed that it deserved serious consideration "whether he should not pay the costs if the other defendant could not." This observation of Lord *Eldon's* was acted upon in a recent case. See *Baker* v. *Loader*, 16 L. R. Eq. 49. There a suit which had been instituted to set aside certain deeds and documents by which the plaintiff had conveyed away the whole of her property, and to recover back the property lost by means of them, was defended on behalf of the party who claimed under the deeds by the solicitor who had prepared the documents sought to be impeached. The bill was then amended by making the solicitor a party for discovery, and asking that he might be ordered to pay the costs of the suit. The amended bill also contained charges of improper motives against him which were not sustained. It was held by Sir *R. Malins*, V.-C., that his having defended the suit on behalf of the

principal defendant, and endeavoured to support the transactions sought to be impeached, in addition to want of caution in the preparation of the documents themselves, were sufficient reasons for ordering him to pay the costs of the suit if the estates sought to be made liable were insufficient to pay them, notwithstanding that the charges against him were not sustained. "The members of the profession," said his Lordship, "cannot too distinctly understand that they are not, because poor misguided people tell them to prepare deeds depriving themselves of their property, and by which they enter into arrangements which no reasonable man can sanction, to undertake such business; and that if they do enter into such transactions they will be in danger of being required to relieve from costs the parties who have had costs thrown upon them by the preparation of such deeds, and that if brought before the Court to explain their conduct they will never get the costs of the explanation." See *Beadles* v. *Burch*, 10 Sim. 332; *Harvey* v. *Mount*, 8 Beav. 439.

As to acquiescence and confirmation, see *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. Mac. & G. 133; *Stump* v. *Gaby*, 2 De G. Mac. & G. 623; *Wollaston* v. *Tribe*, 9 L. R. Eq. 44; *Jarratt* v. *Aldam*, 9 L. R. Eq. 463; *Turner* v. *Collins*, 7 L. R. Ch. App. 342; *Moxon* v. *Payne*, 8 L. R. Ch. App. 88; *Kempson* v. *Asbee*, 10 L. R. Ch. App. 15; and ante, vol. i. pp. 194—197.

IV. *As to gifts by will.*]—The rules of equity in relation to gifts *inter vivos*, by which fraud is presumed when they are obtained from persons standing in certain relations to the donors, have been held not applicable to gifts by wills. See *Parfitt* v. *Lawless*, 2 L. R. P. & D. 462; *Ashwell* v. *Lomi*, 2 L. R. P. & D. 477.

It appears that an attorney, although he himself has prepared it, may take a gift under the *will* of a client, for his own benefit as devisee or legatee, if the will was not made under any mistake, or misapprehension caused by the attorney: *Hindson* v. *Weatherill*, 5 De G. Mac. & G. 301; reversing *S. C.*, 1 S. & Giff. 604; *Walker* v. *Smith*, 29 Beav. 394.

There does not seem to be any sound reason why the rules of equity, as to the presumption of undue influence should not be applicable to wills, and if they are not made so by sect. 25, sub-sect. 11, of the Judicature Act, 1873 (36 & 37 Vict. c. 66) there is certainly still room for further legislation upon a very important subject.

EARL OF OXFORD'S CASE.

13 *Jac.* 1.

[REPORTED 1 CH. REP. 1.]

S. C., Toth. 126 (edit. 1823), nom. *Comes Oxon* v. *Necth.*

JURISDICTION OF EQUITY AS TO PROCEEDINGS AT LAW.]—*Principles on which equity restrains proceedings under a judgment obtained at law.*

MAGDALEN COLLEGE, 39 Hen. 8, seised in fee of the Rectory of Christ's Church, and the Covent Garden, without Aldgate, London, containing seven acres, demised them for seventy-two years, rendering 40*l.* per annum for the rectory, and 9*l.* for the Garden. And 17 Eliz. (fifty years of the said lease being expired), the Queen, at the suit of the said College, licensed them to alien, which they did, and then received for the rectory 25*l.* per annum, and 15*l.* for the garden. It being her Majesty's intent that the College should be advanced greatly in profit, by having the Rectory to them and their successors, discharged of the lease for years, which in present was worth to them but 50*l.* per annum, the utmost rent; the same was accordingly performed by a conveyance to her Majesty, and by her Majesty to Spinola and the Rectory, from Spinola to the College; after which, Spinola and the Earl of Oxford, his assignee, and his under tenants have built upon the Garden one hundred and thirty houses, and therein bestowed 10,000*l.*, which assignee and his under tenants have bonds and security given for the enjoyment thereof, to the sum of 20,000*l.*

Note.—The College is hereby advanced 1700*l.* more than they should have been if the former lease had continued, which is not yet expired.

This conveyance having been in peace forty years, and thus advanced by the purchasers from a thing of little value to a great and considerable one; and it being a

general case wherein persons of all degrees and callings have made purchases, they resting secure on its passing through the Crown, the greatest protection.

The present master of the College having by undue means obtained possession of one of the one hundred and thirty houses, whereof one Castillion was lessee, who being secure of his title, both in law and equity, sealed a lease thereof for three years to one Warren, who thereupon brought an ejectment against one John Smith, for trial of the title in B. R. Wherein a special verdict was had; and while that depended in argument the lease ended, and so no possession could be awarded for the plaintiff, nor fruit had of his suit.

Yet he proceeded to have the opinion of the Judges to know the law (which was a voluntary act of his), to the intent, if the law were with him, he might begin a new suit at law, and spare to proceed in equity, and if the law were against him, that then he might proceed in Chancery. And the Judges of that Court having delivered their opinions against his title, before any judgment entered upon the roll, the Earl and Mr. Wood, for themselves and their lessees, preferred their bill in Chancery; and then judgment was entered, quod querens nil capiat per billam (*a*).

To which bill in Chancery the defendant put in a plea and demurrer, alleging the conveyance to be void by the statute of 13 Eliz., and that they evicted one house, parcel of the premises, by judgment at law; which plea and demurrer were referred by order to Sir *John Tindal* and Mr. *Woolridge*, who reported that they thought it fit the cause should proceed to hearing, notwithstanding the plea and demurrer; and afterwards, in default of an answer, an attachment was awarded against the defendants, whereupon they were attached, and a cepi corpus returned, and by order of the 22nd of October, 13 Jac. 1, they were committed to the Fleet for their contempts in refusing to answer; and do now stand bound over to answer their contempts, they still refusing to answer.

And now this term it was argued, that the defendants

(*a*) See *Magdalen College Case*, 11 Co. 66.

thus standing in contempt, &c., may be sequestered until answer.

Lord Chancellor Ellesmere.—1. The law of God speaks for the plaintiff, Deut. xxviii.

2. And equity and good conscience speak wholly for him.

3. Nor does the law of the land speak against him. But that and equity ought to join hand in hand in moderating and restraining all extremities and hardships.

By the law of God, he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof; and it was a curse upon the wicked, that they should build houses and not dwell in them, and plant vineyards and not gather the grapes thereof. Deut. xxviii. 30.

And yet here in this case, such is the conscience of the doctor, the defendant, that he would have the houses, gardens, and orchards, which he neither built nor planted; but the Chancellors have always corrected such corrupt consciences, and caused them to render quid pro quo; for the common law itself will admit no contract to be good without quid pro quo, or land to pass without a valuable consideration; and therefore equity must see that a proportionable satisfaction be made in this case.

As in the case of *Peterson* v. *Hickman*, the husband made a lease of the wife's land, and the lessee being ignorant of the defeasible title, built upon the land, and was at great charge therein; the husband died, and the wife avoided the lease at law, but was compelled in equity to yield a recompense for the building and bettering of the land. For it was so much the more worth unto her: and wheresoever one hath a benefit, the law will compel him to give a recompense, as if cestui que use sell the land to one that hath no notice of the use, and dieth; by reason that he had the benefit of the sale, his executors were ordered to answer the value of the land out of his estate, as appeareth by a judgment roll of 34 Hen. 6.

And his Lordship, the plaintiff in this case, only desires

to be satisfied of the true value of the new building and planting since the conveyance, and convenient allowance for the purchase.

And equity speaks as the law of God speaks; but you would silence equity.

First. Because you have a judgment at law.

Secondly. Because that judgment is upon a statute law.

To which I answer,—

First. As a right of law cannot die, no more can equity in chancery die; and, therefore, nullus recedat a Cancellariâ sine remedio, 4 E. 4, 11, a. Therefore, the Chancery is always open; and although the term be adjourned, the Chancery is not; for conscience and equity is always ready to render to every one their due, 9 E. 4, 11 a. The Chancery is only removable at the will of the King and Chancellor; and by 27 E. 3, 15, the Chancellor must give account to none, but only to the King and Parliament.

The cause why there is a Chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances.

The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs, and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called *summum jus.*

And for the judgment, &c., law and equity are distinct, both in their courts, their judges, and the rules of justice; and yet they both aim at one and the same end, which is *to do right;* as Justice and Mercy differ in their effects and operations, yet both join in the manifestation of God's glory.

But in this case, upon the matter there is no judgment, but only a discontinuance of the suit, which gives no possession; and although to prosecute law and equity together be a vexation, yet voluntarily to attempt the law in a doubtful case, and after to resort to equity, is neither strange nor unreasonable.

But take it as a judgment to all intents, then I answer, that in this case there is no opposition to the judgment, neither will the truth or justice of the judgment be examined in this Court, nor any circumstance depending thereupon, but the same is justified and approved; and therefore a judgment is no let to examine it in equity, so as all the truth of the judgment, &c., be (not) examined.

No possession is established by the King's writ, after that any judgment is sought to be impeached; for when the plaintiff, by his lessee seeking relief at the common law, is barred, then is his time to seek relief in Chancery when the common law is against him; Doctor and Student, fol. 15. A serjeant is sworn to give counsel according to law,—that is, according to the law of God, the law of reason, and the law of the land; and upon both the laws of God and reason is granted that rule, viz., *To do as one would be done unto.*

And, therefore, where one is bound in an obligation to pay money, payeth it, and takes no acquittance, by the common law he shall be compelled to pay the money again. But when it appeareth that the plaintiff will recover at law, the serjeant may advise the defendant to take a subpœna in Chancery, notwithstanding his oath.

So 1 Hen. 7, 14, if he deliver an acquittance without seal, or the money is paid within a short time after the day, or if he lose the acquittance, if judgment be had in any of these cases, the party may resort to equity: 22 E. 4 & 7 Hen. 7, 11.

Also, after judgment in those cases, if the party have a release, he may have an auditâ querelâ, which is a latin bill in equity, if the other party's conscience be so large as to demand a double satisfaction. So, if the statute be entered into by duress or menace, though the party be in execution, yet he may avoid it by duress of imprisonment; 15 E. 4; Fitz. Nat. Brev. 104, L. 5, Ed. 4, Auditâ Querelâ, 27; and yet it is a judgment upon record; and so of a judgment by a confession and satisfaction, acknowledged by a letter of attorney, which is lost or cannot be produced.

And in the case of *Harning* v. *Castor*, Mich., 3 Jac., in B. R., on an auditâ querelâ, brought per opinionem curiæ, if a judgment be given upon an usurious contract, and it is part of the agreement to have a judgment, the defendant may avoid such judgment by an auditâ querelâ, or by a scire facias, brought upon the same.

So, if a judgment be had against an infant by covin, as if an infant be inveigled to be bail for one in any Court at Westminster, he may have an auditâ querelâ to avoid the same: Trin., 7 Jac., *Markham* v. *Turner*, and 8 Hen. 6, 10. So, if judgment be had by covin or collusion against an executor, to defraud the creditors, if it be pleaded in bar. The covin and collusion may be averred at law by replication, and the judgment frustrated thereby, 3 Hen. 6, 36; and *note*, every outlawry is a judgment, yet the party may have remedy in conscience against him that caused him to be outlawed without just cause: Doctor and Student, lib. 2, cap. 21; 21 Hen. 7, 7; 9 Hen. 6, 20.

So, if one neglect to enrol his deed of bargain and sale, being his only assurance, as in *Jacques and Huntley's case*, in this Court, 13° Junij, 1599, and the bargainor brings an ejectione firmæ against him, and hath judgment, the bargainee may resort to Chancery, and there be relieved, if not for the land, yet for the money paid.

And in *Morgan and Parry's case*, Pasch., 27 Eliz., a woman had an estate in a house for her life, dispunishable of waste, and yet she was enjoined not to commit waste in the house, contrary to the case of *Lewis Bowles* (*a*): (*quere*, if not because of the prejudice to him in remainder?)

(*a*) 11 Co. 79; 1 Roll. Rep. 177; Raym. 284.

By all which cases it appeareth, that *when a judgment is obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party;* and that, in such cases, the Judges also play the Chancellors; and that these are not within the statute 4 Hen. 4, cap. 23; which is, that after a judgment given in the Court of our Sovereign Lord the King, the parties

and their heirs shall be in peace until the judgment be undone by attaint or error.

But, *secondly*, It is objected, that this is a judgment upon a statute law.

To which I answer, It has ever been the endeavour of all Parliaments to meet with the corrupt consciences of men as much as might be, and to supply the defects of the law therein; and if this cause were exhibited to the Parliament, it would soon be ordered and determined by equity; and the Lord Chancellor is, by his place, under his Majesty, to supply that power until it may be had, in all matters of meum and tuum, between party and party; and the Lord Chancellor doth not except to the statute or the law (judgment) upon the statute, but taketh himself bound to obey that statute, according to 8 Ed. 4; and the judgment thereupon may be just; and the College, in this case, may have a good title in law, and the judgment yet standeth in force.

It seemeth, by the Lord *Coke's* report, in *Dr. Bonham's Case* (*a*), that statutes are not so sacred as that the equity of them may not be examined. For he saith, that in many cases, the common law hath such a prerogative as that it can control Acts of Parliament, and adjudge them void; as, if they are against common right or reason, or repugnant or impossible to be performed; and for that he vouches, 8 E. 3, 30; 33 E. 3, Cessavit, 41, 42; Nat. Brev. 209; Plowd. 110; 27 Hen. 6, Annuity, 41; 21 Eliz. Rot. 303. And yet our books are, that the acts and statutes of Parliament ought to be reversed by Parliament, (only), and not otherwise, Bro. tit. "Error," 65, &c.; and 7 Hen. 6, 28; 21 E. 4, 46; 29 E. 3, 24: and, upon that reason, the Lord Chancellors, since the device of the action to be brought by Parsons upon the statute of 2 Ed. 6, have enjoined the stay thereof.

(*a*) 8 Co. 118.

And the judges themselves do play the Chancellors' parts upon statutes, making construction of them according to equity, varying from the rules and grounds of law, and enlarging them, pro bono publico, against the letter and intent of the makers, whereof our books have many

hundreds of cases: 15 Hen. 7, and 14 Hen. 7, 14; 42 E. 3, 6, &c. Will you, then, have equity suppressed in all cases wherein a judgment at law, or upon a statute, is had?

The use of the Chancery has been in all ages to examine equity in all cases, saving against the king's prerogative, as 35 Hen. 6, 27; 11 Hen. 4, 16; and Doctor and Student, lib. 2, cap. 5, 16; then you must have a special statute to except the Chancellor. For general statutes do extend to the particular usages of all the great Courts at Westminster, especially of the Chancery, and especially for matters of equity.

In Chancery upon a recognisance, a capias may be awarded, and the proceedings of that Court shall close up the mouths of the Judges of the common law, notwithstanding the statute of Magna Charta, chap. 29: "Quod nullus liber homo capiatur aut imprisonetur nisi per legale judicium parium suorum vel per legem terræ." And so it was adjudged in *Clement Parsons' Case*, 21 Eliz. in the Exchequer, which you may see in 8 Co. 142; and 25 Eliz., in *Martin* and *Bye's Case*, and in 7° Jac. in Com. Banco, *Higham's Case*, and *Kilway's Case*, vouched to be adjudged, 9 Co. 29, vide Doctor and Student, 306 a; and every court at Westminster ought to take notice of the usages and customs of the rest of the Courts at Westminster, which are as a law to those Courts, and of which the common law takes notice, 2 Co. 53, 65, 503-4; 11 E. 4, 2.

The statute of 5 Eliz., of perjury, directeth how perjury shall be punished, saving the authority of the Star Chamber; yet, for perjury committed in Chancery, either in an affidavit or an answer, &c., if such perjury appear to the Chancellor, the party may be punished according to his direction.

Also, no Exchequer man hath privilege against a subpœna, for matters between party and party, where the king's interest cometh not in question: 20 Eliz., *Cutts* contrà *Peter Goodwin et al.*, and yet their privilege hath several statutes that give strength thereunto; but the use

and precedents of the Chancery are not altered by those laws.

And if a statute staple be extended, which by the statute is a judgment of itself, and the execution thereof is directed by the statute; yet it hath been usual in all ages to moderate the hard consciences of the conusees, and if they have been satisfied with their costs and damages, after the rate of the full value of the land, the land hath been discharged by a decree of equity.

Thirdly, The law of the land speaks not against this.

For, by 9 Ed. 4, 15. the Chancellor sits in Chancery according to an absolute and uncontrollable power, and is to judge according to that which is alleged and proved; but the Judges of the common law are to judge according to a strict and ordinary (or limited) power.

As 7 Hen. 7, fo. 10: A. had lands extended to him in ancient demesne upon a statute merchant. B. purchased the lands, and had a recovery by sufferance in the Court of ancient demesne, with voucher, and entered, and ousted A. A. brought a subpœna, and it was holden, that A. could not falsify the recovery at law, and therefore he should be restored to the possession by the Chancery, for he had not any remedy by the common law. Where *note*, That notwithstanding a double judgment, yet the Judges directed them to the Chancery.

And the statute of 4 Hen. 4, chap. 23, was never made nor intended to restrain the power of the Chancery, in matters of equity, but to restrain the Chancellor and the Judges of the common law, only in matters merely determinable by law in legal proceedings, and not in equitable; and that they should be constant and certain in their own judgments, and not play fast and loose. For by 37 Hen. 6, 13, and divers other authorities, no writ of error or attaint lieth when the suit is by subpœna, and the party only seeks to equity for the equity of his cause.

And, therefore, judgments by default, confession, &c., and not by verdict, are not within this law, so as to bind the Judges on their legal proceedings; as 5 E. 4, 38. In debt, upon an obligation against A., B., C., and D. judgment by

default is had against A. and B., C. demurs, and D. pleads to issue; and, by the opinion of the Judges, a supersedeas was awarded, et hoc causâ conscientiæ, for that the judgment was by default.

In the next place, it is considerable how far the statute of 27 E. 3, cap. 1, doth extend, to check the power of the Chancery in this case. Now, the proper exposition of this statute is from those statutes that were the foundation thereof, and whereupon the statute was built, it being not introductive of new law, but declarative antiqui juris.

The precedent statutes which do explain this statute are 35 E. 1, made at Carlisle; 4 Ed. 3, c. 6, in confirmation thereof; 25 E. 3, cap. 22, and 25 E. 3, cap. 6, "Of provisors of benefices;" these being in time before 27 E. 3, and 38 E. 3, which comes after, and recites the statute of 25 E. 3, and this statute of 22 E. 3, and confirms them, with additions for further remedies, they being all linked together in one chain; which is further apparent by the recitals in the law, and by the preamble thereof, which doth manifest the minds of the law-makers, and do naturally explain the laws, that they do all extend to ecclesiastical jurisdiction and conusance, and not to temporal; and the same is more apparent by other subsequent laws in several kings' reigns following.

But for the temporal Courts, and the support of their judgments, there are only two statutes, viz., Westminster, 2, cap. 5, and 4 Hen. 4, cap. 23, which are already answered.

Vide, the argument *for the authority and jurisdiction of the Court of Chancery, at the end of this Vol.* (1 Ch. Rep.) *where these two statutes are explained.*

In the principal case, Lord *Ellesmere* enters very fully into the examination of the principles upon which equity formerly entertained jurisdiction to grant injunctions to stay proceedings at law. This subject was the cause of a warm contention between Lord *Ellesmere* and Lord Chief Justice *Coke*, the former insisting that Courts of

equity had jurisdiction, not indeed to overrule the judgments of Courts of law, but to prevent a person who had obtained a judgment at law, contrary to equity, from making the Courts of law instruments of injustice: the latter contending, on the other hand, that an injunction to stay proceedings in Courts of common law was an encroachment upon their jurisdiction, and a violation of the statute law of the land. The following is the account given by Mr. Hallam, of the dispute between Lord *Ellesmere* and Lord *Coke*:—"It happened," he relates, "that an action was tried before *Coke*, the precise circumstances of which do not appear, wherein the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He had recourse to the Court of Chancery, filing a bill against the defendant to make him answer upon oath, which he refused to do, and was committed for contempt. Indictments were upon this preferred at *Coke's* instigation, against the parties who had filed the bill in Chancery, their counsel and solicitors, for suing in another court after judgment obtained at law, which was alleged to be contrary to the Statute of *Præmunire*. But the Grand Jury, though pressed, it is said, by one of the judges, threw out these indictments. The king, already incensed with *Coke*, and stimulated by *Bacon*, thought this too great an insult upon his Chancellor to be passed over. He first directed *Bacon* and others to search for precedents of cases where relief had been given in Chancery after judgment at law. They reported, that there was a series of such precedents, from the time of Henry 8, and some, where the Chancellor had entertained suits even after execution. The Attorney-General was directed to prosecute in the Star Chamber those who had preferred the indictments: and as *Coke* had not been ostensibly implicated in the business, the king contented himself with making an order in the Council Book) declaring the Chancellor not to have exceeded his jurisdiction: Hall. Const. Hist. Vol. 1, p. 472; and see The Jurisdiction of the Court of Chancery Vindicated, 1 Ch. Rep. Append. 1; Cary, 163.

The opposition of Lord *Coke* to the jurisdiction of the Court of Chancery, was as void of foundation as it was of success: for equity never affected to examine or overrule a judgment at law, but prevented a party from making an unjust use of it, such as Courts of law, could they have taken cognisance of the equitable circumstances, would not have permitted; for although, as observed by the Lord Chancellor, in the principal case, "law and equity are distinct, both in their courts, their judges, and the rules of justice, they yet both aim at one and the same end,

which is to do right." Again, with reference to the principal case, he adds, "that in that case there was no opposition to the judgment, neither would the truth or justice of the judgment be examined in the Court, nor any circumstance depending thereupon, but the same was justified and approved; and therefore a judgment was no let to examine it in equity, so as all the truth of the judgment be not examined.' And again, after citing various cases, he concludes, "that, when a judgment is obtained by oppression, wrong, and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party." It may be observed here, that, where the Chancellor uses the expression as to frustrating and setting aside a judgment, he evidently means, only, that a party would be prevented from taking advantage of it, if it was inequitable that he should do so.

Moreover, as long as our Courts of equity and Courts of law were distinct, and might, according to the system of jurisprudence administered in each, come to different conclusions upon the same claim, in order that two such apparently opposite sentences might stand together, it is evident that some compromise or understanding must have subsisted between the two Courts; that, what is asserted by the one must be admitted, in some sense at least, by the other; and that it must be ascertained to which of the two the right of qualifying the first decision, and of pronouncing the final decree, and enforcing it when pronounced, was to be ascribed. And, accordingly, we find that equity always admitted and supposed the authority of the common law; but, on the other hand, whatever doubts and contest might have arisen formerly on these subjects, it was afterwards fully settled that the clearest legal right was no answer to a preferable claim in equity; and that, whoever attempted to enforce the former to the detriment of the latter, though by strictly legal means, might be restrained by the injunction of a Court of equity, or punished for proceeding in contempt of it: Burton's Compend. 517, 4th edit.

Lord *Ellesmere*, in the principal case, has noticed certain instances in which the Court had interfered to stay proceedings at law, on account of some equity of which the plaintiff in equity could not take advantage at law; and Mr. Eden, in his work upon injunctions, has included under the different heads of Accident, Mistake, Fraud, Accounts, Illegal and Immoral Contracts, Penalties and Forfeitures, Breaches of Covenants, Administration of Assets, Marshalling of Securities, and Suretyship (most of which subjects are noticed in this work), the different cases in which a Court of equity would by

injunction stay proceedings at law. Eden on Injunctions, 4; and see Joyce on Injunctions, 1053, 1257.

A somewhat feeble attempt to confer equitable jurisdiction upon Courts of common law, was made by the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), under which equitable pleas and replications might be made use of at law, s. 83; but the narrow construction put upon that Act by the judges of the Courts of common law, who held that no equitable plea was good unless it disclosed facts which would entitle the defendant to a perpetual and unconditional injunction in equity (*Mines Royal Societies* v. *Magnay*, 10 Ex. 489; *Wood* v. *Copper Miners Co.*, 17 C. B. 561; *Wake* v. *Harrop*, 6 H. & N. 768, 18 H. & C. 202), rendered applications to Courts of equity still necessary in many cases. See Mayne on Equitable Defences.

The Legislature has, however, recently taken a bolder course, and, by the Supreme Court of Judicature Acts, 1873 and 1875 (36 & 37 Vict., c. 66; and 38 & 39 Vict., c. 77), has united and consolidated the Court of Chancery, the Courts of Common Law, the Court of Probate, the Court of Divorce and Matrimonial Causes, and Admiralty into one Supreme Court of Judicature in England (sect. 3 of the first Act; sect. 9 of the second Act), consisting of two permanent divisions—"Her Majesty's High Court of Justice," and "Her Majesty's Court of Appeal" (sect. 4 of the Act of 1873). The High Court of Justice, consisting of five divisions, to be called respectively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate Divorce and Admiralty Division, sect. 31. In every civil cause or matter commenced in the High Court of Justice, law and equity, is to be administered by the High Court of Justice and Court of Appeal respectively, according to the rules in the Act mentioned, sect. 24.

And by sub-section 5, section 24, it is enacted that "No cause or proceeding, at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity in which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act

had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just."

And by the 25th section of the Judicature Act, 1873 (36 & 37 Vict., c. 66), after, in various sub-sections, amending and declaring the law to be hereafter administered in England as to matters thereinafter mentioned, it is enacted by the 11th sub-section that "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

The result of this legislation is that, as our Courts of law and equity are no longer distinct, and as the rules of equity in all cases of conflict prevail over those of law in every Division of the High Court, an injunction to restrain proceedings in one Division of the High Court can no longer be granted by another Division.

When necessary, however, proceedings in any Division (as will be hereafter shewn) may be stayed if it appears that the case is one which might be more conveniently disposed of in another Division, as, for instance, the Chancery Division. See *Garbutt* v. *Fawcus*, 1 Ch. D. 155. There an action on a promissory note for 900*l.* had been commenced in the Court of Queen's Bench, before the 1st of November, 1875, by R. Fawcus against J. H. Garbutt. On the 13th of November Garbutt caused a writ in the Chancery Division to be issued against Fawcus, claiming specific performance of an agreement by Fawcus not to enforce any claim against Garbutt in respect of certain securities or obligations of Garbutt held by Fawcus, and claiming a stay of proceedings in the action of *Fawcus* v. *Garbutt*. Upon a motion by Garbutt before *Malins*, V.-C., to stay the proceedings in *Fawcus* v. *Garbutt*, his Lordship refused to stay the proceedings, and ordered Garbutt to pay the costs of the application, and the order was affirmed by the Court of Appeal. "The question," said *Mellish*, L. J., "is whether, since the Judicature Acts have come into operation, what is, in fact, an injunction Bill in equity, can be filed, and proceedings in the Queen's Bench Division can thus be stayed. It

appears to me that the 5th subsection of the 24th section of the Judicature Act, 1873, has, in the plainest terms, taken away the right of the Chancery Division to grant any such injunction. It is quite clear that the subject matter of this application is one which is capable of being pleaded by way of defence in the Common Law Division, and if the action had been brought after the Judicature Acts came into operation, there could be no question about it. The action was, however, brought before that time, but that makes no difference in this case. By section 22, power is given to the Court, or a Judge in Chambers, to order that the action shall be continued and concluded according to the ordinary course of the High Court of Justice. That section has been frequently acted upon, and wherever there has appeared to be a good equitable defence, the action has been allowed to proceed under the new procedure."

"It was objected that this was only a matter of discretion, whereas before the Act it was a matter of right to have the injunction, and that right having been taken away, it must follow that a party must *ex debito justitiæ* be allowed to raise an equitable defence. But the right remains as before. Before the Act this injunction would not have been granted as a matter of course, but must have been made on affidavits showing a *primâ facie* case, and a case of the same sort must be made before the Common Law Judge, in order to get leave to plead the same matter as an equitable defence. If leave were refused, the Court of Appeal has the same power of saying whether it was fit that the defence should be pleaded, as the Court of Appeal in Chancery had to say whether it was a case for an injunction."

"It is then said that this is not an injunction which is asked for, but a stay of proceedings. That, however, is even a stronger thing; because an injunction affected only the parties, but a stay of proceedings affects the Court itself. This, however, is not a case for any stay of proceedings, but is clearly a case for an equitable defence. Proceedings will be stayed only where the whole action ought to come to an end, as in the case of actions brought against a company after a winding-up order has been made. Here the defence might fail, and the plaintiff at law might succeed; but if proceedings in the common law action were stayed, and the action in Chancery was carried on and failed, the plaintiff at law would have no means of recovering, except, perhaps, by the circuitous course of pleading his case before the Chancery Division as a counter-claim. The plaintiff here ought to have applied to the Judge of the Queen's Bench

Division for leave to plead his equitable defence."

When, in an action in the Exchequer Division, it appeared on the facts that there was a *primâ facie* case for specific performance which, under the practice before the Judicature Acts, would have entitled the defendant on a bill for specific performance to an injunction to restrain the action, inasmuch as the question of specific performance could be more conveniently disposed of in the Chancery Division, it was held that the action ought to be transferred thereto: *Hillman* v. *Mayhew*, 1 Ex. D. 132.

As a general rule, however, where the defendant in an action in one of the Divisions of the High Court of Justice other than the Chancery Division relies on an equity, as, for instance, to have a deed set aside as part of his defence, the Division in which the action is may give effect to the equity, so far as it is incidental to the purposes of the defence. *Mostyn* v. *The West Mostyn Coal and Iron Co. Limited*, 1 C. P. D. 145; *Breslauer* v. *Barwick*, 24 W. R. (C.P.D.) 901.

The Jurisdiction, however, of the Chancery Division of the High Court of Justice to restrain proceedings in Courts not coming within the other four Divisions, it seems, is not taken away. For instance, suppose there were some grounds which rendered it inequitable for a person to take proceedings in the Lord Mayor's Court, there does not appear to be any reason why, upon a proper case being made, the Court of Chancery should not, as formerly, restrain proceedings in such Court: *Mildred* v. *Neate*, 1 Dick. 279; *Barker* v. *Goodair*, 11 Ves. 78; *Furnival* v. *Bogle*, 4 Russ. 142; *Sieveking* v. *Behrens*, 2 My. & Cr. 581; *Cottesworth* v. *Stephens*, 4 Hare, 185.

Staying proceedings in other Courts after an order made for winding-up or administration.] — In order to prevent the exercise of the too large powers of preference which executors have at law with regard to the payment of creditors, Courts of equity encouraged suits for the general administration of assets, because they produced equality amongst creditors; and as a decree is a judgment for the benefit of all the creditors, all proceedings at law by any of them, whether the action were for an ascertained debt, or for unascertained damages, as upon a breach of covenant to repair would, *after the decree*, be restrained by injunction (*Morrice* v. *Bank of England*, Ca. t. Talb. 217; 3 Swanst. 573; 4 Bro. P. C. 287, Toml. edit.; *Kenyon* v. *Worthington*, 2 Dick. 668; *Brooks* v. *Reynolds*, 1 Bro. C. C. 183: *Paxton* v. *Douglas*, 8 Ves. 520: *Perry* v. *Phelips*, 10 Ves. 34; *Drewry* v. *Thacker*, 3 Swanst. 541, 544; *Clarke* v. *Ormonde*, Jac. 123, 124; *Largan* v. *Bowen*, 1 S. & L. 299;

Rouse v. *Jones*, 1 Ph. 462; *Vernon* v. *Thellusson*, 1 Ph. 466; *Belmore* v. *Belmore*, 12 Ir. Eq. Rep. 493; but not *until* a decree were obtained, although a bill were filed (*Rush* v. *Higgs*, 4 Ves. 638; *Teague* v. *Richards*, 11 Sim. 46; *Nokes* v. *Gandy*, 17 L. R. Eq. 297); or unless a decree gave a present right to go in and prove debts. Thus, in *Ranken* v. *Harwood*, 5 Hare, 215, a creditor recovered judgment, and sued out a writ of fieri facias thereupon, in the lifetime of his debtor, and placed the writ in the hands of the sheriff on the day after the debtor died. A decree was *afterwards* made in the suit of an equitable mortgagee, of certain parts of the real and personal estate of the debtor, against his devisee and executor, for the sale of the mortgaged property; and *if* the proceeds of such sale should be insufficient to satisfy the plaintiff's debt, *then* for an account and application of the general, personal, and real estate of the testator, in a due course of administration. *After* this decree, the judgment creditor levied under the fieri facias, on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the Court refused on two grounds: first, because the decree for an account and administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the plaintiff's demand; and, secondly, because the judgment creditor acquired a right to the goods of the debtor, by virtue of the writ of fieri facias, from the teste of the writ, and therefore paramount to the right of the executor. This decision, on appeal, was affirmed by Lord *Cottenham* (2 Ph. 22), who observed, that the Court could not interfere unless there was in existence a decree under which the creditor had a *present right* to go in and prove his debt, which he could not do in that case. See *Lee* v. *Park*, 1 Kee, 714; *Vincent* v. *Godson*, 3 De G. & Sm. 717; *Marriage* v. *Skiggs*, 4 De G. & Jo. 4. So, where before an administration decree the creditor of a deceased person had obtained judgment against the executrix of the deceased, and a garnishee order nisi against a debtor to the estate, the Court, after decree, refused to restrain proceedings on the garnishee order. *Fowler* v. *Roberts*, 2 Giff. 226.

As a charging order, when made absolute, operated from the making of the order nisi, if a charging order obtained before a decree for administration were made absolute after the decree, proceedings in the charging order would not be restrained. See *Haly* v. *Barry*, 3 L. L. Ch. App. 452. There a creditor recovered judgment against his debtor, and issued a fi. fa. Shortly afterwards, the debtor died. The creditor entered a suggestion on the record,

entitling him to have execution against the executrix, and obtained a charging order nisi upon shares belonging to the debtor. After the order nisi had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order nisi not having been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor. It was held by the Lords Justices, affirming the decision of Sir *R. Malins*, V.-C., that an injunction ought not to be granted.

Where, however, a creditor obtained a judgment against the executor, and on the same day a decree was made for the administration of the estate, it was held that it ought to be considered that the judgment and decree were obtained at the same moment, and that the judgment creditor could only come in *pari passu* with the other creditors : *Parker* v. *Ringham*, 33 Beav. 535.

The power to grant injunctions restraining any cause or proceeding in the High Court of Justice was taken away by sub-sect. 5 of sect. 24 of the Judicature Act, 1873. But by a recent order it is provided that when an order has been made by any Judge of the Chancery Division, for the administration of the assets of any testator or intestate, the Judge in whose Court such administration shall be pending, shall have power, without any further consent, to order the transfer to such Judge of any action pending in any other Division brought or continued by or against the Executors, or administrators of the testator or intestate, whose assets are being so administered, as the case may be. Order LI., rule 2 a, Rules of June, 1876, No. 18.

There has, moreover, been a great conflict of judicial opinion upon the question to what Court application should be made to stay an action, after a petition for winding-up a company has been preferred to the Chancery Division ; whether it should be made to the Chancery Division, or the Division in which the action was pending. The judges of the Common Pleas Division, although holding they had jurisdiction to stay such action, under the 5th subsection of sect. 24 of the Judicature Act, 1873, were nevertheless of opinion that such application ought to be made to the Chancery Division. *Kingchurch* v. *The People's Garden Company, Limited*, 1 C. P. D. 45. The same principle was held applicable where a company was being wound up voluntarily. *Needham* v. *Rivers' Protection and Manure Company*, 1 Ch. D. 253, *sed vide, In re South of France Pottery Works Syndicate*, W. N. 1877, p. 205. But Sir *G. Jessel*, M. R., was of opinion that an application to stay

an action could only be made to the Division in which the action was pending; otherwise all the old motions for injunctions would come back in another form: *In re People's Garden Company*, 1 Ch. D. 44. See also *Walker* v. *Banagher Distillery Company*, 1 Q. B. D., 129. This question is now set at rest by Order LI., rule 2 a, Rules of June, 1876, No. 18, which provides that, when an order has been made by any Judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1867, the Judge in whose Court such winding-up shall be pending, shall have power without any further consent, to order the transfer to such judge of any action pending in any other Division brought or continued by or against such company.

After a decree for administration, an executor cannot exercise any discretion, and he is bound to take the objection of the Statute of Limitations as against creditors (*Phillips* v. *Beal*, 32 Beav. 26), although before decree he might have paid a debt justly due, although barred by the statute (*Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 415), but an executor's right of retainer is not forfeited by the institution of a suit: *Phillips* v. *Beal*, 32 Beav. 26, 27.

Considerable inconvenience arose from the practice which formerly prevailed, by reason of the executor, through the medium of a creditor, frequently applying, for the purpose, not of preventing a preference, but of preventing the payment of any creditor, and keeping the assets himself. Lord *Eldon* introduced the rule, when the answer did not state what the assets were, that the executor should be called upon to state them by affidavit, and then the injunction might be granted upon his bringing the money into court, or upon such order being made as the state of the assets required: *Gilpin* v. *Lady Southampton*, 18 Ves. 470. And see *Paxton* v. *Douglas*, 8 Ves. 520; *Drewry* v. *Thacker*, 3 Swanst. 546; *Clarke* v. *Ormonde*, Jac. 125; *Vernon* v. *Thellusson*, 1 Ph. 471.

A creditor restrained in equity from taking proceedings at law against an executor or administrator, was entitled to his costs of the action up to the time when he had first notice of the decree (*Dyer* v. *Kearsley*, 2 Mer. 482, n.; *Jackson* v. *Leap*, 1 J. & W. 229; *Vernon* v. *Thellusson*, 1 Ph. 466); and if the action were commenced *before* the filing of the bill, the creditor, if he came in under the decree, and discontinued his action, would be entitled to prove for his costs at law, in addition to his debt (*Goat* v. *Fryer*, 3 Bro. C. C. 24; 2 Cox, 201); but he would not be entitled to costs subsequently incurred, nor to the costs of the motion to restrain his proceedings (*Curre* v. *Bowyer*, 3 Madd. 456; *Anon.* 2 S. & S. 424;

Powell v. *Powell*, 12 Ir. Eq. Rep. 501. But see *Jones* v. *Jones*, 5 Sim. 678).

After a decree or order on summons for the administration of an estate, a legatee would be restrained from proceeding in a County Court to recover a legacy, and that notwithstanding the legatee submitted to take a judgment against the executor *de propriis bonis* alleging a devastavit (*Ratcliffe* v. *Winch*, 16 Beav. 576: but see *Powell* v. *Powell*, 12 Ir. Eq. Rep. 501; *Molyneux* v. *Scott*, 3 Ir. Ch. Rep. 291); but the legatee would be entitled to his costs of the proceeding in the County Court down to the time of his being served with notice of the administration order: *Ratcliffe* v. *Winch*, 16 Beav. 577.

If a creditor continued proceedings at law after a notice of a decree for administration, he would be ordered to pay the costs of a motion to restrain him from further proceedings, but he would be allowed to set them off against the costs of the proceedings incurred prior to the notice; *Gardner* v. *Garrett*, 20 Beav. 469.

Where an estate is administered, and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law: *Dean* v. *Allen*, 20 Beav. 1; *Fletcher* v. *Stevenson*, 3 Hare, 370. But see *Simmonds* v. *Bolland*, 3 Mer. 554; and see *Dodson* v. *Sammell*, 29 L. J. N. S. (Ch.) 335.

If, after a decree, an executor thinks fit to pay a creditor, he does so at his own risk, and he is only entitled to stand in the place of the creditor against the estate. *Irby* v. *Irby*, 24 Beav. 525.

If, after a decree to account, the executors let judgment go by default, or permitted creditors to proceed at law, they would be responsible; if the creditors took property of the testator's in execution, the executors would not be able to charge it to the estate: they might be allowed to stand in the place of those creditors against the estate, but they could not do more: per Lord *Eldon*, in *Clarke* v. *Lord Ormonde*, Jac. 122; approved of by Lord Justice *Turner* in the recent case of *Marriage* v. *Skiggs*, 4 De G. & Jo. 4; *Lucas* v. *Williams*, 10 W. R. (L. J.) 606, 607, reversing the decision of Sir *John Stuart*, V. C., reported (Ib.) 578. In *Kirby* v. *Burton*, 8 Beav. 45, a creditor, in April, 1843, obtained a judgment by default against an executrix. A decree in a creditor's suit was obtained in April, 1844, and on the 25th of May following, the judgment was set aside on the terms of the executrix pleading plene administravit. On the 3rd of June, on the eve of trial, the executrix moved for an injunction, which the Court granted, to stay execution only, and afterwards refused

to permit the creditor to proceed against the executrix for the purpose of charging her personally. See also Seton, Decrees, p. 886, 3rd. edit.

After an estate has been fully administered in the Court, an executor will not be permitted, without the leave of the Court, to prosecute an action to recover part of the testator's property from a party to the suit: *Oldfield* v. *Cobbett*, 5 Beav. 132; 6 Beav. 515.

The principles upon which a creditor was restrained from proceeding at law, after a decree for administration, were held not applicable to the case of a creditor in bankruptcy proceeding in a foreign country against a bankrupt having property there, after a fiat of bankruptcy in this country. See *Pennell* v. *Roy*, 3 De G. Mac. & G. 126. There a debtor became bankrupt in England, having real estate in Scotland: it was held by the Lords Justices that this state of circumstances gave no jurisdiction to the Court of Chancery to restrain a creditor who had not proved under the bankruptcy from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt. "An endeavour," said Lord Justice *Knight Bruce*, "was made to establish a proposition laid down at the bar, of a close analogy, if not identity, between the present demand on the Court and that of an executor or administrator sued by a creditor, or an alleged creditor, of the deceased, after a decree under which all his creditors may come. If the analogy existed, I do not know that it would therefore be right for the Court to interfere in a case such as the present; but there is, clearly, in my opinion, no analogy. The duties of an executor or administrator, the manner in which he represents the deceased, the extent to which, and the mode in which he is by law liable to be sued by a creditor of the deceased, the different defences and judgments possible in an action against the executor or administrator, the right which he has to deliver himself from a suit against him, if he cannot do so otherwise, by applying assets for the purpose, and the title which the creditors generally acquire, by a decree, to those assets, are alone and obviously sufficient to destroy all ground of comparison between the cases." And see and consider *Cockerell* v. *Dickens*, 3 Moore's P. C. C. 98.

Indian creditors, moreover, would not be restrained from obtaining payment out of the English assets until English creditors are paid in full (*Re Brett*, 29 L. J. N. S. (Ch.) 297); but where a person died domiciled in Ireland, leaving property in Ireland and England, and the same executors

in both countries, it was held by Sir *R. T. Kindersley*, V.C., that an Irish judgment had priority over English simple contract creditors against Irish property remitted to England by the executors and being there administered. See *Cook* v. *Gregson*, 2 Drew. 286.

And where a judgment had been obtained in a foreign Court by the foreign administrator of a creditor against an English debtor, who had since died, and whose estate was being administered in England, it has been held that the foreign administrator could prove without taking out English administration to his intestate. *In re Macnichol*, 19 L. R. Eq. 81.

Injunction to restrain proceedings in Courts out of the jurisdiction.] — The Chancery Division may, it seems, still restrain a person within its jurisdiction from taking proceedings in courts out of its jurisdiction, as in foreign countries properly so called, our colonies, or Ireland or Scotland. It interferes, however, not upon any pretension to control or overrule the decisions of such Courts, or to examine judicial and administrative acts abroad, but on the circumstance of the party on whom the order is made being within the power of the Court. "Soon after the Restoration," says Lord *Brougham*, "and when this, like every other branch of the Court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of Chancellors, the *Nottinghams* and *Macclesfields*, —the parents of equity,— the point received a good deal of consideration in a case which came before Lord *Clarendon*, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of *Love* v. *Baker* (2 Freem. 125; 1 Ch. Ca. 67). In *Love* v. *Baker* it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the Court allowed the subpœna to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord *Clarendon* refused the injunction to restrain those proceedings at Leghorn, after advising with the other Judges; but the report adds, 'sed quære, for all the bar was of another opinion;' and it is said, that when the argument against issuing it was used, that this Court had no authority to bind a foreign Court, the answer was given, that the jurisdiction was not directed to the foreign Court, but to the party within the jurisdiction here,— a very sound answer, as it appears to me; for the same argument might apply to a Court within this country, which no order of this Court ever affects to bind, our orders

being only pointed at *the parties*, to restrain them from proceeding. Accordingly, this case of *Love* v. *Baker* has not been recognised or followed in later times:" *Lord Portarlington* v. *Soulby*, 3 My. & K. 106. And see *Wharton* v. *May*, 5 Ves. 71; *Beauchamp* v. *Marquis Huntley*, Jac. 546; *Campbell* v. *Houlditch*, cited 3 My. & K. 108; *Bushby* v. *Munday*, 5 Madd. 297; *Kennedy* v. *Earl Cassillis*, 2 Swanst. 313; *Bunbury* v. *Bunbury*, 2 Beav. 173; *The Marquis of Breadalbane* v. *The Marquis of Chandos*, 2 My. & Cr. 711; *Hope* v. *Carnegie*, 1 L. R. Ch. App. 320.

The fact also of a foreigner having property in this country enables the Court of Chancery to make effectual an injunction issued against him: *The Carron Iron Company* v. *Maclaren*, 5 H. L. Cas. 416.

Where pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party and restrains the foreign proceedings: *Per* Lord *Cranworth*, C., 5 H. L. Cas. 437. And see *Harrison* v. *Gurney*, 2 J. & W. 563; *Beckford* v. *Kemble*, 1 S. & S. 7; *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 585.

Upon the same principle, where a creditor came in under a decree in Chancery under an administration suit, and yet proceeded in an action in Scotland, which he had commenced in ignorance of the decree, Sir *L. Shadwell*, V. C., enjoined the proceedings in Scotland with costs, and his order was affirmed by Lord *Cottenham*, C., with costs; *Graham* v. *Maxwell*, 1 Mac. & G. 71. And if a creditor is compelled to come in under a suit here, the same principle applies: *Per* Lord *St. Leonards*, C., 5 H. L. Cas. 455.

In the case of *Beauchamp* v. *Lord Huntley*, Jac. 546, where a creditor who had a specific charge upon a part of the testator's real estates, came in under a decree in a general administration suit, and then claimed to prove in a creditor's suit, which he had instituted in Ireland, Lord *Eldon* restrained him from proceeding with the latter suit, and made him pay the costs.

Even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill calculated to answer the ends of Justice, the Court of Chancery has restrained the foreign action, imposing, however, terms which it has considered reasonable for protecting the party who was suing abroad: *Per* Lord *Cranworth*, C., 5 H. L. Cas. 438; and see *Bushby* v. *Munday*, 5 Madd. 297. In *Baillie* v. *Baillie*, 5 L. R. Eq. 175, a testator domiciled in England gave his real and personal property situate in England and Scotland to be divided between

two of his sons, and appointed his three sons executors. The will was proved in England by two of the sons. At the death of the testator, the other son, one of the residuary legatees, was indebted to an insurance company carrying on business in Scotland and England, who obtained judgment in an action in Scotland against such son, and proceeded in Scotland against the executors to arrest the amount in their hands, to which the indebted son was entitled. It was held by Sir *R. Malins*, V.C., that upon the executors undertaking to obtain forthwith an administration decree in England, they were entitled to an injunction to restrain the proceedings in Scotland against the executors.

So likewise when there is no question as to the foreign litigation being or not being necessary, or being or not being likely to be so effectual as litigation in this country, still if a person within the jurisdiction of the Court of Chancery is instituting proceedings in a foreign Court, the instituting of which is contrary to good conscience, the Court will, on a bill filed here, restrain the prosecution of such foreign suit just as if it had been a suit in this country. Thus, in *Lord Portarlington* v. *Soulby*, 3 My. & K. 104, an injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt was, under the circumstances, continued by Lord *Brougham*. "As to the argument," observed his Lordship, "that the Courts of equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country; for it might be said that the Court of Exchequer has the power of restraining, and therefore there needs no interposition of the Court of Chancery. It suffices to say that the Court in which the action is brought is a Court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth." See also *Simpson* v. *Fogo*, 1 J. & H. 18; 1 H. & M. 195.

But where the interposition of the Court of Chancery would not place creditors, foreign and domestic, on an equal footing (*Liverpool Marine Credit Company* v. *Hunter*, 4 L. R. Eq. 62; 3 L. R. Ch. App. 479), or where the matter may be more conveniently litigated in the foreign Court, equity will not interfere. Thus, *Jones* v. *Geddes*, 1 Ph. 725, an injunction granted on a suggestion of fraud to restrain a party resident in England from prosecuting a suit in the Court of Session in Scotland, to enforce a legal security against land situate in that country, was, on appeal, dissolved, on the ground, that, although the remedy afforded in equity in cases of fraud was more effectual and complete than in

the Scotch Court; the question between the parties in the case might, upon the whole, be more conveniently litigated, and with a more conclusive result, there. See also *Venning* v. *Lloyd*, 29 L. J. N. S. (Ch.) 152.

When a foreigner seeks no assistance from the courts of this country, it will require a very strong case to induce the Court of Chancery to restrain him when domiciled in another country, from proceeding to obtain payment of debts according to the law of that country. See *Carron Iron Company* v. *Maclaren*, 5 H. L. Cas. 416, reversing *S. C.*, 16 Beav. 279; and see *Stainton* v. *The Carron Company*, 18 Beav. 146; 21 Beav. 152, 500; 24 Beav. 346; *Maclaren* v. *Stainton*, 26 L. J. N. S. (Ch.) 332.

Before, moreover, the Court of Chancery interposes upon an interlocutory application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit. See *Ostell* v. *Le Page*, 2 De G. Mac. & G. 892; *Kennedy* v. *Cassillis*, 3 Swanst. 313.

The result of the authorities is, that if the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court. But though the authorities will justify such a course, yet they will not, it seems, make it the duty of the Court so to act, if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should take their own course: *Per* Lord *Cranworth*, C., 5 H. L. Cas. 439.

The Courts of Chancery cannot interfere where relief is sought in consequence of errors and irregularities in the decree of a colonial equitable Court, as an appeal lies from that Court to the appellate jurisdiction in this kingdom: *Henderson* v. *Henderson*, 3 Hare, 100; but where such proceedings may have taken place in a foreign Court, from which there is no appeal to any superior jurisdiction which a Court of equity in this country could regard as certain to administer justice in the case, the result may be different: 3 Hare, 118.

Injunctions by the Court of Bankruptcy.] — It may be here mentioned that under the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, every Court having jurisdiction in bankruptcy under that Act, has full power to decide all questions whether of law or fact arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete

distribution of property in any such case; and no such Court as aforesaid shall be subject to be restrained in the execution of its powers under this Act by the order of any other Court. (Sect. 72.) And by a former section of the same Act such Court has power to restrain, in a proper case, proceedings both at law and equity, sect. 13. See *Ex parte Rumboll In re Taylor and Rumboll*, 6 L. R. Ch. App. 842; *In re Escherich and Baring*, 20 W. R. (C. J. B.) 766; *Re Marcus Davis*, Ib. 767; *Morley* v. *White*, 8 L. R. Ch. App. 214; *Ex parte Gordon In re Dixon*, 8 L. R. Ch. App. 555; *Graham* v. *Winterson*, 16 L. R. Eq. 243; *Jenney* v. *Bell*, 2 Ch. D. 547. Robson on Bankruptcy, 36, 3rd edit.

The power of the Court of Bankruptcy to restrain suits in other Courts is untouched by the Judicature Act, 1873, s. 24, sub.-s. 5, or the Judicature Act, 1875, s. 9, and remains as before the passing of these Acts. See *Ex parte Ditton*, 1 Ch. D. 557. There an order was made in the London Court of Bankruptcy restraining an equitable mortgagee of certain property of a bankrupt from proceeding in a foreclosure suit against the trustee, and ordering him to give up the deed to the trustee, and concur with him in selling the property; and that on completion of the purchase the sum claimed by the mortgagee should be paid into the Court of Bankruptcy. The Court of Appeal varied the order, directing that the mortgagee should not give up the deed till payment into the Court of Bankruptcy of the amount claimed by the mortgagee.

How far parties will be restrained from applying for an Act of Parliament.]—It has been laid down by many eminent judges, that the Court of Chancery, acting *in personam*, has power, in a proper case, to grant an injunction against a party applying to Parliament for a private Act, or an Act respecting property; but no such injunction has, it seems, yet been granted, nor has any judge yet ventured to say in what particular case such an injunction would be granted. A leading case upon this subject is that of *Heathcote* v. *The North Staffordshire Railway Company*, 2 Mac. & G. 100. There the plaintiff had agreed with the Railway Company to withdraw his opposition to their bill in Parliament in consideration of their completing their line of railway in a particular manner. The Company subsequently found themselves unable to carry their contract into execution, and gave notice of their intention to apply to Parliament for an Act to authorise them to abandon the scheme. Lord *Cottenham*, C., dissolving an injunction granted by Sir *L. Shad-*

well, V.-C., held that the Court could not interfere to restrain the Company from making the application to Parliament. "It has been suggested," said his Lordship, "that this Court could not interfere without infringing upon the privileges of Parliament; so the Courts of common law thought at one time; and there is as much foundation for the one as for the other supposition. In both cases this Court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill or a bill respecting property; but what would be a proper case for that purpose it may be very difficult to conceive. The case of Parliament differs widely from that of the Courts of common law: the province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal right; but the ordinary province of Parliament in such bills is to abrogate existing rights, and to create new rights. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold that this Court should by its injunction deprive the subject of the benefit of Parliamentary interference in such cases. . . . . The injunction, therefore, cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of it to do so. What difference then can it make whether such pre-existing right exists by the tenure of property or by virtue of contracts? In both cases Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does or intends to do, compensation to the party affected; and in neither has this Court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise:" *Attorney-General* v. *Manchester and Leeds Railway Company*, 1 Railw. Cas. 436; *Lancaster and Carlisle Railway Company* v. *North-Western Railway Company*, 2 K. & J. 293; *Steele* v. *North Metropolitan Railway Company*, 2 L. R. Ch. App. 237; *In re London, Chatham, and Dover Railway Arrangement Act*, 5 L. R. Ch. App. 671, 682; *Ex parte Hartridge, Ex parte London, Chatham, and Dover Railway Arrangement Act*, 17 W. R. 946; *Telford* v. *The Metropolitan Board of Works*, 20 W. R. (V. C. B.) 481.

Upon the same principle, in the absence of any equity the Court

will not restrain an application in a proper case to the legislature of a foreign country: see *Bill* v. *The Sierra Nevada Lake Water and Mining Company*, 1 De G. F. & Jo. 177. There a company was formed in California for purposes connected with land in that country, but nearly all the shareholders were resident in England. A resolution was passed at a meeting of the English shareholders, authorising the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the company. It appearing that there was no intention to create preference shares, except with the sanction of the Californian legislature, it was held by the Lords Justices, reversing the decision of Sir *John Stuart*, V.C., that an injunction ought not to be granted to restrain the company from acting on the resolution, for that the Court will not in general restrain parties from applying to the legislature, whether of this or a foreign country.

As, however, it is unlawful, and in fact a breach of trust, to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, the Court will interfere by injunction, at the suit of any of the shareholders, to restrain such application: *Simpson* v. *Denison*, 10 Hare, 51.

So where it appeared that certain shareholders of a company had resolved to use its funds, and to pledge its credit, and to make contracts for the purpose of making an application to Parliament to vary the original object contemplated by the Act of Parliament by which the company was formed, the Court of Chancery, at the instance of other shareholders, granted an injunction, restraining the appropriation of funds, the pledging of the company's credit, and the entering into contracts in support of such an application to Parliament: *The Great Western Railway Company* v. *Rushout*, 5 De G. & Sm. 290; See also *Cunliff* v. *Manchester and Bolton Canal Company*, 2 Russ. & My. 480, n.; *Ward* v. *The Society of Attornies*, 1 Coll. 370; *Colman* v. *The Eastern Counties Railway Company*, 10 Beav. 1: *Cohen* v. *Wilkinson*, 12 Beav. 125, 138; *Munt* v. *The Shrewsbury and Chester Railway Company*, 13 Beav. 1, sed vide *Ware* v. *The Grand Junction Waterworks Company*, 2 Russ. & My. 470; *Vance* v. *East Lancashire Railway Company*, 3 K. & J. 50.

Upon the same principle, where persons have in their hands funds which have been appropriated by Act of Parliament to certain given purposes, they cannot without the previous consent of the Court of Chancery, apply them for an extension of those purposes; although it is purely and bonâ fide an extension, or a more enlarged

application of the fund to those purposes, which the legislature has regarded as good and beneficial. Thus in the case of the *Attorney-General* v. *The Corporation of Norwich*, 16 Sim. 225, Sir *L. Shadwell*, V. C., restrained the Corporation of Norwich from soliciting, at the expense of the borough fund, a bill in Parliament to enable them to improve the navigation of the river which flows through that town to Yarmouth. "If this Court," said his Honour, "had sanctioned the application to Parliament, it would have allowed the corporation the expenses of the application; but if trustees, whether they be a public body or private individuals, think proper to apply to Parliament, without the sanction of the Court, to enable them to carry into effect a project, which, however, beneficial it may appear to be, may eventually fail, the Court will not allow them to retain their expenses out of the trust fund:" and see *Munt* v. *The Shrewsbury and Chester Railway Company*, 13 Beav. 1; *The Attorney-General* v. *Andrews*, 2 Mac. & G. 225; *Attorney-General* v. *West Hartlepool Improvement Commissioners*, 10 L. R. Eq. 152, and see *Bower* v. *Commissioners of Sligo*, 4 I. Rep. C. L. 489.

Although, however, funds cannot be applied by persons in promoting a bill in Parliament, for the purpose of extending their powers, they may be applied in *defence* of existing rights, and they will not consequently be enjoined by the Court of Chancery. Thus, in *Bright* v. *North* (2 Ph. 216), where Conservators of river banks were empowered by Act of Parliament to apply the funds under their control (which were raised by a rate upon the proprietors of adjacent lands) "in doing, constructing, and executing all such works, acts, matters, and things as they should from time to time deem necessary, proper, or expedient for putting the banks into and maintaining the same in a permanent state of stability," it was held by Lord *Cottenham*, C., that they were authorised to apply a portion of the fund in watching, and if necessary, opposing a bill in parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence. And see *Attorney-General* v. *The Mayor of Wigan*, Kay, 268. So likewise it has been held that a municipal corporation is justified in discharging out of the corporate funds the expenses of opposing quo warranto informations against individual members of the corporation, if the object of such informations be to impeach the title, or destroy the legal existence of the Corporation as a body; *Attorney-General* v. *The Mayor of Norwich*, 2 My. & Cr. 406.

Upon the same principle as that laid down in *Simpson* v. *Denison*

(10 Hare, 51), it has been held, that the costs of a prosecution for libel instituted by the directors of a trading company, are not properly payable out of the assets of the company, and the payment of such costs will be restrained by injunction: *Pickering* v. *Stephenson*, 14 L. R. Eq. 322; 41 L. J. (N. S.) 493; 20 W. R. 654, in which case, however, the Court refused to order the repayment of costs already paid, as the directors had acted bonâ fide in accordance with the wishes of a large majority of the shareholders.

SAVAGE *v.* FOSTER.

Term. S. Trin. 9 Georgii in Canc.

[Reported, 9 Modern Reports, 35.]

Concealment—Fraud.]—*A person knowing his own title, and not giving notice of it to a purchaser, not allowed to set it up against a purchaser.*

In such case, infancy or coverture will be no excuse.

THE case was as follows:—Margaret Smith, being seised of the lands in question upon her marriage with Peter Flavill, settled the same upon trustees and their heirs, to the use of the said Peter for life; then, upon Margaret, his intended wife, for life; remainder, after the death of the said Peter and Margaret, to the heirs of the said Peter, on the body of the said Margaret to be begotten; remainder, to the right heirs of the said Margaret for ever.

The said Peter and Margaret had issue, only one daughter (the now defendant), who was married to one Foster.

Peter Flavill died, and then his widow married one Brown, by whom she had issue, *one other* daughter, and no more, which daughter being courted by one Williams, but he refusing to marry her without such a fortune, which Margaret her mother, not being able to give without breaking through this settlement, she conveyed the said lands to the aforesaid Williams, &c., *and the defendant, Mrs. Foster and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother Margaret Brown to make a conveyance in favour of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown.*

Whereupon the said Margaret conveyed these lands, &c., to the use of herself for life, remainder to Williams and his heirs. Then the marriage took effect, and after-

wards Williams sold these lands to the plaintiff Savage, who entered and built a house thereon.

And now Mrs. Foster, who was the issue in tail, by virtue of the said settlement (*i. e.* the first), and endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she, having full notice of the purchase, and of her own title, gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert,* but that she should be concluded by this fact as well as if she were an infant.

Argument for the defendant Mrs. Foster:—

Two things are necessary to bind the right in cases of this nature; the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title: for it would be of dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this Court on the foot of fraud.

It is true, the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with Williams, but she did not know upon what terms. But if she had known the terms of that marriage, she was then a *feme covert,* and her husband ought to have given the plaintiff notice of her title; therefore, his negligence shall not prejudice her who had done nothing to lose her inheritance, and the entire benefit of this settlement for ever.

Argument for the plaintiff Savage:—

On the other side it was first denied, that the two things before mentioned by the plaintiff's counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title; and the other,

that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying on the agreement in order to a purchase; for if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself by giving the purchaser notice of such right; and though this defendant was a *feme covert*, yet it was a fraud in her not to give the purchaser notice of her right; and, therefore, it shall be bound for ever, and the rather, because the defendant solicited her mother to make this conveyance in favour of Williams, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

Judgment :—

Where there is a parol agreement made for a lease, and the lessee by virtue of such agreement enters and builds, this Court will establish it, on the foot of fraud in the lessor, notwithstanding the Statute of Frauds (29 Car. 2. c. 3), because contracts executed in part are not always within the statute, though executory contracts are. (*a*)

(*a*) See *Lester* v. *Foxcroft*, Colles' P. C. 108; *ante*, vol. i. p. 828, and note.

Now, this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to and assisting in carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now, when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to

give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants, and *feme coverts*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary, that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it, that it could not be done without their knowledge.

Therefore it was decreed, that the defendant should levy a fine to the plaintiff, to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise "he" (*a*) shall pay costs.

(*a*) query "she."

And the case of *Watts* v. *Cresswell* (2 Vin. Ab. 415, 2 Eq. Ca. Ab. 515), was now remembered where tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title.

So in the case of *Clare* v. *The Earl of Bedford* (13 Vin. Ab. 536, 7). One Clare, who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him and for that reason, his mortgage was postponed on the foot of fraud (*b*).

(*b*) *Nota* in the next session of Parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition, but it was rejected for not coming in time.

In cases of actual misrepresentation, it is a well-known principle acted upon both at law and in equity, that where a person makes a representation to another in such a way, or under such circumstances, as to induce him to believe that it is meant to be acted on, he is liable as for a fraud, in the event of the representation proving to be false, and damage thereby accruing to the party to whom it is made. *See* Kerr on Frauds, 12, 81.

In courts of equity, which has carried its jurisdiction over fraud to a wider extent than the old courts of law, it has been acted upon as a well-known principle, that not only in cases of actual misrepresentation, but also where a person even under disability has so conducted himself as to induce another to enter into some contract, or to do some act, injurious to his rights and interests, which otherwise he would not have done, such person will either be compelled to make good that which he induced the other to believe, or at any rate will not be allowed to derive any profit from his conduct.

Thus it was held in *Savage* v. *Foster*, selected as the leading case on this subject, that where a married woman knowing her own title to property, as tenant in tail, subject to the life interest of her mother, upon the marriage of her half-sister, induced her mother, the tenant for life, to convey the lands to herself (the mother) for life, with remainder to the intended husband in fee, she was not allowed afterwards to set up her title as tenant in tail against the plaintiff a *bonâ fide* purchaser from the husband, inasmuch as the husband married without notice of her title, and it was decreed that she should levy a fine to the plaintiff, to extinguish her right to the land in the settlement, and that the plaintiff should have a perpetual injunction to quiet his possession.

The principle, moreover, was clearly laid down, that not only where a person knowing his title to property encourages others to buy it, but even where he lies by and permits them to do so, equity would compel such person to convey to the purchasers. "Where anything, in order to a purchase," observed the Court, "is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase, for it was apparent fraud in him not to give notice of his title to the intended purchaser." *Hobbs* v. *Norton*, 1 Vern. 136; 2 Ch. Ca. 128: *Hanning* v. *Ferrers*, 2 Eq. Ca. Ab. 356, pl. 20; *Clare* v. *Earl of Bedford*, 13 Vin. 536; *Watts* v. *Cresswell*, 9 Vin. 415; *S. C.*, nom. *Watts* v. *Hailswell*, 4 Bro. C. C. 507, n.; *Berrisford* v. *Milward*, 2 Atk. 49; *Cory*

v. *Gertcken*, 2 Madd. 40; *Mangles* v. *Dixon*, 1 Mac. & G. 437; *Thompson* v. *Simpson*, 2 J. & L. 110; *Govett* v. *Richmond*, 7 Sim. 1; *Nicholson* v. *Hooper*, 4 My. & Cr. 179, 185, 186; *Overton* v. *Banister*, 3 Hare, 503; *Stikeman* v. *Dawson*, 1 De G. & Sm. 90; *Wright* v. *Snowe*, 2 De G. & Sm. 321; *Vaughan* v. *Vanderstegen*, 2 Drew. 363; *In re King*, 3 De G. & Jo. 63; *Sharpe* v. *Foy*, 4 L. R. Ch. App. 35; *In re Lush's Trusts*, Ib. 591.

Upon the principle laid down in *Savage* v. *Foster*, if a person having an incumbrance on an estate, deny the fact upon an inquiry being made by a person about to purchase it, equity will relieve against the incumbrance: *Ibbotson* v. *Rhodes*, 2 Vern. 554; *Amy's case*, cited 2 Ch. Ca. 128; *Hickson* v. *Aylward*, 3 Moll. 1. So likewise, where upon a treaty for a mortgage of an estate, a person who was entitled to be recouped out of the estate, in case a certain incumbrance was levied out of his own estate, was in communication with the mortgagee, to whom he was referred as a person to give information upon the subject of the transaction, but he gave the mortgagee no information of his equitable claim, it was held by Lord Chancellor *Sugden* that he could not afterwards set up his claim against the mortgagee: *Boyd* v. *Belton*, 1 J. &. L. 730.

If a trustee, in whom property is vested, represent it as unincumbered, he will be answerable to the purchaser in case it turns out that he has had notice of an incumbrance, and he will not be allowed to allege forgetfulness as an excuse. See *Burrows* v. *Lock*, 10 Ves. 470, 475; *Slim* v. *Croucher*, 2 Giff. 37, 1 De G. F. & Jo. 518; *Re Ward*, 31 Beav. 7; *Sankey* v. *Alexander*, 9 I. R. Eq. 259. But in order to render a trustee so liable, his representations must be clear and unambiguous, so that there can be no doubt as to the sense in which they were used, unless indeed he used ambiguous language for the purpose of deception: *Stephens* v. *Venables*, 31 Beav. 124.

Mere silence, however, on the part of an incumbrancer, where he is not brought into contact with parties engaged in any transaction relative to the property upon which he claims a charge, or where he is not called upon by them to speak concerning it, will not, it seems, amount to a waiver of it on his part. Thus, in *Osborn* v. *Lea*, 9 Mod. 96, the Court was of opinion, "that it would be very hard for a mortgagee to be at peril of losing his mortgage money, if he did not give notice of his mortgage to any person whom he knew to treat about the sale, or any settlement of the lands in his mortgage; and that it very much differed from the case where the mortgagee himself helps to carry on such treaty."

Even where a person has been induced to become a purchaser, by

the misrepresentation of another, ignorant of his own right, but where he might have had notice of it, equity will relieve the purchaser; thus, in *Teasdale* v. *Teasdale*, Sel. Ch. Ca. 59, a father, supposing his son to be tenant in fee, stood by and let his son make a settlement on his intended wife, for her jointure. The father, after the decease of his son, discovered that he was only tenant for life, and that the fee was in himself, on which title he had a verdict, and judgment at law. Upon a bill being filed by the son's widow, it was insisted on behalf of the father, that the case was different from the cases where persons cognisant of their title had concealed them; that the father did not know of his title, and therefore could not be said to conceal it. But Lord *King* said he should make no difference whether he knew of this title or not, considering the near relation of father and son. It was plain it was thought the son had the fee; and, had it been known it was in the father, it would have been insisted on that he should have joined, else the marriage would not have been had; as he knew of the settlement, he should not take advantage against it. See also *Pearson* v. *Morgan*, 2 Bro. C. C. 388; *West* v. *Jones*, 1 Sim. N. S. 205.

Another class of cases, within which the *Earl of Oxford's Case* falls (*ante*, p. 590), may be noticed as further illustrating the principles laid down in *Savage* v. *Foster*. For instance, if a person having a title to an estate stood by and suffered a person ignorant of it to expend money upon the estate, either in buildings or other improvements, and afterwards asserted his title in the old Court of law, upon his proving his title judgment would have been given for him, without any compensation for improvements being awarded to the person evicted. In equity, however, a person who had expended money under such circumstances on the estate of another would be entitled to be indemnified for his expenditure, either by a pecuniary compensation, or, in some cases, if he were a lessee under a defective lease, by a confirmation of his title; and as the law was deficient in this respect, and it would be inequitable for the owner to profit by his own fraud, he would be restrained from proceeding at law: *Hunning* v. *Ferrars*, Gilb. Eq. Rep. 85; *East India Company* v. *Vincent*, 2 Atk. 33; *Stiles* v. *Cowper*, 3 Atk. 692; *Attorney-General* v. *Balliol College*, 9 Mod. 411; *Jackson* v. *Cator*, 5 Ves. 688; *Kenny* v. *Brown*, 3 Ridg. 518, 529; *Pilling* v. *Armitage*, 12 Ves. 85; *Shannon* v. *Bradstreet*, 1 S. & L. 52, 73, 74; *The Duke of Devonshire* v. *Eglin*, 14 Beav. 530; *Rochdale Canal Company* v. *King*, 16 Beav. 530; *Duke of Beaufort* v. *Patrick*, 17 Beav. 60,

75; *Piggott* v. *Stratton*, 6 Jur. (N. S.) 129. In *Powell* v. *Thomas*, 6 Hare, 300, a colliery proprietor constructed a railway from his colliery across the lands of several other persons, by agreement, and his solicitors wrote a letter to the defendant across whose lands he desired to carry the railway, referring to the powers of a local Act of Parliament, supposed to enable him to take lands within a certain area for roadways, and offering, on the part of the plaintiff, to pay him for the land at a fair valuation. The defendant did not reply to the letter, and the railway was made across his land without further communication with him. A year or two afterwards, the plaintiff and the defendant had an interview, but did not agree as to the price to be paid for the land, and three or four years after the railway was made, the defendant brought his ejectment, whereupon the plaintiff filed his bill for an injunction, charging acquiescence, and Sir *J. Wigram*, V. C., on motion, restrained the action, upon the plaintiff giving judgment in the ejectment, and paying a sum into Court, not less than the amount of the utmost valuation of the land. See also *Clavering's case*, cited 5 Ves. 690; *Greenhalgh* v. *Manchester and Birmingham Railway Company*, 3 My. & Cr. 784; *Norway* v. *Rowe*, 19 Ves. 144; *Hart* v. *Clarke*, 6 De G. Mac. & G. 232; 6 Ho. Lo. Cas. 633; *Somersetshire Canal Company* v. *Harcourt*, 24 Beav. 571, 2 De G. & Jo. 596; *Mold* v. *Wheatcroft*, 27 Beav. 510; *Slim* v. *Croucher*, 1 De G. F. & Jo. 518; *Whalley* v. *Whalley*, 2 De G. F. & Jo. 310; *Bankart* v. *Tennant*, 10 L. R. Eq. 141.

As to expenditure on the property of a corporation upon the faith of a regular corporate resolution, see *Marshall* v. *The Corporation of Queensborough*, 1 Sim. & Stu. 520.

And this principle acted upon in the *Earl of Oxford's Case* will apply with still greater force, if the person lying by and permitting expenditure upon his own property, stands in some fiduciary relation, —as that of agent, to the person making it,—which renders it more peculiarly incumbent upon him to give notice of his title: *Lord Cawdor* v. *Lewis*, 1 Y. & C. Exch. Ca. 427.

So, a party has so encouraged that which he afterwards complained of as a nuisance, as not only to preclude him from complaining of it in a Court of equity, but so as to give the adverse party a right to restrain him from recovering damages at law for such nuisance. See *The Case of the Watercourse*, and *Short* v. *Taylor*, 2 Eq. Ca. Ab. 522, pl. 3; *Williams* v. *The Earl of Jersey*, Cr. & Ph. 91; *Harryman* v. *Collins*, 18 Beav. 11. But in some cases, as where both parties were ignorant of the injurious consequences of what turned out afterwards to be a nuisance,

the Court has, on the ground of acquiescence, refused an injunction to prevent the injured party from recovering damages at law, although his acquiescence might have been sufficient to have disentitled him to an injunction to restrain the nuisance: *Bankart* v. *Houghton*, 27 Beav. 425.

But the circumstance that a party is commencing operations avowedly for a purpose which another considers to be injurious to him, and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the Court either to form its own opinion as to the legality of the meditated purpose, or to put that question into a course of immediate trial; and therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused: *Haines* v. *Taylor*, 2 Ph. 209.

Upon the same principle, a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction: *Nicholson* v. *Hooper*, 4 My. Cr. 186. And see *In re King*, 4 Ir. Ch. Rep. 300, 314.

Where the owner of the property, knowing that another person is about to commence improvements on it, gives notice of his claim to the property, such person will have no equity to restrain the proceedings of the owner to evict him, although he did not again assert his title before the expenditure began, or while it was going on, or although he did not disclose any particulars of his title, and it turns out that the claim exceeds what he was actually entitled to; for the party in possession will not be justified in disregarding it, or supposing it to be unfounded: *Master of Clare Hall* v. *Harding*, 6 Hare, 273.

And the principle is the same, whether the owner and the party making the expenditure by mistake are strangers or tenants in common of the property. *Ibid.*

A person expending money by mistake upon the property of another has, it seems, no equity against the owner, who was ignorant of, and did not encourage him in, his expenditure. But if it were necessary for the owner to proceed in equity, he would only be entitled to its assistance, according to the ordinary rule, by doing equity and making compensation for the expenditure: *Neesom* v. *Clarkson*, 4 Hare, 97.

If a person builds on the land of another knowing him to be the owner thereof, there is no principle of equity which would prevent the owner claiming the land

with the benefit of all the expenditure made on it. Per Lord *Cranworth*, L. C., in *Ramsden* v. *Dyson*, 1 L. R. Ho. Lo. 141. See also *Rennie* v. *Young*, 2 De G. & Jo. 136.

Upon this principle, a lessee or tenant from year to year is not entitled to the interference of equity in consequence of his expenditure, although with the knowledge of the landlord, unless he can clearly show that it was made with reference to some agreement (*Pilling* v. *Armitage*, 12 Ves. 78; *Dann* v. *Spurrier*, 7 Ves. 235); but such an agreement may be implied from the conduct of the parties: *White* v. *Wakley*, 26 Beav. 17, 20. In *Dann* v. *Spurrier*, 7 Ves. 235, Lord *Eldon* observes: "I fully subscribe to the doctrine of the cases that have been cited, that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement: a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still, it must be put upon the party to prove that case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that sort of encouragement. . . . In order to give a person a larger interest in the property than he derives under the instrument making his title, it must be shown, that, with the knowledge of the person under whom he claims, he conceived he had that larger interest, and was putting himself to a considerable expense, unreasonable compared with the smaller interest, and which the other party observed, and must have supposed incurred under the idea that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment.

Upon the same principle it seems that if a tenant from year to year laid out money upon the land in his occupation upon an erroneous supposition, created or encouraged by the landlord, that he should have a lease, a Court of equity would not allow the landlord to lie by and profit by such expenditure. Per Lord *Cranworth*, L. C., in *Ramsden* v. *Dyson*, 1 L. R. Ho. Lo. 142.

But the tenant would not be entitled to any relief if he failed to show that he had any absolute right as against the owner beyond that of a tenant from year to year, or that the owner believed he was expending his money in the mistaken belief that he possessed such right. Thus, in *Ramsden* v. *Dyson*, 1 L. R. Ho. Lo. 129, Thornton took a piece of land belonging to Sir J. Ramsden,

from Sir John Ramsden's agent, by parol agreement. It was known to all parties that the land was to be built upon. A ground rent was fixed at 4*l.* Thornton laid out 1800*l.* in building, and afterwards made another application to Sir J. Ramsden's agent for another piece of land, also for the purpose of building on it. In this application Thornton declared himself willing to take the land as "tenant-at-will." The land was allotted to him, and the rent fixed at 1*l.* 0*s.* 7*d.* When the buildings were erected on the land, the persons who had so taken the land were entered in Sir John Ramsden's rental books as tenants. It was admitted on all sides, that where such takings were made the tenants would never be disturbed while the ground rent fixed as above described was paid. When the tenant desired to transfer the land to another person, notice was given to the agent, and the entry of the name of the tenant in the books of rental kept by the agent was altered. In many cases the form of proceeding was, that the land was surrendered to the landlord, and the new tenant was accepted, much after the form of a transfer of copyhold. The tenancies were very numerous. Thornton alleged that there was believed to exist, and that Sir John Ramsden's agents had, by their words and conduct, encouraged such belief, a "tenant-right tenure" on the estate, that a person who had so taken and built upon Sir John Ramsden's land was entitled at his pleasure to become a leaseholder, and to demand a grant of a lease for sixty years, renewable every twenty years on payment of a fine equal to double the annual ground rent. Such leases had, in fact, been granted; but there was no direct evidence of their being granted on any such claim of right. There was, however, evidence that a railway company, being desirous of obtaining some of these pieces of land, held under parol agreement, on payment of a ground rent, had refused to purchase them unless such leases were granted, and that, in fact, such leases were granted, and thus the tenants received compensation for their buildings. It was held by the House of Lords (dissentiente Lord *Kingsdown*), reversing the decree of Sir *John Stuart*, V. C., reported 4 Giff. 519 (nom. *Thornton* v. *Ramsden*), that these circumstances did not show the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease; and, consequently, that the landlord having brought ejectment against Thornton, equity could not interfere to compel the grant of a sixty years' lease, nor to stay the ejectment.

The disability of a party, whether arising from infancy or coverture, cannot be successfully

used in defence of frauds such as we have been considering, or indeed any frauds committed by such party.

It is true, that, where a person enters into a contract during his minority, he is not, either at law or in equity, bound thereby after his majority on the mere ground that without any false assertion on his part the other party believed him to be of age: *Stikeman* v. *Dawson*, 1 De G. & Sm. 105.

In order, however, that relief may be obtained against an infant, it is not essential that he should actively encourage the fraud, if he be privy to it. Thus in *Watts* v. *Cresswell* (9 Vin. Ab. 415; *S. C.* 2 Eq. Ca. Ab. 515), cited in the principal case, a tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the mortgage deed, and the Court relieved on the ground of the fraud in the infant, by not giving notice to the mortgagee of his title. That certainly was a very strong case; for the young man who was *employed in soliciting the loan* had only heard that the lands were settled upon him after his father's death. But Lord *Cowper* said, "If an infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it."

The principle invariably acted upon by the Court of equity is this, that an infant shall not take advantage of his own wrong. Thus in *Clarke* v. *Cobley*, 2 Cox, 173, a woman, at the time of her marriage, was indebted on two promissory notes. After the marriage the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit, the husband pleaded his infancy at the time of giving the bond. On a bill being filed in equity for relief, the Court ordered the notes to be returned to the plaintiff with directions that the defendant should not plead the Statute of Limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given.

Although a mortgage by an infant, falsely representing himself to be of age, might be good as against himself, nevertheless it will not be so as against a subsequent mortgage made after he attained his majority to a person who advanced his money without notice of the first mortgage. See *Inman* v. *Inman*, 15 L. R. Eq. 260. There an infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stating (untruly) that he was then of full age. After attaining twenty-one, he mortgaged his interest in the fund for an amount exceeding what was ultimately

available, without disclosing the fact of the prior charge. It was held by Sir *J. Bacon*, V. C., that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting, to a mortgagee without notice.

Although an infant may falsely represent himself of age, a person aware that he was not of age, and who was therefore not deceived by such representation, cannot obtain relief in equity: *Nelson* v. *Stocker*, 4 De G. & Jo. 458.

The principal case is a good illustration of the equitable doctrine, that a married woman, like an infant, cannot take advantage of her own fraud. So in the case of *Peterson* v. *Hickman*, *ante*, p. 592, cited, where the husband made a lease of the wife's land, and the lessee, being ignorant of the defeasible title, went to great expense in building upon the land, the wife having, upon the husband's death, avoided the lease at law, she was compelled in equity to yield a recompense for the buildings and improvements upon the land. See also *Vaughan* v. *Vanderstegen*, 2 Drew. 363, 378, 379. *Ante*, vol. i., p. 537.

The law on this subject is well summed up in the principal case: "In the case of fraud, *infancy or coverture shall be no excuse;* for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and feme coverts, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet, when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or feme covert should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge."

MR. JUSTICE EYRE *v.* COUNTESS OF SHAFTSBURY.

De Term. S. Hil. 1722.

[REPORTED 2 P. WMS. 103; GILB. EQ. REP. 172.]

GUARDIAN AND WARD.]—*A guardianship, devised to three persons, without saying "and to the survivors or survivor of them," yet the survivor shall have it.* *S. C.*, 2 Eq. Ca. Ab. 710, pl. 3; 755, pl. 4.

The right of the testamentary guardian, by the express words of the Act of Parliament, takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

The mother of a ward of the Court, contriving and effecting his marriage, without obtaining the consent of the testamentary guardian, or making an application to the Court, is liable for a contempt of the Court, although the marriage be in other respects proper.

THE late Earl of Shaftsbury, by his will, dated 10th of November, 1710, devised the guardianship of the person and estate of his infant child (the present earl) to Mr. Justice Eyre and two others (since deceased), without saying "and to the survivor of them;" and this devise of the guardianship was until the child should come to twenty-one years of age.

Lord Shaftsbury died beyond sea, and the infant earl was now twelve years of age, when Mr. Justice Eyre, perceiving that his lordship had not a proper governor provided for him by the countess his mother, and that the person who was ordered to attend him as his gentleman was not a fit person for that purpose, petitioned the Lord Chancellor that he, as sole surviving guardian, might have the ordering, as he should think proper, of such governor, gentleman, and other servants to attend the said infant

earl; and that the person of the said infant earl might be delivered over to the petitioner.

Argument for the respondent.

On the behalf of the countess, it was insisted by the *Solicitor-General*, Mr. *Lutwiche*, Mr. *Cowper*, and Mr. *Talbot*, that the guardianship, being devised to three, without saying "and to the survivor of them," the same did not survive; that it is but a bare authority, and no interest, in regard no profit could be made thereof; that, if a power were given to three, and one of them should die, the survivors could not execute such power; that, if two were made committee of a lunatic, on the death of one of them the commitment would determine; that this was a trust annexed to the person, and not assignable, nor was it reasonable it should survive, forasmuch as the testator might think it proper to trust three, but not to invest a smaller number with a charge of that importance.

Also it was said, that, if the infant earl should die without issue under age, in such case the late earl by his will had given an annuity of 500*l.* per annum to Mr. Justice Eyre, which made it improper that he alone should be intrusted with the person of the infant earl, who would be a gainer on his dying without issue and under age; that, the will having appointed three guardians to the infant, it was the same thing as if the testator had appointed those three jointly, and then it was plain, that, if one should die, the survivors could not act; that, according to *Auditor Curle's case* (11 Co. 2 b), where an office is granted to two, on the death of one of the grantees, the office determines.

And though it might be attended with some inconvenience were such guardianship or authority to determine on the death of one of the persons intrusted, yet it must be allowed to have been in the power of the testator to have prevented this inconvenience, by limiting the guardianship to the survivor by express words: Salk. 465.

(*a*) See *Duke of Beaufort* v. *Berty*, 1 P. Wms. 704 *Frederick* v. *Frederick*, 1 P. Wms. 721.

It was, moreover, urged, that this was a matter of trust; for every guardianship was a trust (*a*); that the Crown, as

parens patriæ, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing as to take away an infant under thirteen years of age, from so careful a mother as the countess was; that the tender calls of nature were on the mother's side; and then there were two physicians (Dr. Robinson and Dr. Friend), who both testified that the infant earl was of a tender and sickly constitution; so that at least the Court might refuse to grant this in a summary way, or otherwise than upon a bill.

Also, with regard to the servants, it was represented to be a very hard thing to turn away such as the countess had experienced to be good servants, and to take persons in their room whom she had no experience of; particularly that Dr. Stubbs, the governor, came in at first with the approbation of Mr. Justice Eyre, and that he was a man of learning, probity, and piety, and a clergyman.

Argument for the petitioner.

On the other side it was said, that this guardianship was not devised to three jointly, but to three until the infant earl should come to twenty-one; that a guardian had not only a bare authority, but also an interest, for he might bring a writ of ravishment of ward, or might make a lease during the minority of the infant, as was determined in the case of *Shopland* v. *Ryoler* (*a*); so that guardians had an interest coupled with their authority, and consequently the office would survive.

(*a*) Cro. Jac. 55, 98.

It was true it could not be granted over: no more could the office of executorship; but yet there could be no question but that, if there had been two executors, and one should die, the other would take the whole executorship as survivor.

And as to the objection, that there was no profit in the guardianship, and therefore it should not survive, the same way of reasoning would hold in the case of an executorship, for that was barely a trust, and no ways profitable; notwithstanding which, being a legal interest, it would survive. It was likewise said, that in case where three guardians were appointed, if this were supposed to be but

a joint authority, and consequently not to survive, it would prove a great inconvenience, and in a good measure frustrate the intention of the person appointing them.

As to what was held in *Auditor Curle's case* (viz.), where an office has been usually granted to two, and one of them dies, that this is a determination of such office, the reason must be supposed to be, because they both make but one officer, as in the case of the sheriffs of Middlesex.

That, with regard to the 500*l.* per annum given to Mr. Justice Eyre, in case of the infant's death without issue and under age, that could be no objection in case of a testamentary guardian appointed by the party himself, whatever it might be where the guardian was to be appointed by the Court; for, where the testator himself says that J. S. shall be guardian of his son, and by the same will also declares that the said guardian shall have the whole estate in case the child shall die within age, surely that would be good; much more shall the devise in our case, which is but a small part of the estate.

Then, as to the objection of hardship from the guardians being empowered to impose servants, governors, &c., who, when put upon the young lord by such guardian, would probably not regard the countess, as having no dependence upon her, this might be as well turned the other way (viz.), that if they were put in by the mother, they would have no regard to the guardian, who yet was intended by the will to be in loco parentis, and to supply the father's place.

That Dr. Stubbs, the governor, might be a good scholar and a pious man, and yet it would not necessarily follow that he was a proper governor to attend the young earl to court, or to noble families, or at the exercises of dancing and riding, which it was fit his lordship should be acquainted with.

Besides, it was of great consequence, in regard such servants are apt to flatter their young masters, and to entertain their thoughts with such things as would be rather pleasing than useful to them.

Lastly. With respect to the tenderness of the young

lord's constitution, that was, however, of late grown stronger, and he being now upwards of twelve years of age, this was the proper crisis for forming his mind, and instilling into him a taste of those noble qualities and that spirit which became a person of his high station, in order to make him useful to his country; and this being the proper time, surely it was reasonable to trust Providence in these cases, and to send the young nobleman to some public school.

Judgment.

LORD CHANCELLOR MACCLESFIELD.—The father, by the statute (*a*), has a right to dispose of the guardianship of his child until twenty-one, and, having done so here, it will be (*b*) binding, unless some misbehaviour be shown in the guardian, in which case, it being a matter of trust, this Court has a superintendency over it.

(*a*) 12 Car. 2, c. 24.

(*b*) See *Dillon* v. *Lady Mountcashell*, 4 Bro. P. C. 366. Toml. ed.

But as to the objection, that this right of guardianship does not survive, because it is not said in the will in express terms that it shall go to the survivor, there seems to be no colour for it; because, where several guardians are appointed by a will, each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden; and it would be mischievous, and of very ill effect, if, where there are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do anything; and yet this must be the consequence if a guardianship devised to several should be taken to be one joint naked authority; such construction would make the Act of little force. A guardian has an authority coupled with an interest, and may bring a *writ of ravishment* of ward (*c*) on the infant's being taken from him; and though it is true that the damages recovered shall, by the statute, go towards the benefit of the ward, yet the declaration must lay it ad damnum of the guardian, the plaintiff.

(*c*) This writ was given by the Stat. West. 2 (13 Ed. 1, c. 35) to the Guardian in Chivalry to recover the body of the ward. And by the equity of Stat. West. 2 (13 Ed. 1, c. 24), which gave a writ *in consimili casu* the guardian in socage might have ravishment of ward. Military tenures were abolished by 12 Car. 2, c. 24, by which an action of ravishment of ward or trespass was given to the testamentary guardian. The writ *in consimili casu* was abolished by 3 & 4 Will. 4, c. 27, s. 36, and the ordinary remedy to recover the body of infant either by father or guardian is now by *Habeas corpus*. See *post*, p. 678. See *Re Marston*, 17 W. R. (Q. B. Ir.), 794.

(*a*) 11 Co. 26.

The reason of *Auditor Curle's case* (*a*), where, on the office of auditor being granted to two, without saying "and to the survivor," such office, on the death of one, was held to be determined, was because, in such case, both made but one officer, as the two sheriffs of Middlesex make, as to their office, but one person. In the present case, here is a plain right placed and vested in Mr. Justice Eyre, as the surviving guardian, and who, every one is assured, will well execute such trust, which it will be impossible for him to do without being allowed to place and choose the governor, gentleman, &c., to attend upon and take care of this young nobleman.

And, though Dr. Stubbs may be a good, learned, and pious man, yet he may not be so fit to attend the young earl to all places; for instance, to courts, places of exercise and diversion, &c., at which it may be proper for his lordship to appear.

But I must differ from Mr. Justice Eyre, as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery (*b*).

(*b*) Few, at the present day, would entertain this singular notion of the Lord Chancellor.

Wherefore, per Cur., discharge Dr. Stubbs from being governor, as also Mr. Bennett from being gentleman, and deliver the infant into the hands of his guardian, Mr. Justice Eyre, who desired the young earl might dine with him. But the Lord Chancellor said, that this was in confidence, that the Judge should return him to his mother, the countess, at night; for that, as yet, the Court would not make any order touching the custody of the earl's person.

Afterwards, on the Great Seal's being taken from the Earl of Macclesfield, and placed in the hands of three Lords Commissioners, on the 18th of March, 1724, Mr. Justice Eyre (lately made Lord Chief Baron of the Exchequer) exhibited his petition to the Lords Commissioners, setting forth the former proceedings; and that the infant earl, who was now just fourteen years of age, and had been married to Lady Susannah Noel, daughter to the Countess of Gainsborough, was detained from the

petitioner; that such marriage was *without the consent or privity* of the said Lord Chief Baron, the surviving guardian. Therefore the petitioner thought it his duty to lay these things before the Court, praying that the custody or tuition of the infant lord might be granted to him, and that the Court would make such order touching this matter as they should think proper.

Upon this the Dowager Countess of Shaftsbury petitioned the Lords Commissioners, that the order of the late Lord Macclesfield, declaring the right of guardianship to belong to the Lord Chief Baron Eyre, and directing the person of the infant earl to be delivered to the said Lord Chief Baron might be set aside.

Also, the infant earl petitioned the Lords Commissioners, insisting that the guardianship of his lordship, given by the will, was determined by the death of two of the guardians, and praying that his lordship, being now of the age of fourteen years, might be at liberty to choose his guardian.

On hearing these petitions, the Court ordered a sequestration, unless cause, both against the Countess (dowager) of Shaftsbury, and against the Countess of Gainsborough, for their contempt in contriving and effecting this marriage without the consent of the guardian, and without applying to the Court. And the person of the infant earl was ordered to be restored by the Countess Dowager of Shaftsbury to the Lord Chief Baron, it being the opinion of the Court, that though the declaration made by the late Lord Chancellor, that the right of guardianship did belong to the Lord Chief Baron, as surviving guardian, and the order made thereupon was ever so erroneous, yet that the same was a good order until reversed, and, consequently, it was a contempt to break it.

Judgment by the Lords Commissioners.

On the 15th May, the three Lords Commissioners, (viz.), Sir *Joseph Jekyll*, Master of the Rolls, Mr. Baron *Gilbert*, and Mr. *J. Raymond*, having heard this matter solemnly argued by counsel on both sides, gave their judgment, which was delivered by the Lord Commissioner *Jekyll*, that the Court were all of opinion the

sequestration against the Countess of Shaftsbury ought to be absolute.

Lord Commissioner Jekyll.—The marriage of a ward without the consent of the guardian is a ravishment of the ward (2 Inst. 440), and aggravated in this respect, that, after such ravishment by marriage, the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher.

The punishment inflicted by the law on such as married a ward without the consent of the guardian.

By the Statute of Westminster, 2 (13 Ed. 1, c. 35), it is enacted that if one be guilty of ravishment, either of a male or female ward, if the ward be restored, though not married, the ravisher shall be punished with two years' imprisonment; but if the ward be not restored, or if he be restored and be married, the party guilty of such ravishment (if he cannot make satisfaction for the marriage) shall be punished by imprisonment for life, or by abjuring the realm, at the discretion of the Court where he is tried; so that a ravishment of a ward became an offence not only against the guardian, but against the king; and whereas, on the ward's being married, the ravisher was to be punished by perpetual imprisonment, or by abjuring the realm, this shows the greatness of the offence, by the grievousness of the punishment.

And the matter of marrying infants without the proper consent of guardians, is provided against, both at law and in this Court, especially the latter, it being notorious that a Court of equity entertains no greater jealousy of, nor shows more resentment against anything than the unlawful marriage of infants.

On persons marrying a lunatic.

In the case of a marriage of a lunatic (viz.), that of Mr. Packer's marrying Mrs. Ash (see *Packer* v. *Wyndham,* Prec. Ch. 412), the Court committed Mr. Packer, the parson, and others that were their agents, and Packer continued in custody for a considerable time; and infants and lunatics may be compared together, both of these being unable to take care of themselves.

On this Court committing the custody of an infant to the

In the case where an infant is committed by the Court to the custody or care of any one, such committee gives

a recognisance that the infant shall not marry without leave of the Court, which form is very rarely altered, and on special circumstances; so that, if the infant marries, though without the privity, or knowledge, or neglect of the committee, yet the recognisance is, in strictness, forfeited, whatever favour the Court upon application may think fit to shew such committee, when he appears not to have been in fault.

care of any one, such committee enters into a recognisance that the infant shall not marry without leave of the Court. See *Dr. Davis's Case*, 1 P. Wms. 698; but this practice has some time since been discontinued, except perhaps in the case of a female ward being allowed to go out of the jurisdiction: *Jeffrys* v. *Vanteswarstwarth*, Barn. 144, 145.

In Lord *Somers's* time, Mr. Goodwin married an infant (Mrs. Knight), and was committed, and this commitment was followed by an Act of Parliament for dissolving the marriage.

So, on Sir Edward Hannes's daughter and heir, who was an infant, being inveigled from her guardian, Dr. Waugh, and married to one Willis, though Mrs. Hannes was not taken from a guardian assigned by the Court, yet, in that case, both Mr. Willis, and the parson, and the agents, were all committed by the Master of the Rolls, Sir *John Trevor*, and the order afterwards confirmed by Lord *Harcourt*.

Interposition of the Court to prevent anticipated unequal marriage.

And, as this Court punishes the instruments where such marriage is had without the consent of the guardian, so, if there be only an apprehension that the infant will be married unequally, either by the guardian or by his neglect, a Court of equity will interpose, and send for the infant and commit him to the custody of a proper person, or relation, in order to prevent such danger: as was done in the case of the infant Lady Catherine Annesley, by Lord Chancellor *Harcourt*, and likewise in another case (viz.), that of Mr. Vernon, of Staffordshire, by Lord *Macclesfield* (*a*).

(*a*) See *Lord Raymond's Case*, Ca. t. Talb. 58; *Smith* v. *Smith*, 3 Atk. 304.

But the present case is still of a higher nature, as it is the case of a peer of the realm, in whose education the public is interested, and where the guardianship of him is devised by a peer of the realm (viz.), by the will of the late Lord Shaftsbury.

As to the objection that has been made to the order of this Court, that there are no words therein, that the infant shall not be married without the consent of the guardian:

Resp. The Court could not suppose, or foresee, that any person would marry the infant without the guardian's consent; and, for that reason, there was no express provision against it in the order; but still this prohibition is implied (viz.), that no person, without the leave of the guardian, should marry this infant; besides, by the same reason that these words ought to be inserted, the order should likewise have provided that no person should take away or ravish this ward from the guardian, &c., all which things are surely implied; but, further, it is a sufficient answer to this objection, that such negative words are never inserted in the order.

But then it is objected, here is no disparagement in this marriage; forasmuch as the birth of the noble lady to whom Lord Shaftsbury is married, and also her quality, are equal to those of her husband; and she has had the advantage of being educated under the Countess of Gainsborough, her mother, a lady of great honour, virtue, and quality.

Resp. Admitting all this to be so, yet it may be reasonably supposed, that, if the infant earl had staid till he had attained his age, and could have made a jointure and settlement, in such case his Lordship might have had a better portion.

But, in reality, though there be no disparagement, yet this is only by way of extenuation, and can never be urged as a justification; for, it is the marriage without the consent of the guardian that constitutes the offence; so that, such marriage having been to one of equal degree and fortune, can at most tend but to extenuate.

And it is observable, that the disparagement of the ward was not where such ward, without the guardian's consent, married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree; for which see the statute of Merton, cap. 6 & 7, 2 Inst. 89—92.

Object. The punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage, having been once solemnised and per-

fected, the same cannot be afterwards rescinded or dissolved.

Resp. The like objection might be made, though the marriage were ever so much to the disparagement of the ward; but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of wards.

Object. This marriage is by the Countess, the mother of the infant earl, who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward.

Resp. The right of a testamentary guardian takes place of a guardianship by nature; by the express words of the Act of Parliament (12 Car. 2, c. 24) the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

Object. There is no instance of any one case, where a complaint has been against an infant's mother, for taking away her own child.

Resp. The Lords Selkirk and Orkney, guardians of the infant Duke of Hamilton, petitioned against the Duchess of Hamilton for taking away the infant Duke out of their custody, and their complaint was received; upon which the Court would have proceeded against the mother, but the guardians could not make out their right of guardianship by reason of some defect in the instrument under which they claimed.

So, that, all these objections being answered, the Court are of opinion, that the sequestration against the Countess Dowager of Shaftsbury ought to be made absolute.

As to the case of Lady Gainsborough, that seems to differ; and here the question is, whether the Countess of Gainsborough's consenting that her daughter should be married to the infant earl, be not a contempt?

8 Edw. 3, p. 52. The case was a writ of ravishment of ward, which was brought against four men and a woman; the men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter, upon which *Hirle*, C. J., gave the rule, that the woman was equally guilty with the four

men of the ravishment of the ward, the marriage of the infant, without the consent of the guardian, constituting the offence; and though the guardian be not appointed by the Court, nor any commitment made by the Court of the infant, yet have those been punished who have married the ward without the consent of the guardian, as appears from the above-cited case of Mrs. Hannes, where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir Edward Hannes, the father's personal estate, and for an allowance of maintenance for the infant.

Whereas, in the principal case, the decree goes something further, as it directs that the will of the late Earl of Shaftsbury should be performed, part of which will is, that the infant earl should be under the care and guardianship of the persons named therein.

In 3 Co. 38 (*Ratcliffe's Case*), it was resolved, that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward against any one for taking away his heir-apparent, male or female, and for marrying such heir; and that it is not material of what age such heir then was; and as the ancestor might bring such action for taking away and marrying the heir, so also might the guardian for taking away and marrying the ward.

It does not appear that the late Earl of Gainsborough left any testamentary guardians of his children; so that the Countess was guardian of them by nature; the marriage of her daughter belonged to her; consequently it is to be presumed that she married her daughter to the infant earl; at least, if she did not, she may purge herself by oath.

But it is material that the Lord C. B. Eyre, the guardian of the infant earl, has not, in his petition, made out any direct charge, or prayed anything against the Countess of Gainsborough; and, possibly, the Court may not be bound, *ex officio*, to punish for a ravishment of a ward where there is no complaint.

The Court has the care, but not the guardianship, of infants; and the Lord C. B. Eyre is not a guardian appointed by the Court (*a*), but by the will of the father, in which respect the Court is the less concerned.

(*a*) See *Goodal* v. *Harris*, 2 P. Wms. 562.

And though the stat. 12 Car. 2, c. 24, says, that a testamentary guardian may maintain an action of ravishment of ward, if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian.

So that, in this case, forasmuch as the testamentary guardian has not complained of or prayed any redress against Lady Gainsborough, the Court will do nothing against her, but discharge the order of sequestration with respect to her (*b*).

(*b*) See Mr. *Herbert's Case*, 3 P. Wms. 116.

And now we come to the petition of the infant Earl of Shaftsbury, where it is first objected, that though the Court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship, unless the matter be brought judicially before them, by bill, answer, and proofs.

Resp. In this case here are a bill and answer, and both the will and the devise of the guardianship are set out by the bill; whereupon the decree says, that the trust of the will shall be performed, one of which said trusts is the guardianship of the infant.

It is not material that the earl was defendant, for so it was in the case of Mrs. Hannes, who was married to Mr. Willis without the consent of the guardian; and this Court may upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard that the care of all infants is lodged in the king as *pater patriæ*, and by the king this care is delegated to his Court of Chancery.

That right which the king has as *pater patriæ* to take care of his subjects in cases of charities, idiots, lunatics, and infants, falls under the direction of the Court of Chancery, which, in consequence thereof, hath used, upon petition only, without any bill or decree, to make orders touching the determination of such right.

In F. N. B. 232, the king is bound, of common right and by the laws, to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the king's protection; for which reason it is, that idiots and lunatics,

who are incapable to take care of themselves, are provided for by the king as *pater patriæ;* and there is the same reason to extend this care to infants.

This is the reason given in the writ *de idiota inquirendo,* which the king issues out to take care of him who *regimini sui ipsius et bonorum, et terrarum suarum minimè sufficit,* which reason also appears in the *writ de lunatico inquirendo;* and in 4 Rep. 123, b. (*Beverley's Case*), infants, as well as idiots, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves.

In like manner, in the case of charity, the king *pro bono publico,* has an original right to superintend the care thereof, so that, abstracted from the statute of 43 Eliz. c. 4, relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney-General's name, for the establishment of charities.

(*a*) 2 Vern. 333. Also in the case of *Lord Falkland* v. *Bertie* (*a*), the Lord *Somers,* in delivering his opinion, takes notice, that several things are under the care and superintendency of the king, as he is *pater patriæ,* and instances in all charities, idiots, lunatics, and infants.

Indeed, several Acts of Parliament have made alterations in some cases of this nature, which so far stand altered, and no further; but unless there be express words in an Act of Parliament for that purpose, the original jurisdiction of this Court remains as before; but there is not any one Act that has taken away the original jurisdiction of this Court with respect to this care and superintendency in the case of infants, charities, idiots, and lunatics. Since the statute which took away the Court of Wards (*b*), the jurisdiction of wardship returns to the Court of Chancery: (*c*) and it appears by the Register 21, b. 198, that a writ may issue out of this court to remove the guardian of an infant, and to put another guardian in his stead.

(*b*) Established by 32 Hen. 8, c. 46; 33 Hen. 8, c. 22. Abolished by 12 Car. 2, c. 24, s. 3. See Co. Litt. 77 a, 77 b.

(*c*) 2 Vern. 342.

Though an infant cannot bring an ac-

The law is particularly favourable to, and careful of an infant's interest; and though the infant himself cannot

bring an account against the guardian, until his coming of age, yet a third person may bring a bill for an account against the guardian, even during the minority of the infant (*a*).

count against his guardian until his coming of age, yet a third person may bring such bill for an account, even during the minority of the infant.

So in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age.

(*a*) See *Pomfret* v. *Lord Windsor*, 2 Ves. 484.

Lord *Somers* has often said, that this Court should be always open for petitions; and orders on petitions, in regard to the guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship.

Thus, in the case of *Lord Tenham* and *Barrett* (*b*), there was no bill depending in this Court, but only a petition, desiring that Lady Tenham, the mother, being a Papist, might not have the guardianship of the infant, determined on petition against the mother: upon which an appeal was brought to the House of Lords (*c*), before whom it was never objected, nor once thought of, that this Court could not, on a petition only, determine the right of guardianship: and on the appeal the Lords also determined the right against the mother.

(*b*) See 9 Mod. 40; 14 Vin. Ab., p. 172, note to Ca. 1; 2 Eq. Ca. Ab. 16, nom. *Reynolds* v. *Lady Tenham*.

(*c*) *Lady Teynham* v. *Lennard*, 4 Bro. P. C. 302. Toml. edit.

Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity: no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill.

But in the last place it is objected, that, upon the wording of this will, the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying, and to the survivor of them: and that this is a joint personal confidence wherewith three are intrusted, wherefore, by the death of any one, the guardianship is determined; and to prove that a guardianship is personal, it has been urged, that it is not assignable, nor will it go to executors or administrators.

Resp. I admit a guardianship is not assignable, neither will it go to executors or administrators; but for all that,

it is coupled with an interest, and is not a naked authority. I admit, also, it has been said, that where a naked authority is given to two, if one dies, the survivor cannot act; but the same book, viz., 1 Inst. 112, 113, says, that where an authority is coupled with an interest, it does survive. In the case of *Gardiner* v. *Sheldon* (*a*), (Vaugh. 182), the case of a guardian is compared to that of an executor or administrator, which is not assignable, but yet survives; and though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship, by appointing an executor by his will, yet the case of a guardianship devised to two is strictly like the case of an administration granted to two (especially where the debts amount to as much as the assets); for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship: it will not go to his executors or administrators, but to the surviving administrator (*b*); such an administrator is accountable to the creditor for everything, as much as the guardian is to the infant; such an administrator can make no profit.

(*a*) Quære *Bedell* v. *Constable.*

(*b*) *Adams* v. *Buckland*, 2 Vern. 514; *Hudson* v. *Hudson*, Ca. t. Talb. 127.

And that a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action and avow in his own name, may make leases (*c*) during the minority of the infant, and may grant copyholds (*d*) even in reversion, as *dominus pro tempore.*

(*c*) 2 Roll. Abr. 41, pl. 4; but a lease by the testamentary guardian will be valid only during the minority of the ward: *Roe* d. *Parry* v. *Hodgson*, 2 Wills. 129; *Shaw* v. *Shaw*, Vern. & Scriv. 607.

(*d*) 2 Roll. Abr. 41, pl. 3.

A guardianship is not properly an office, nor to be resembled (for instance) to the office of a parkership; for the former has an interest in the infant's estate; but a parker has no right or interest in the park, or land inclosed therein, and the owner of the land may determine such office by disparking the park or killing the deer; and whereas in Poph. 204, it is said, that where the Lord Grey committed the custody of his son to four, and one of them died, the authority determined; this case is put upon the clause of the statute of 4 & 5 Phil. & Mar. cap. 8 (*e*), which says, "that whosoever takes a damsel unmarried, and under the age of sixteen, out of the custody of their father or mother, or any such person to whom the father in his

(*e*) Repealed by 9 Geo. 4, c. 31.

life-time, or by his will, or by any act in his life-time, has appointed the same, shall be subject to the pain of two years' imprisonment, or to the payment of such fine as the Court shall appoint." So that, by that Act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as the guardian has: he had but a bare authority.

As to *Auditor Curle's Case* (*a*), that depended upon the statute of the 32 Hen. 8, c. 46; but in the principal case, when the now infant earl was so very young as not to be above a year old, and the testator had appointed him three guardians, it was hardly probable that the testator himself could imagine that all those three guardians should live until the child's age of twenty-one; and then to say, that the guardianship shall determine by the death of any one of the guardians, would be to affirm, that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were appointed by the father, the less likelihood there would be that they all should live till the child arrive to twenty-one.

(*a*) 11 Co. 2 b.

LORD COMMISSIONER GILBERT.—The late Earl of Shaftsbury, the plaintiff's father, by his will, dated December 10, 1710, appoints Sir Robert Eyre, Sir John Croply, and Jasper Stanhope, Esq., afterwards Lord Stanhope, guardians of the present earl, till his age of twenty-one years. Sir Robert Eyre preferred his bill in this Court, and proved the will, and the Court ordered the same to be performed. Sir John Croply and Lord Stanhope died, and there happening a dispute between the Countess of Shaftsbury and my Lord Chief Baron Eyre concerning the guardianship, on the 28th of February, in the 9th of the King, the Court declared the right of guardianship to be in my Lord Chief Baron, and that nothing should be done in relation to the care and education of the said earl, without the direction of my Lord Chief Baron. My Lord Chief Baron, the 22nd of

The judgment of Lord Commissioner *Gilbert* is taken from his own Reports, where the case appears under the name of *Shaftsbury* v. *Shaftsbury* (see Gilb. Eq. Rep. 172), and is substituted for the short note of it in Peere Williams.

March last, preferred his petition to this Court, setting forth that the Earl of Shaftsbury was married to the Lady Susannah Noel, daughter to the Earl of Gainsborough, without his privity or consent; upon which, and the affidavits thereunto annexed, the Countess of Gainsborough and Lady Shaftsbury, as likewise the earl, were ordered to attend; and the Countess of Shaftsbury likewise preferred her petition to discharge the order of the 28th of February in the 9th of the King; and in this case there have been four questions made :—

1. Whether the Court has jurisdiction to declare the right of guardianship in this case?

2. Whether the Court could declare it by petition, or whether it must be by bill?

3. Whether this be a legal declaration of the right of guardianship; (that is), whether it will survive or not?

4. Whether these ladies, or either of them, are in contempt of the Court?

1st Question. First, Whether the Court has jurisdiction?

Now, touching the wardship at law, there was a twofold jurisdiction.

The first was, when the tenures were in being; and there, till the Court of Wards was erected, the whole jurisdiction of the king's wards, where the lands were held in chivalry, was under the jurisdiction of this Court.

So likewise, in relation to subjects, this Court determined touching the wardships of the body, who was the prior, and who was the posterior lord.

For the wardship of the body of the heir went to the lord who had the prior homage; and that was determined in the Court of Chancery, where several lords applied for the writ of ravishment, which was an original writ.

But this sort of guardianship was a sort of dominion of masters over servants and vassals, and was introduced among the Gothic nations, to breed them to arms; and it was a great burthen upon the people, and is fallen now with the tenures.

But the Crown has another jurisdiction, and that is as *pater patriæ*, as a father over his children.

The king has a right to take care of infants, lunatics, and idiots, that cannot take care of themselves; and this care cannot be exercised otherwise than by appointing them proper curators or committees.

So Fleta, cap. 9, fol. 4, *de Tutelis*, speaking of infants, "*Quidam sub custodiâ parentum et proximorum consanguineorum, et illis dantur custodes de jure gentium.*" Fleta.

So Bracton, treating of this subject, lib. 2, cap. 38, fol. 86: "*Nunc autem dicendum, &c., de illis qui minores sunt et infra ætatem, et quos oportet esse sub tutelâ et curâ aliorum, et quod se ipsos regere non norunt, et quorum quidam debent esse sub custodiâ dominorum cum terris et tenementis, quæ sunt de feodo, eorum, quidam sub custodiâ parentum, et proximorum consanguineorum ut prædictum est. Et quibus dantur custodes aliquando, de jure de antiquo feoffamento, et aliquando curatores ab homine.*" Bracton.

Thus Staunford, in his Exposition of the King's Prerogative, p. 37: "The king is the protector of all his subjects, and of all their goods, lands, and tenements; and, therefore, of such as cannot govern themselves, nor order their lands and tenements, his grace (as a father) must take upon him to provide for them, that they themselves and their things may be preserved;" and he quotes Fitzherbert, 232, that the king is bound of right to defend his subjects, their goods and chattels, lands and tenements; and that every one is in the protection of the king who has not forfeited it by some offence. Now, how can the infants be protected by the Crown, but by assigning them proper guardians where it is disputable? Staunford.

Lord *Coke* says, in *Beverley's Case* (*a*), that the king shall have the protection of their goods and chattels, as well as of their lands, and compares it to the case of an idiot. (*a*) 4 Rep. 126.

Nobody has ever doubted the jurisdiction of this Court in the case of idiots and lunatics; and indeed I should have thought this point had been at peace as to the infants, when it was settled by Lord *Somers*, in the case of *Lord Falkland* v. *Bertie* (*b*). (*b*) 2 Vern. 333.

There are since innumerable precedents, wherein this

Court has determined touching the guardianship of infants, as in the case of *Freeman* and *The Bishop of Oxford*, the 5th of July, 1719, where the Bishop of Exeter, surviving guardian to the father's will, applies to the Court, and the infant is sent from Oxford to Cambridge.

And in *Vernon* and *Vernon's Case*, 10 Geo. 1, several orders were made upon petition, and among the rest, one upon petition, that the infant was conversant with the daughter of the guardian, that he should be immediately sent for, and ordered forthwith to Eton School.

(*a*) Cited Ridg. 149 ; 8 Mod. 214.

And in *Anesley* and *Anesley's Case* (*a*) it was ordered to take the infant from the mother, and a sequestration against the Duke of Buckingham and the mother for not producing the infant.

Now, as the king has the protection of infants, I don't see any other protection can be than by assigning them their guardians ; and where should that protection be exercised but in that Court where care is taken of all persons under natural disabilities ?

Natural allegiance.

The very notion of natural allegiance seems to be founded on this protection that is due from one born here, though he goes into a foreign country and lives under and takes oaths to another prince. And why ? Because it is a debt of gratitude due for the protection which the infant receives at his first breathing vital air, since care is supposed to be taken of him, by appointing proper guardians to manage him and his affairs.

And I presume that the law that the next of kin, to whom the inheritance should not descend, should be guardian, was taken up originally as a rule of reason in this Court, and by usage came to be the law of the land ; for I have looked into the books of the civil law, and all the foreign feudists, and their rule is, that he that has the right of succession has the guardianship ; *ubi successionis emolumentum ibi et tutelæ onus esse debet.* 28 Edw. 1, cap. 1, seems to be only an affirmance of the common law.

There are often disputes who are the next of kin, or who is the proper guardian. That must be determined

somewhere; and where can it be determined but in this Court, where all persons under disability are protected?

The second question is, whether the Court can declare the right of guardianship by petition, or whether it must be by bill? 2nd Question.

'Tis said, that if the right of guardianship could be determined by petition it must be determined by affidavits, where the contrary party has not the liberty to cross-examine. Objection.

'Tis agreed, that in all cases where it is necessary for the crown immediately to interpose, it must be determined upon order; for, otherwise, there can be no provision for the infant during the time of the dispute. Answer.

So there is a necessity in some cases, that it should be determined upon petition.

But in this case, who in fact are guardians, has been determined already in a cause instituted by bill and answer; and so there can be no dispute touching the fact; and so the right is properly determined upon petition.

The third question is, whether this be a legal declaration of the right of guardianship; that is to say, whether it will survive or not? And here it has been argued, that the guardianship is a naked authority, and so cannot survive. 3rd Question.

But 'tis agreed, that if it be an authority coupled with an interest it will survive.

Indeed, in the civil law they looked upon it to be a naked authority; but yet, where there were several guardians, and one only gave security, it was executed by him alone. See Vinius, tit. 24, *De Satisfactione Tutor et Curator.*

But if it were an authority, it is not like an authority to do a single act where it must be done by them all, because it is the will of the party that authorises them all, and so one alone can't execute it.

But in this case the authority must, from the nature of the thing, be joint and several; for one alone must

receive the money of the infant, and not meet altogether for that purpose.

And were it an authority, or were it not, it is to be construed joint and several; else the more guardians were appointed for the security of the infant, he would be the less secure, because upon the death of any one of them the guardianship would be at an end.

But no doubt, with us, it must be reckoned an interest.

For the law has appointed remedies, both droitural and possessory, to recover the guardianship.

First, Droitural.—And that was the writ *de custodiâ terræ et hæredis:* and Fitzherbert has compared the droitural and possessory action, in the title *De Custodiâ Terræ et Hæredis*, fol. 133.

The Statute of Merton, c. 6, provideth, that, in the writ of right of ward, the plaintiff shall recover the value of the marriage.

Secondly, Possessory.—And that, at common law, was the action of trespass; and in this, at common law, he could only recover damages for his ward, and not the ward itself.

The Statute of Westminster 2, (13 Ed. 1, c. 35), gives a writ of ravishment of ward, in which the plaintiff recovered the body of the heir, and not damages only.

And by the Equity of Westminster 2, (13 Ed. 1, c. 24), a writ of ravishment lay for the guardian in socage, as a writ *in consimili casu*.

Everyone will allow the guardian in chivalry had an interest; and if the guardian in socage would have the writ *in consimili casu*, he must have an interest also.

And a man may as well have an interest of honour, which every person has in relation to his family, as an interest of profit.

And it appears, in *Ratcliffe's Case* (3 Co. 37), that the father had an action of trespass for taking away his son and heir *quare filium et hæredem rapuit*, though he was not in propriety of speech counted the guardian; for the heir was looked upon as part of the family. But the

father, however, had an interest in the son, and so it was trespass to take him away.

But the father had not a writ *de custodiâ terræ et hæredis*, because the father was no guardian. Nor was there any need of a droitural action, because he was always in possession of his son; and so an action of trespass lies for the marrying his heir apparent, whether he be within age or of full age, because it is an injury to marry and destroy the hopes of his family by an improvident marriage: Fitz. Abr. tit. Garde, 32. Quære.

And this lies even against the lord, for the father had the custody against the lord; for the father, being tenant in chivalry, could breed his son to arms; but no collateral ancestor had the custody against the lord.

And, therefore, this makes the difference that is mentioned in *Ratcliffe's Case* (3 Co. 37), that a collateral ancestor may have a writ of ravishment against any person that ravishes *consanguineum et hæredem;* (that is) his heir apparent, because that is an injury to himself.

But the action does not lie against the feudal lord, because he had a right to marry him.

And every man may be said to have an interest in his heir apparent, because nothing imports him more than to continue his name in proper representatives.

But the father at common law could not appoint a guardian, because the law had appointed a guardian, whether the father was tenant in chivalry or in socage.

The first law that gave the father the power of appointing, was 4 & 5 Phil. & Mar. c. 8 (*a*). The words of the statute are, "that nobody shall take away any maid or woman-child unmarried, being within the age of sixteen years, out or from the possession, custody, or governance, and against the will of the father of such maid or woman-child, or of such person or persons to whom the father of such maid or woman-child, by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give, or grant the order, keeping, education, or governance of such maid or woman-child."

(*a*) Repealed as to England by 9 Geo. 4, c. 31, s. 1. As to India, by 9 Geo. 4, c. 74, s. 125.

This gives an authority to appoint the custody of a

female child for a special purpose. He that takes away the female child, and marries her or deflowers her, is an offender within that statute.

So, this being a custody for a special purpose, it was properly enough construed to be a naked authority.

Therefore I take the case in Poph. 204, to be good law, that, when two persons are appointed guardians by authority of this statute, and one of them dies, it will not survive, because that statute gives an authority to a special purpose, to make the ravisher criminal within that law.

But the 12 Car. 2, c. 24, gave the father a power, by deed executed in writing, or by act executed in his lifetime, or by his last will and testament, to appoint the custody and tuition of his child or children till the age of twenty-one years; and such disposition of the custody to be as good and effectual against all and every person claiming the custody of such child or children as guardians in socage or otherwise; and the persons to whom such custody shall be disposed, to have a writ of ravishment of ward or trespass.

This statute was formed by Sir *Matthew Hale*, and, when wardship were taken away, introduced the testamentary guardians: and this testamentary guardian, by the rules of the civil law, was to take place before all others.

But our testamentary guardian is not a naked authority, but is made after the model of a guardian in socage, and, by consequence, an interest passes to the guardian.

And the Act (Rights), given to the guardian in socage, are given by this law.

But 'tis said, that every interest is assignable, transferable, or devisable, and that the guardianship is not; and therefore it is a naked authority and not an interest.

Every interest of profit is assignable, because it is the nature of property, that the person who is the owner should have dominion over it, so as to assign or transfer it.

But the guardian in socage has no interest of profit: it

is an interest of honour, and for the honour of the family committed to his next of kin, and therefore is inherent to the blood, and can't be assignable.

Because a stranger could not have that interest to take care of the ward, nor have it at heart.

The guardian in socage was accountable to the infant when he came to the age of fourteen, and he could not transfer that account to another.

The testamentary guardian, as is said, is formed after the manner of guardian in socage, and comes instead of him, and is *in loco parentis*.

Therefore, though it be not assignable, nor transferable, yet it is such an interest as shall survive.

The fourth question is, whether the ladies, or either of them, are in contempt of the Court? 4th Question, contempt of the Court.

And it is very plainly sworn upon the Lady Shaftsbury, that she has owned that she has seen him married and bedded.

The mother's being present in this case, is a plain evidence of assent.

And the mother can't marry her child without the consent of the testamentary guardian.

For the father, who had the power over his child by law, has placed it under the power of the testamentary guardian.

Therefore it is taken out of the power of the mother.

But it is objected, that this Lord Shaftsbury has married the Lady Susannah Noel, a lady of birth, quality, and fortune, and therefore is married without disparagement, and that this will be no contempt of the Court.

When the ward is put under the protection of this Court by the testamentary guardian, it is a contempt of the Court to marry him without the consent of the guardian.

It is a breach of filial duty for children to marry without the consent of the parent.

The testamentary guardian is *in loco parentis*, and he having put the ward under the protection of the Court, it is then a contempt to marry him without the guardian's

consent, and the contempt being in marrying him without the consent of the guardian, an improvident marriage is only an aggravation of the offence, if that had been the case.

There is nothing in the objection, that the mother has the natural power over her son, and that *jura sanguinis nullâ lege civili possunt dirimi.*

For the father, whilst living, was the head of the family: he had power over his child, and he might dispose of him by law. And it is the duty even of the mother to pay that respect to the memory of her deceased husband, as not to marry her son without the consent of the guardian appointed by the father.

And when the child is by the guardian put under the protection of this Court, it will be a contempt even of the mother to marry him without the consent of the guardian.

As to the Lady Gainsborough, this contempt is not sworn upon her.

For an order for sequestration in the case of a peer, or a commitment in the case of a common person, is a judicial act of the Court, and therefore must be founded on a proper affidavit, as I apprehend.

The order is the judgment of the Court, the sequestration or commitment is but the execution of it.

And therefore the judgment is to be founded upon truth, and not upon conjecture only.

For if she be examined upon subsequent interrogatories, this will not make good the determination of the Court by a matter *ex post facto.*

Wherefore he agreed with Lord *Jekyll in toto*, as did also Lord Commissioner *Raymond* (*a*).

(*a*) See 2 P. Wms. 125.

No part of the jurisdiction of equity was more important or beneficial than that which it exercised over infants, whether it were in guiding or controlling the acts of their guardians or of themselves, limiting and, when necessary, even abrogating entirely the natural and legal rights and authority of a father. In future, under the Judicature Act, 1873, all causes and matters relating to the wardship of infants and the care of infants' estates are as-

signed to the Chancery Division of the High Court, sect. 34, subs. (3), and "in all questions relating to the custody and education of infants, the rules of equity will prevail:" sect. 25, subs. 10. The principal case is often referred to, on account of the important investigation which this branch of the law then received by the distinguished Judges who decided it.

I. *Guardianship of Father and Mother.*]—Passing over the different species of guardianships, discussed with so much learning in the principal case, some of which have been either abolished by statute, have fallen into disuse, or have become of little practical importance, such as guardianship in chivalry, guardianship in socage, guardianship by custom, guardianship by the appointment of the spiritual Courts, guardianship by election, and guardianship under stat. 4 & 5 Phil. & Mar. c. 8 (as to which the reader is referred to the notes of Mr. Hargrave, Co. Litt. 88, b.), it may be laid down as indisputable that the father is by nature and nurture the guardian of his children, and is entitled to their custody, during their infancy (*Ex parte Hopkins*, 3 P. Wms. 152, 154; *Stileman* v. *Ashdown*, 2 Atk. 480; *Wellesley* v. *Duke of Beaufort*, 2 Russ. 21; *De Manneville* v. *De Manneville*, 10 Ves. 52, 62); and even as against their mother he may place them with another person (*Ex parte M'Clellan*, 1 Dowl. 81; *Ex parte Glover*, 4 Dowl. 291; *Ex parte Skinner*, 9 Moo. 278); even when he is himself abroad (*Re Emily Suttor*, 2 Fost. & Fin. 267; except where his rights are controlled by the Court or by the Statutes hereafter mentioned.

The law of this country gave to the father the custody of the children and the control over them, not for his own gratification, but on account of his duties with reference to the public welfare, it has therefore been held (previous to the passing of 36 Vict. c. 12) that contracts by a father to give up to his wife the custody and education of their children, were contrary to public policy, and would not be inforced in equity against the husband, even although he may have been guilty of adultery and cruelty to his wife (*Hope* v. *Hope*, 8 De G. Mac. & G. 731; *Vansittart* v. *Vansittart*, 4 K. & J. 62; 2 De G. & Jo. 249); unless he had been guilty of such gross misconduct as totally to unfit him to have custody and control of his children, as for instance, where he had criminally assaulted a daughter: *Swift* v. *Swift*, 34 Beav. 266.

An agreement, however, by a husband in a deed, compromising a suit in the Divorce Court, that two of the children should remain at such schools as the husband should direct, and that their holidays should be passed at such places as the trustees should direct, was held reasonable, and enforced by the Court against the husband: *Hamilton* v. *Hector*, 6 L. R. Ch. App. 701.

And it seems that if a deed were actually executed by the father, it would not be rendered absolutely void, by reason of its containing provisions by which he abandoned his right to the custody of his children (*Vansittart* v. *Vansittart*, 2 De G. & Jo. 249; *Walrond* v. *Walrond*, 1 Johns. 18); and a trustee has been appointed under such a deed by the Court (*Re Matthews*, 26 Beav. 463; and see *Swift* v. *Swift*, 34 Beav. 266; *S. C.*, Ib. (L. J.) 731); and a legal and proper covenant therein enforced: *Hamilton* v. *Hector*, 13 L. R. Eq. 511.

The law upon this subject has, however, been recently altered by 36 Vict. c. 12, which enacts that "no agreement contained in any separation deed made between the father and mother of an infant, or infants, shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement, if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

It seems in accordance with the observation of Lord Commissioner *Jekyll*, in the principal case, that, after the death of the father, without appointing a testamentary guardian, the mother is also their guardian by nature and nurture: *Villareal* v. *Mellish*, 2 Swanst. 533; *Mellish* v. *De Costa*, 2 Atk. 14; *Roach* v. *Garvan*, 1 Ves. 158; *Mendes* v. *Mendes*, 3 Atk. 624; 1 Ves. 91; *In re Race*, 26 L. J., N. S. (Q. B.) 169; *S. C.*, nom. *The Queen* v. *Clarke*, *Re Alicia Race*, 7 Ell. & Bl. 186.

II. *Testamentary Guardian.*]—An important power was, by 12 Car. 2, c. 24, conferred upon the father, of appointing, even although he were a minor, by deed or will, guardians for his legitimate children; these are usuallytermed testamentary guardians.

By the Act of 12 Car. 2, c. 24, it is among other things enacted, "that where any person hath, or shall have, any child or children under the age of one-and-twenty years, and not married at the time of his death, it shall be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time *en ventre sa mere*, or whether such father be within the age of one-and-twenty years, or of full age, by his deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for, and during such time as he or they shall respectively remain under the age of one-and-twenty years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants; and such

disposition of the custody of such child or children, made since the 24th of February, 1655, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise: And such person or persons to whom the custody of such child or children hath been, or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children, and shall and may recover damages for the same in the said action, for the use and benefit of such child or children: sect. 8. And such person or persons to whom the custody of such child or children hath been, or shall be so disposed or devised, shall and may take into his or their custody to the use of such child or children the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective age of one-and-twenty years, or any lesser time, according to such disposition as aforesaid; and may bring such action or actions in relation thereto, as by law a guardian in common socage might do. Sect. 9.

A similar Act was passed in Ireland, 14 & 15 Car. 2 (Ir.), c. 19, except that no persons could be appointed guardians who did not belong to the Church of England.

By the late Statute of Wills (1 Vict. c. 26), the power of making a will is taken away from minors, who can, therefore, it seems, now only appoint guardians for their children by deed.

The power of appointing a testamentary guardian for children does not extend to those who have attained the age of twenty-one (*Ex parte Ludlow*, 2 P. Wms. 638); or to illegitimate children: *Sleeman* v. *Wilson*, 13 L. R. Eq. 36.

According to 12 Car. 2, c. 24, a father may appoint any person or persons to be testamentary guardians, with the exception of Popish recusants; but as Roman Catholic and other disabilities are now removed by 33 Geo. 3, c. 21, s. 2, amended by 34 & 35 Vict. c. 48, it seems that the religious tenets of the person appointing, and of the persons appointed, testamentary guardians, will not be any obstacle to the validity of the appointment. Thus an appointment by a Jew (*Villareal* v. *Mellish*, 3 Swanst. 538), or of a Roman Catholic, though an ecclesiastic in England (*Talbot* v. *Earl of Shrewsbury*, 4 My. & Cr. 673), or Ireland (*In re Byrnes*, 7 I.R. C.L. 199), or of a dissenter (*Corbett* v. *Tottenham*, 1 Ball & B. 59) will be valid.

Although the Court would allow the appointment of members of a firm individually as guardians, it

will not recognise the appointment of a firm as "the house of Messrs. A. B. and C." in that capacity: *De Mazar* v. *Pybus*, 4 Ves. 647.

A father, moreover, may appoint a person to be guardian upon the happening of some future event (*Selby* v. *Selby*, 2 Eq. Ca. Ab. 488), and if the event do not take place the person so appointed will not be guardian. Thus, where a man appointed his wife guardian of his son, and added that if his wife married again before his son attained twenty-one, from thenceforth he appointed his brother sole guardian. The wife, not having married again, died before the son attained twenty-one, and it was held that the brother could not be guardian. See *Selby* v. *Selby*, 2 Eq. Ca. Ab. 488.

It seems that if a person be appointed to the guardianship over an infant without any period being mentioned for its duration, the guardianship will last during the minority: *Mendes* v. *Mendes*, 1 Ves. 91; *sed vide* Vaugh. 184, 185.

No particular form of words is essential for the appointment of guardians. Thus where a testator desires "his son and daughter to be under the care and direction of A. B. and C. D." (*Bridges* v. *Hales*, Mos. 108, and see *Teynham* v. *Lennard*, 4 Bro. P. C. Toml. Ed. 302), or directs M. to "take the care and management of B. house, and my children" (*Miller* v. *Harris*, 14 Sim. 540), they will be held to have been properly appointed guardians under the Act. See also *Mendes* v. *Mendes*, 1 Ves. 89; 3 Atk. 619; *In re Park*, 14 Sim. 89; *sed vide Edwards* v. *Wise*, Barn. Ch. Rep. 139.

But, where a testator devises his land "to A. B. during the minority of his son and heir in trust for his heir, and for his maintenance and education until he be of age" (*Bedell* v. *Constable*, Vaugh. 184), or appoints A. B. to "be guardian of the estate" of his infant children (*In re Lord Norbury*, 9 I. R. Eq. 134), A. B. will not thereby be constituted a testamentary guardian.

An appointment of a guardian by deed is said by Lord *Eldon*, C., "to be only a testamentary instrument in the form of a deed or will" (*Ex parte The Earl of Ilchester*, 7 Ves. 367), and may be revoked by a will: *Earl of Shaftsbury* v. *Hannam*, Ca. t. Finch 323.

But a testamentary appointment of guardian is not revoked by a subsequent testamentary appointment, not executed according to the Statute, and not directly importing revocation (*Ex parte the Earl of Ilchester*, 7 Ves. 348), or by a codicil, by which the care, charge, and education of the children is left to one of them (*Hare* v. *Hare*, 5 Beav. 629, and see *Knott* v. *Cottee*, 2 Ph. 192, *post* 682), and where persons are trustees and guardians, although the trusteeship may be revoked,

they will still remain guardians: *Re Park*, 14 Sim. 89.

The office of testamentary guardian, as decided in the principal case, where there are more than one, goes to the survivor (see ante, p. 633), and it has been recently decided, that the Act of 12 Car. 2, c. 24, s. 8, sanctions a father in giving authority to a surviving guardian to nominate a person in the place of one who has died. *In the goods of Thomas Parnell*, 2 L. R. P. & D. 379.

A guardianship, however, as is laid down in the principal case, is not assignable: *Mellish* v. *De Costa*, 2 Atk. 14; *Reynolds* v. *Tenham*, 9 Mod. 40; *Villareal* v. *Mellish*, 2 Sw. 536.

Guardians, before acting, may disclaim (*O'Keeffe* v. *Casey*, 1 S. & L. 106), but if they have once acted, they cannot renounce (*Spencer* v. *Chesterfield*, Amb. 146), but the Court may appoint other persons to have charge of the infant until further order. *Ib.*

Where a will contains simply an appointment of a guardian but no disposition of personal property, or an appointment of an executor, it is not entitled to probate: *Lady Chester's Case*, 1 Ventris, 207; 3 Keb. 30: *In the goods of Francis Morton*, 12 W. R. (Prob.) 320; *Gilliat* v. *Gilliat*, 3 Phill. 222.

A testamentary guardian will not be disabled from exercising the office from having been a witness to the execution of the deed by which he was appointed: *Morgan* v. *Hatchell*, 19 Beav. 86.

A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children, and a grant made to the latter will be revoked, and a fresh grant made to the testamentary guardian: *In the goods of Louisa Morris*, 2 Sw. & Tr. 360.

A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his wards: *Mathew* v. *Brise*, 14 Beav. 341. But they may lose all right to make any claim against him or his estate by acquiescence: *Sleeman* v. *Wilson*, 13 L. R. Eq. 36.

In a petition under the Settled Estates Act (19 & 20 Vict. c. 120), for a sale of property to which an infant is interested in remainder, the consent of the testamentary guardian of the infant is not sufficient, and a guardian must be appointed for the purpose of consenting on behalf of the infant: *In re R. James, Deceased*, 5 L. R. Eq. 334.

The guardianship, as was decided in the principal case, was not determined by the marriage of a male infant (see ante, p. 633). In *Mendes* v. *Mendes*, 1 Ves. 91, Lord *Hardwicke* is reported to have said that the marriage of a female ward would determine the guardianship, but this *dictum* does not appear in the case as reported in 3 Atk. 624, and in another case

Lord *Hardwicke* held that the guardianship of a person appointed by the Court of Chancery did not determine by marriage of a female ward: *Roach* v. *Garvan*, 1 Ves. 160.

No power was given to the mother of appointing a testamentary guardian, and the appointment of one by her husband supersedes her guardianship by nature and nurture. She may, however, be appointed a testamentary guardian.

But, although a mother has no legal power by will to appoint a guardian for her children, yet the Court will have regard, in the appointment of a guardian, to the expression of her wishes, especially when there has been a similar indication of those of the father: *Re Kaye*, 1 L. R. Ch. App. 387.

Scotch testamentary tutors are not testamentary guardians, according to 12 Car. 2, c. 24: *Johnstone* v. *Beattie*, 10 C. & F. 42; *Scott* v. *Bentley*, 1 K. & J. 281, 284; *Stuart* v. *The Marquis of Bute*, 9 Ho. Lo. Ca. 440.

In cases relating to the care of infants, the benefit of the infant being the foundation of the jurisdiction and the test of its proper exercise, there ought on this subject to be a perfect reciprocity of action between the Courts of England and Scotland, although as to judicial jurisdiction the two countries are to each other independent foreign countries: *Stuart* v. *The Marquis of Bute*, 9 Ho. Lo. Ca. 440.

III. *Guardian appointed by a Stranger.*]—Although a mere stranger has no legal right to appoint guardians for an infant during the life of his father (see *Ex parte Hopkins*, 3 P. Wms. 152; *Powel* v. *Cleaver*, 2 Bro. C. C. 510), nevertheless, a father may act in such a manner as to render an appointment by a stranger effectual. Thus, where a person confers a benefit upon the father, or upon the children, for their maintenance or otherwise, upon condition that the father gives up the guardianship of them, if he accepts the benefit himself, or commits the care of his children to the guardian nominated by the stranger, he will not afterwards be allowed to *prejudice their interests* by asserting his legal rights, either by interfering with their education or enforcing the delivery up to him of their persons. Thus, in *Colston* v. *Morris*, Jac. 257, n., the testator left a sum of money to the infant, and gave and committed, so far as it was in his power so to do, the guardianship, custody, care, tuition, management, and education of the infant to the trustees; and he gave a legacy to the father, on condition of his not interfering with the management and direction of the trustees respecting the education of the infant. The cause having been heard by Sir *J. Leach*, V. C., it was declared by the decree, that, on the father undertaking to give up and abandon all interference with the

management and direction of the trustees in the education and management of the infant, such undertaking to be given in the manner and form approved by the Master, he should be entitled to the benefits given to him by the will; but in case he should refuse to give such undertaking, then it was declared that he was not entitled to them; and it was declared, that, in the event of his giving such undertaking, the trustees were entitled to the guardianship, custody, or tuition and management of the infant during her minority; and in that case the Master was to approve of a proper scheme for the education and bringing up of the infant, according to the meaning and intent of the testator, as expressed in his will, regard being had to her rank and expectations in life: Reg. Lib. A. 1818, fol. 1444. The father entered into a recognisance not to interfere in the education of the infant as directed by the decree, and the decree made on further directions ordered the costs of so much of the suit as related to his recognisance to be paid out of his legacy: Reg. Lib. A. 1820, fol. 889. See also *Potts* v. *Norton*, 2 P. Wms. 109, n.; *Blake* v. *Blake*, Amb. 306.

In *Powel* v. *Cleaver*, 2 Bro. C. C. 499, J. P. by will gave considerable benefits to his sister, her husband, and their infant children, upon the express condition that his executor should have the care, guardianship, tuition, and management of the persons of the infants during their minority. The father, during the testator's life, permitted the children to be brought up by and at his expense, and after his decease he took the benefits conferred upon him by the will, acquiesced in the arrangement of the guardianship, and not only yielded the management of his sons to the executors, but called for and received the maintenance provided for them. Afterwards, the father preferring another person to the gentleman appointed by the executors, for superintending the education of his eldest son, resumed his right of guardianship over him. But Lord *Thurlow* said, that the Court would take care that the child should be properly educated for his expectations, and that it must be laid before the Court how the son was disposed of.

Lord *Eldon*, with reference to this case, has observed, "that it was contended that the bounty given to the father had put him to his election, and he could not, after receiving the legacy, withhold compliance with the condition for the education of his children; but that argument could not sustain the jurisdiction. The father, not knowing that he was making the election, was at full liberty to pay back the money. But Lord *Thurlow's* opinion went upon this, that the law imposed a

duty upon parents, and, in general, gives them credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred in which the father was unable or unwilling to execute that duty, and, further, was actively proceeding against it, of necessity the state must place somewhere a superintending power over those who cannot take care of themselves, and have not the benefit of that care which is presumed to be generally effectual. In those cases there was a struggle between the feelings of the father and a due attention to the interests of the child, upon the condition that his education should be conducted in the manner prescribed, which was the course of maintenance and education the best calculated to promote his happiness in the state in which that fortune would place him. But Lord *Thurlow* took upon him the jurisdiction, on this ground, that he would not suffer the feelings of the parent to have effect against that duty which, upon a tender, just, and legitimate deliberation, the parent owed to the true interests of the child; and his Lordship separated the person of the child from the father; always taking care that the separation shall not have a greater effect than the case requires, and that the intercourse shall be as frequent and full as the case requiring the separation will permit:" 10 Ves. 63. See also *Lyons* v. *Blenkin*, Jac. 245; *Andrews* v. *Salt*, 8 L. R. Ch. App. 622, 640.

In *Fagnani* v. *Selwyn*, Jac. 268, n., a settlement was made on an infant (whose father was dead and whose mother resided abroad), on condition of her being under the care of the settlor, who had for some years maintained and educated her at his own expense only. It was referred to the Master to consider whether he should be appointed guardian, taking the settlement into consideration.

The class of cases which have just been considered may at first sight seem to be contradictory to the principle laid down in other cases (previous to the passing of 36 Vict. c. 12), that it was contrary to public policy that a father should transfer his parental duties, as to the custody and education of his children to another (see ante, p. 659), but that principle seems to have been laid down and acted upon in cases where the Court was called upon to enforce against the father an executory contract entered into by him with his wife to give up to her the custody and control of his children; but the other class of cases depends upon another principle, viz., that when a father has not merely entered into an executory contract with reference to the transfer to another of the custody and education of his children, but has actually given them up to another, or ac-

cepts benefits on the faith that they will be given up, the Court will not allow the father to assert his legal rights over his children to their prejudice.

But the Court will not deprive a father of the custody of his children merely because a person makes an offer to *maintain them*, even although it might be for the benefit of the children that such offer should be acceded to. Thus, in a case heard in private before Lord *Eldon*, in August, 1821, the mother of the infants who was possessed of a considerable property, settled to her separate use, was living separate from her husband, whose income was small. A petition was presented by the mother, in the name of herself and the infants, praying that they might be placed with her, or that it might be referred to the Master to approve of a plan for their education, and to appoint a proper person to have the care of them, the mother offering to provide for their maintenance out of her separate income. It was urged as one of the grounds in support of the petition, that the father's income was not sufficient to enable him to give the infants an education suitable to their situation in life, and to their expectations, and that it would therefore be for their benefit that their mother's proposal should be acceded to. On this part of the case the Lord Chancellor said, "that there were cases where, without any provision antecedently made, the Court would remove a child from the parent . . . . . but wherever the Court had interfered against the father, upon pecuniary considerations, they had been solid considerations,—not merely expectations. In all the cases which his Lordship remembered, there had been some immediate irrevocable provision, by which the child could be brought up in a manner suitable to its future prospects. The Court had there said, that it would not permit the father wantonly and capriciously to deprive the child of that benefit: as in *Powel* v. *Cleaver*, where benefits were given to a child on condition that he should be educated in a particular manner, the father was not allowed to defeat the gift. So, in the case of the young lady whom Mr. George Selwyn had provided for. But the Court could not interfere upon a mere offer:" Jac. 264, and see *Ex parte Hopkins*, 3 P. Wms. 152; *In re Fynn*, 2 De G. & Sm. 457; *Clavering* v. *Ellison*, 3 Drew, 451; 3 Jur. N. S. 277: 26 L. J., N. S. (Ch.) 335.

Although the authorities cited, abundantly show that where an agreement by which a father has given up the custody of his child to a third person has been so acted upon that it could not be revoked without injuriously affecting the interests of the child, the father has been restrained from exercising the rights which at

law he undoubtedly retained (*Reg.* v. *Smith*, 17 Jur. 24; 22 L. J., Q. B. 117), however, even a Court of equity has allowed the father to rescind and abandon such agreement, if he did so before it had been acted on so as to alter the status of the child. *Hill* v. *Gomme*, 1 Beav. 5405, My. & Cr. 680. And it must be borne in mind that by the Judicature Act, 1873 (36 & 37 Vict. c. 66), in all questions relating to the custody and education of infants, the rules of equity shall prevail, sect. 25, subsect. 10.

IV. *Ward of the Court—Guardian by appointment of the Court.*] —The jurisdiction of the Lord Chancellor to appoint guardians for infants is undoubted, although Mr. Hargrave, in a learned note, attempted to show that it was not, as far as yet appears, of ancient date; and that, though unquestionable, yet it seems at first to have been a usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. See Co. Litt. 88, b., n., 16.

This opinion of Mr. Hargrave is controverted in a very able note of Mr. Fonblanque, who comes to the conclusion, "that the superintendence and protective jurisdiction of the Court in the case of infants, is a delegation of the duty of the Crown; that its general jurisdiction was not even suspended by the statutes of Henry 8, erecting the Courts of Wards and Liveries. That the case of idiots and lunatics is distinguishable; the jurisdiction exercised in Chancery as to the first, being the grant of an interest, and in the latter, the delegation of a power conferred by Parliament:" 2 Fonb. 232. Lord *Eldon*, in *De Manneville* v. *Manneville*, 10 Ves. 63, has observed, "that Mr. Fonblanque has stated the principle very correctly; for in *Butler* v. *Freeman* (Amb. 301), Lord *Hardwicke*, professing not to go upon guardianship, and disclaiming wardship, puts it upon this: that the Court represents the King as *parens patriæ*." And see *Powel* v. *Cleaver*, 2 Bro. C. C. 499; *Wellesley* v. *Duke of Beaufort*, 2 Russ. 21; 2 Bligh. N. S. 124.

The Court of Chancery has jurisdiction over the custody of the children of English subjects, though such children were born and are resident abroad: *Hope* v. *Hope*, 4 De G. Mac. & G. 328; *S. C.*, 19 Beav. 237; *S. C.*, 8 De G. Mac. & G. 731.

If an action be commenced *relative to an infant's estate or person*, the Court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or of a testamentary guardian, immediately becomes a ward of the Court: *Butler* v. *Freeman*, Amb. 303; *Hughes* v. *Science*, 2 Eq. Ca. Ab. 756, pl. 14; Macphers. App. 1.

An order in Chancery on petition, constituting a guardian of an infant, makes that infant a ward of Court: *Stuart* v. *The Marquis of Bute*, 9 Ho. Lo. Ca. 440; *S. C., Marquis of Bute* v. *Stuart*, 2 Giff. 582.

Where money belonging absolutely to an infant is paid into Court under the Trustee Relief Act (10 & 11 Vict. c. 96), and an order upon a petition under that Act for payment of part of the dividends to his testamentary guardian for his maintenance, is made upon an application at Chambers, the infant is thereby made a ward of Court: *In re Hodge's Settlement*, 3 K. & J. 213; *Re Tweedale*, Johns. 109; and see *Darcy* v. *Maddock*, 4 Ir. Ch. Rep. 40; *In re Lloyd's Trusts*, 2 I. R. Eq. 507.

And an order in Chambers for the maintenance of an infant out of the income of a legacy, upon a summons taken out in her name by her guardian, has been held, without suit, to constitute the infant a ward of the Court: *In re Graham*, 10 L. R. Eq. 530.

The payment, however, into Court under the 32nd section of the Legacy Duty Act of a legacy bequeathed to an infant (*Re Hillary*, 2 Drew. & Sm. 461), or of purchase-money belonging to an infant under the Lands Clauses Act (*Ex parte Brewer*, 2 Dr. & Sm. 552), or an order approving of a settlement under the Infants' Settlement Act (*Re Strong*, 26 L. J. Ch. 64; *Re Dalton*, 6 De G. Mac. & G. 201); will not constitute such infant a ward of Court.

The Court must have some property of the infant's, in *order to exercise its jurisdiction*. "It is not, however," as observed by Lord *Eldon*, "from any want of jurisdiction that it does not act (where it has no property of an infant's), but from a want of the *means to exercise* its jurisdiction; because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infant:" *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 21.

But the Court can upon petition, although an infant has no property, appoint a guardian under the Marriage Act (4 Geo. 4, c. 76, s. 17), to give consent to a marriage (*In re Woolscombe*, 1 Madd. 213), or make an order for the delivery of an infant to the party who ought to have the custody of it, as well as under the general jurisdiction upon *habeas corpus* (*In re Spence*, 2 Ph. 247); but where the petition is not for such purpose, and an infant has no estate, real or personal, no guardian will be appointed, as the Court has no object of which it can take notice (*Ex parte Becher*,

1 Bro. C. C. 556). Where, therefore, for any cause it is desirable to make an infant a ward of the Court, it is the common practice to settle some money or other property upon him. *In re Lyons*, 22 L. T., N. S. 770.

The Court, although no suit be pending, will appoint a guardian, upon the petition either of the infant himself, or of some other person in his behalf, without a bill having been filed (*De Costa* or *Villareal* v. *Mellish*, 2 Atk. 14; 2 Swanst. 533; West's Rep. 299; *Ex parte Ricards*, 3 Atk. 518: *Ex parte Birchell*, 3 Atk. 813; *Ex parte Salter*, 2 Dick. 769; 3 Bro. C. C. 500; *Ex parte Mountfort*, 15 Ves. 445; *Ex parte Wheeler*, 16 Ves. 266; *Ex parte Myerscough*, 1 J. & W. 151; *Ex parte Angell*, 13 Sim. 258; *In re Christie*, 9 Sim, 258); even where a testamentary guardian has been appointed, if he declines to act (*Ex parte Champney*, 1 Dick. 350; *O'Keeffe* v. *Casey*, 1 S. & L. 106); and, as was done in the principal case, where there are conflicting claims for the guardianship, they may be settled upon petition (*Teynham* v. *Lennard*, 4 Bro. P. C. 302, Toml. edit.; *Ex parte Jordan*, 1 Dick. 294: *Ex parte The Earl of Ilchester*, 7 Ves. 348); and where there is no suit relative to the infant's property, a guardian will be appointed for *the person and estate* of the infant, and he does not thereby become a ward of the Court; where a suit is pending, a guardian *for the person* only will be appointed, as the Court will manage the estate, and, as before observed, the infant then becomes a ward of the Court.

Although a father has no right, under 12 Car. 2, c. 24, to nominate guardians for his *natural* children, the Court will generally appoint those whom he has selected (*Peckham* v. *Peckham*, 2 Cox, 46; *Ward* v. *St. Paul*, 2 Bro. C. C. 583); and will not allow the mother to remove them from their residence with their guardians, although she will be allowed reasonable access to them: *Ord* v. *Blackett*, 9 Mod. 116.

In nearly all cases formerly there was a reference to approve of a proper person or persons to be appointed guardian or guardians: Seton on Decrees, 277, 1st edit. Where, however, the property of the infant was very small, the Court would at once appoint a guardian without a reference. *In re Jones*, 1 Russ. 478; *Ex parte Jackson*, 6 Sim. 212; *Price* v. *Shaw*, 2 Dick. 732; *Ex parte Nicholls*, 1 Bro. C. C. 877.

Under the new practice of the Court, where a suit has been instituted, guardians are appointed at Chambers: Smith's Ch. Prac. 965, 7th ed.; 2 Dan. Ch. Pr. 1196, 5th ed. And a guardian may be now appointed without suit, by a summons in Chambers: Ib. 966.

And by 3 & 4 Vict. c. 90, the Court is intrusted with certain

powers for the care and education of infants convicted of felony.

Formerly, although the Court would appoint a guardian of the *estate and person* of an infant, it would not appoint a receiver of the rents and profits of his property unless a bill were filed. *Ex parte Mountfort*, 15 Ves. 445.

This rule, however, has been frequently relaxed in modern practice, and receivers as well as guardians have been appointed on petitions or summons without suit. *Re Leeming; Re Gascoigne*, 20 L. J., Ch. 550; *Re Goode*, 1 I. Ch. Rep. 256. The more usual course, however, is to appoint a guardian of the person and estate without a receiver: 2 Dan. Ch. Pract. 1196, 5th ed.

The Court will appoint a guardian, notwithstanding the infant, being fourteen years of age, and entitled to real estate, has by deed appointed a guardian for himself: *Curtis* v. *Rippon*, 4 Madd. 462; *Coham* v. *Coham*, 13 Sim. 639.

The Court of Chancery has an original jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind not so found (per Sir *G. Jessel*, M. R., in *Vane* v. *Vane*, 2 Ch. D. 125). In all the cases in which it has been exercised two circumstances have concurred; first, the property has been small, and the Legislature has now in the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86, s. 12), indicated what amount of property ought to be deemed small, viz., £1000 or income of £50; and secondly, that it was impossible, from some reason or other, to obtain an order in lunacy: *Vane* v. *Vane*, 2 Ch. D. 124, 125, and the cases there cited. Where, however, the amount of property exceeds the limits mentioned in Lunacy Regulation Act, but is really a small one, the Court will make an order, if there be no opposition and no intention to take proceedings in lunacy: *Vane* v. *Vane*, 2 Ch. D. 124.

A guardian to an infant defendant of unsound mind, not so found by inquisition, should be appointed by the Court of Chancery, and not under the jurisdiction in lunacy (*Pideock* v. *Boultbee*, 2 De G. Mac. & G. 898); indeed it seems to be doubtful whether there is any process in lunacy by which a legal guardian can be appointed: *In re Brown*, 1 Mac. & G. 201.

Where two or more guardians are appointed by the Court, the office, upon the death of one of them, does not, as in the case of the testamentary guardianship, survive, but there must be a new appointment (*Bradshaw* v. *Bradshaw*, 1 Russ. 528); the survivors, however, if there be no objection, will be reappointed without a reference, *Hall* v. *Jones*, 2 Sim. 41.

The Court will not ordinarily appoint a married woman to be sole guardian: *Re Kaye*, 1 L. R. Ch. App. 387.

And where a female, appointed by the Court a guardian, even if she be the mother of the infant, marries, it is of course to make a reference to appoint a guardian; but she may be reappointed: *Anon.*, 8 Sim. 346; *In re Gornall*, 1 Beav. 347.

V. *Jurisdiction exercised by the Court over Guardians of different Kinds.*] 1. *Over Father.*—So great is the power with which the Court is intrusted, that, even during the life of the father, it will, when necessary, interfere between him and his children. One instance, viz., upon the appointment of a guardian by a stranger, has been already considered. This jurisdiction was, in the well-known case of *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1, treated by Lord *Eldon* as not admitting of a doubt.

"The law," said his Lordship, "makes the father the guardian of his children by nature and by nurture. An Act of Parliament has given the father the power of appointing a testamentary guardian for them. One should think that the guardian so appointed must have all the authority that Parliament could give him, and his authority is, perhaps, as strong as any authority that any law could give. But it is above a century ago since, in the case of *The Duke of Beaufort* v. *Berty* (1 P. Wms. 703), the Lord Chancellor of that day (Lord *Macclesfield*) determined that the statute guardian was subject to all the jurisdiction of this Court. The Lord Chancellor, in effect, said, 'I will not place the statute guardian in a situation more free from the jurisdiction of this Court, than the father is in.' So that he applied the acknowledged jurisdiction over the father, as a justification for interfering with the testamentary guardian. The former jurisdiction he stated as the acknowledged law of the Court; and he went further, for he added, 'that, if he had a reasonable ground to believe that the children would not be properly treated, he would interfere, upon the principle, that, *preventing justice* was preferable to *punishing justice*.'"

In accordance with these principles, where *the father is insolvent*, his character is bad, and he has deserted his children, or is endangering their property, and neglecting their education, the custody of the children will be committed to a person *to act as guardian* (for a guardian cannot be appointed during the father's life); and a receiver will, it appears, be appointed in some cases, where there is no opposition, without a suit. See *Kiffin* v. *Kiffin*, cited 1 P. Wms. 705; *Ex parte Mountfort*, 15 Ves. 445; *Wilcox* v. *Drake*, 2 Dick. 631; *S. C.*, Jac. 250, n.; *Re England*, 1 Russ. & My. 499; *Thomas* v. *Roberts*, 3 De G. & Sm. 758: and see *Re Cormicks*, 2 I. E. R. 264.

In *Creuze* v. *Hunter*, 2 Cox, 242, a petition was presented stating the entangled state of Mr. Hunter's property, and that he was an outlaw, and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, as also to maintenance by the will of his grandfather; and prayed that Mr. Hunter might be restrained from taking his son abroad, or improperly interfering with his education, which was then principally directed by his mother, who lived separate from her husband. Affidavits were filed on both sides, imputing very improper conduct to both father and mother. Upon the petition first coming on, Lord *Thurlow*, C., threw out, that he would not allow the colour of parental authority to work the ruin of the child; and afterwards ordered that the father should be restrained from interfering with the management of his child without the consent of Lord Hawke and Mr. Adams, whom both parties allowed to be proper persons for such a purpose.

The jurisdiction of the Court being questioned by the counsel for Mr. Hunter, the Lord Chancellor observed, that he knew there was such a notion, but he was of opinion that the Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child; and that, whenever a case was brought before him, he would act upon this opinion: if the House of Lords thought differently, they might control his judgment; but he certainly would not allow the child to be sacrificed to the views of the father. See *S. C.*, 2 Bro. C. C. 500, n., Belt's edit.; Jac. 250, n.; *Ex parte Warner*, 4 Bro. C. C. 101; *Skinner* v. *Warner*, 2 Dick. 779. Where both the father and mother have been guilty of misconduct, of the worst kind, the guardianship of the infants will be committed to other persons, but a liberal allowance will be made to them in order to support their parents. *Allen* v. *Coster*, 1 Beav. 202.

Where the character of the father is good, although he may be poor or insolvent, his children will not be taken from him: *Kilpatrick* v. *Kilpatrick*, Macphers. 143; *In re Curtis*, 28 L. J. (Ch.) 458.

And even where a man was not able to maintain his children, and his character was such that the Court would not have appointed him a guardian, the Court would not interfere by the appointment of a guardian, where the grandmother, not having any property to settle, only offered to undertake and covenant to maintain them, although it would have been most beneficial to the infants to have been taken out of the custody of their father: *In re Fynn*, 2 De G. & Sm. 457. And see *Lord Westmeath's Case*, Jac. 251, n.

In cases where *the father is not insolvent*, but is guilty of immorality of such a nature as is likely to contaminate the morals of his children, should they be permitted to reside with him, especially if his general language and conversation be such as is likely to corrupt their minds by irreligious and atheistical notions, the Court has not hesitated, in exercise of its jurisdiction, to remove the children from their father. Thus, in *Shelley* v. *Westbrooke*, Jac. 266, n., a petition was presented by the infant plaintiffs, stating, that their father, having deserted their mother, and unlawfully cohabited with another woman, their mother had returned to her father's house, who assisted her in maintaining them, and had lately died. It was then stated, that the father avowed himself an atheist, and that, since his marriage, he had written and published a work, in which he blasphemously derided the truth of the Christian revelation, and denied the existence of a God as Creator of the universe; and that, since the death of his wife, he had demanded that the children should be delivered up to him, and that he intended, if he could, to get possession of their persons, and educate them as he thought proper. Their maternal grandfather had lately transferred 2000*l.* Four per Cents. into the names of trustees, upon trust for them, on their attaining twenty-one or marrying with his consent, and in the meantime, to apply the dividends for their maintenance and education. Lord *Eldon*, by order, restrained the father and his agents from taking possession of the infants, or intermeddling with them, until further order; and it was referred to the Master to inquire what would be a proper plan for the maintenance and education of the infants; and also to inquire with whom and under whose care the infants should remain during their minority, or until further order. "With respect," observed his Lordship, "to the question of jurisdiction, it is unnecessary for me to add to what I have already stated. After the example of Lord *Thurlow*, in *Orby Hunter's Case*, I shall act upon the notion that this Court has such jurisdiction, until the House of Lords shall decide that my predecessors have been unwarranted in the exercise of it. . . . . This is a case in which, as the matter appears to me, the father's principles cannot be misunderstood; in which his conduct, which I cannot but consider as highly immoral, has been established in proof, and established as the effects of those principles; conduct, nevertheless, which he represents to himself and others, not as conduct to be considered as immoral, but to be recommended and observed in practice, and as worthy of approbation. I consider this, therefore, as a case in which the father has demonstrated

that he must and does deem it to be matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct, in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community.

"I cannot, therefore, think that I should be justified in delivering over these children, for their education exclusively, to what is called the care to which Mr. Shelley wishes it to be entrusted . . . . . Much has been said upon the fact that these children are of tender years. I have already explained, in the course of the hearing, the grounds upon which I think that circumstance not so material as to require me to pronounce no order. I add, that the attention which I have been called upon to give to the consideration, how far the pecuniary interests of these children may be affected, has not been called for in vain. I should deeply regret if any act of mine materially affects those interests. But to such interests I cannot sacrifice what I deem to be interests of greater value and higher importance." See also *Curtis* v. *Curtis*, 5 Jur. N. S. 1147; *Re Meades*, 5 I. R. Eq. 98.

In *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 1, the habits of the father whose children were taken from him were profligate, and his language often profane, and he cohabited in his own house in open adultery with the wife of another man. This case, on appeal, was affirmed in the House of Lords: 2 Bligh N. S. 124; 1 Dow. & C. 152: see Sugd. Prop. 187.

So, where it was established to the satisfaction of the Court that the father of children of from ten to two years old was to be considered as guilty of an unnatural crime, the Court not only refused to give possession of the children to the father, but even after he had escaped conviction by the witnesses not appearing against him, would not allow the children to have any intercourse with him; and even if they had been with him, it would have felt it to be proper to remove them: *Anon.*, 2 Sim. N. S. 54.

If a father be living in a state of habitual drunkenness, incapacitating himself from taking care of his children's education, he is not to be looked upon as a man of such reason and understanding as to enable him to discharge the duty of a parent; and if such a case were to occur again, as it has occurred before, the Court would take care that the children should not be under the control of a person so debased himself, and so

likely to injure them. Per Lord *Eldon*, in *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 30. And in *De Manneville* v. *De Manneville*, 10 Ves. 62, his Lordship said, that he had removed a child from its father, upon considerations such as these: the father was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant, and he thought it not inconsistent with a due attention to parental authority, so abused, to call in the authority of the king, as *parens patriæ*. See *Warde* v. *Warde*, 2 Ph. 786. Where, moreover, a father, who had for four years abandoned his wife and his child,—a ward of Court, and who laboured under religious delusions, such as rendered him totally unfit to superintend the education of his child, he was restrained from interfering with his custody, and there was a reference to approve of a proper person to act as guardian. *Thomas* v. *Roberts*, 3 De G. & Sm. 758.

So, where a father who had been bankrupt, had by his cruel behaviour to his wife compelled her to exhibit articles of peace against him under which he was committed to Newgate for want of bail, previous to which event he had no settled place of abode, and was unable to provide for his infant children or wife, upon a petition presented by them, the Lords Commissioners *Eyre*, *Ashhurst*, and *Wilson* referred it to a Master to approve of a proper person to have the care of their persons and superintendence of their education during their minorities, and that the father might be restrained from removing them from the several schools and situations where they had been placed by their mother and her relations. *Ex parte Warner*, 4 Bro. C. C. 101; S. C. nom. *Skinner* v. *Warner*, 2 Dick. 779.

However, acts on the part of a father which, although somewhat cruel, amount to little more than harshness or severity (see *Curtis* v. *Curtis*, 5 Jur. N. S. 1147, and cases there cited), although they may be such as may prevent his wife from living happily with him, provided they be not such as to contaminate the morals of his children (*Re Spence*, 2 Ph. 252), will not afford sufficient grounds for the Court of Chancery to interfere with the father's power over his children.

Nor will the fact that he had formerly been given up to idleness, profligacy, and drunkenness. *Re Halliday*, 17 Jur. 56.

Where a father is guilty of gross ill-treatment and cruelty towards his children it is a sufficient cause for the Court to supersede his authority as a parent. Thus, in *Whitfield* v. *Hales*, 12 Ves. 492, upon the authority of Lord *Eldon's* opinion in *De Manneville* v. *De Manneville* (10 Ves. 52), Lord *Erskine*, upon petition, made an order referring it to the Master

to appoint a guardian, and a proper allowance for the maintenance of infants whose father, the plaintiff in the cause, was in possession of the estate. The petition was supported by affidavits of gross ill-treatment and cruelty towards the infants by the father; on account of which a prosecution had been instituted, under which he was imprisoned. The application was not opposed.

But the Court has refused to deprive a father, though living in adultery, of the custody of his child, where he did not bring the child in contact with the woman with whom he was so living; or to order him to permit the mother to have access to the child, where no misconduct on his part was shewn with reference to the management and education of the child. Thus, in *Ball* v. *Ball*, 2 Sim. 35, where a lady and her daughter, who was about fourteen years of age, presented a petition, stating that the father was living in habitual adultery with another woman, on account of which a divorce had been obtained in the Ecclesiastical Courts, and praying that the daughter might be placed under the mother's care, *she offering to maintain her at her own expense*, or that the mother might be permitted to have access to her at all convenient times, Sir *Anthony Hart*, V.C., dismissed the petition. "This Court," said his Honor, "has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of the common law right over the custody of his children. . . . Some conduct of the father, with reference to the management and education of the child, must be shewn to warrant an interference with his legal right."

This decision of Sir *Anthony Hart* is certainly a harsh one, although, perhaps, he may have been right, as the mother did not offer to make a provision for, but only to maintain the child; but it is clear that access would have been allowed to the mother had the children been wards of the Court. See *Anon.*, Jac. 264, n., where Lord *Eldon* said, that, as the children were wards of the Court, and therefore under its protection, and recollecting that children ought to be brought up in dutiful obedience and warm affection towards both parents, he would not allow the father to take them so out of access as not to have opportunities of nourishing those feelings. If any complaint was made of want of access, it might be remedied.

Even where children are taken from the custody of the parent, access or communication with him will, if proper, be permitted. See *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 43: in which case, when it was referred to the Master

to consider under whose care and custody the children should be placed, Lord *Eldon* observed, "that into whatsoever hands the children might fall, it would be their duty to consult the interest and happiness of the children, by allowing filial affection and duty towards their father to operate to the utmost."

The jurisdiction of the Court over infants was much increased by *Talfourd's* Act (2 & 3 Vict. c. 54), which enabled the Court to give to the mother access to her children, and even the custody of her children under seven years of age, and thus enabled her, when ill-treated by her husband, to assert her rights as a wife, without the fear of losing what is naturally so dear to her as a mother—the society of her children. See *Warde* v. *Warde*, 2 Ph. 786; *Ex parte Bartlett*, 2 Coll. 661; *Re Halliday*, 17 Jur. 56; *Re Curtis*, 28 L. J. (Ch.) 458; *Re Tomlinson*, 3 De G. & Sm. 371. But the Court refused to make an order where the wife had left her husband without cause (*Re Taylor*, 11 Sim. 178); and where her conduct had been bad and was likely to be injurious to her children. *Re Windscom*, 2 Hem. & M. 540; and see *Shillito* v. *Collett*, 8 W. R. (V.C.K.) 683.

For further cases on 2 & 3 Vict. c. 54, see Morgan and Chute's Chancery Statutes and Orders, 309, 5th ed.

The Legislature has repealed 2 & 3 Vict. c. 54, by The Infants Custody Act (36 & 37 Vict. c. 12) —an Act still more favourable to married women. It is thereby amongst other things enacted, that "from and after the passing of this Act (24th April, 1873), it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants *under sixteen years of age*, to order that the petitioner shall have access to such infant or infants, at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, *not exceeding sixteen, as the Court shall direct:* And further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the Court shall deem proper." Sect. 1. See *In re Taylor, an Infant*, 4 Ch. D. 157, where the principles which guide the Court in cases under the Act are considered.

The right to the custody of children may be enforced both by a father, or in the event of his death by the guardian, by means

of a writ of *habeas corpus*, and if they have not arrived at years of discretion (*Reg.* v. *Greenhill*, 4 Ad. & Ell. 624; *In re Hakewill*, 12 C. B. 223; *Reg.* v. *Clarke*, 7 Ell. & Bl. 186; *Reg.* v. *Howes*, 3 Ell. & Ell. 332; 7 Jur. N. S. 22), except where the conduct of the father had been grossly immoral or he wanted the children for an unlawful purpose (*Reg.* v. *Clarke*, *Re Race*, 7 Ell. & Bl. 186, 199; *Re Turner*, 41 L. J. Q. B. 142), a Court of law would deliver them to him, although he were of a very bad character (*Ex parte Skinner*, 9 Moore, 278), or although circumstances existed under which the Court of Chancery would hold that he had forfeited his right to the custody. *Reg.* v. *Isley*, 5 Ad. & Ell. 441.

The children, however, if they had arrived at years of discretion, *i.e.*, might choose their own custody, and the Court would not deliver them to the father against their wishes: *Re Andrews*, 8 L. R. Q. B. 153; *Re Shanahan*, 20 L. T. 183; *Re Connor*, 16 I. C. L. 112.

Where, however, a *ward* was produced before a judge of the Court of Chancery, he might order him to be delivered to the guardian, though he were of years of discretion (*Rochford* v. *Hackman*, Kay, 309) to remain where he was (*Harrison* v. *Goodall*, Kay, 310 n.; *Re Lyons*, 22 L. T. N. S. 770), or to go at liberty: *Ibid.* And see *Bond* v. *Roberts*, 13 Sim. 400; Kay, 309 cited.

It must, however, be remembered that by the Judicature Act, 1873 (36 & 37 Vict. c. 66) it has been enacted that in questions relating to the custody and education of infants the rules of equity shall prevail. Sect. 25, subs. 10.

Hence on an application by a father to any Division of the High Court to obtain the possession of his child by a writ of *habeas corpus*, no order will be made in his favour if there are reasons against his having the custody, which would heretofore have operated upon the Courts of equity in such a case. See *Re Goldsworthy*, 2 Q. B. D. 75: there the affidavits of the mother and others, in answer to a rule for a *habeas corpus* by a father to remove his child (a boy of nine years of age) from the custody of the child's maternal grandfather, disclosing facts which shewed the applicant to be a person of intemperate and vicious life, and in the habit of using gross and disgusting language as well as personal violence to his wife, the Court of Queen's Bench Division declined to interfere, the present custody of the child being unobjectionable. "All we have to determine," said *Pollock*, B., "is whether the present case is brought within the rules and principles upon which Courts of equity have been heretofore guided in cases of this kind. I think it is. It is the case of a man habitually indulging in inebriety, and in the use of violence

and language of a character the most abominable that can be conceived. Such conduct must of necessity seriously affect the interest and welfare of the child. For these reasons I think it is inexpedient that the present custody of the child should be interfered with."

And it is no good reason for a Court declining to exercise jurisdiction in such a case that proceedings between the husband and wife are pending in the Divorce Court, because, although that Court has by means of *vivâ voce* evidence a better opportunity of inquiring into a matter of such a kind than any other Court, the inquiry into the proper custody of the children is there a merely collateral one. *Re Goldsworthy*, 2 Q. B. D. 75, 84, 85.

2. *Jurisdiction exercised over Testamentary Guardians and Guardians appointed by the Court.*] — As in the case of a father, so in that of a testamentary guardian, the Court will interfere, if his conduct be improper (*Duke of Beaufort* v. *Berty*, 1 P. Wms. 704); although it will not do so ordinarily, as in the case of guardians appointed by itself: *In re Goode*, 1 Ir. Ch. Rep. 256. And it seems to be the better opinion, that a testamentary guardian cannot be *actually removed* from his office, though upon a proper case being made out, he will be *suspended*, and a proper person will be appointed to *act as guardian*, and to superintend the maintenance and education of the infant: *Foster* v. *Denny*, 2 Ch. Ca. 327; *S.C.*, 1 Eq. Ca. Ab. 260, pl. 3; *Ingham* v. *Bickerdike*, 6 Madd. 275. So on the bankruptcy or insolvency of a testamentary guardian, a proper person will be appointed to have the care of the person (*Smith* v. *Bate*, 2 Dick. 631); or to have the care of the maintenance and education (*Heysham* v. *Heysham*, 1 Cox, 179) of the infant; and orders are frequently made, regulating the conduct both of testamentary guardians and guardians appointed by the Court (*Roach* v. *Garvan*, 1 Ves. 160; *Spencer* v. *Earl of Chesterfield*, Amb. 146; *O'Keeffe* v. *Casey*, 1 S. & L. 106; *Ex parte The Earl of Ilchester*, 7 Ves. 381;) but, as was decided in the principal case, the pecuniary interest which a testamentary guardian may have in the death of the ward, will be no ground for superseding him: *Morgan* v. *Dillon*, 9 Mod. 135; *Dillon* v. *Lady Mount Cashel*, 4 Bro. P. C. 306, Toml. edit.; *Corbet* v. *Tottenham*, 1 Ball & B. 59.

The marriage of a female testamentary guardian does not determine the guardianship: *Roach* v. *Garvan*, 1 Ves. 160; *Dillon* v. *Lady Mount Cashel*, 4 Bro. P. C. 306, Toml. edit. But in *Jones* v. *Powell*, 9 Beav. 345, it was said by Lord *Langdale*, M. R., that, although the Court does not ordinarily interfere with a testa-

mentary guardian, it has an undoubted control over *any allowance directed to be paid to him;* and if such a guardian, being a feme sole, marries, it seems right to see what ought to be done. It might probably be the most beneficial thing to continue the feme covert guardian; but it ought in some way or other to appear. In that case, therefore, on a petition for increased maintenance, he thought that he must require it to be shown by affidavit, that it would be for the benefit of the infants to continue to reside with their mother, who was one of their testamentary guardians, notwithstanding her second marriage.

In general, the testamentary guardian, or guardian appointed by the Court, will be entitled to the custody of the infant's person, but the Court, as in the principal case, will exercise its discretion either in ordering the ward to be delivered up to the guardian, or in permitting him to reside with the mother, or that she may have access to him: *Ex parte The Earl of Ilchester*, 7 Ves. 380; *Wright* v. *Naylor*, 5 Madd. 77; *Talbot* v. *The Earl of Shrewsbury*, 4 My. & Cr. 672, 683; for "though," as Lord *Eldon* observes, "the effect of the appointment of a guardian is to commit the custody of the guardianship, this Court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest, it is important to observe, that it can never end happily but by implanting in the hearts of the children filial and dutiful feelings towards the parent; the best and most important duty imposed upon the guardian by the deceased parent:" *Ex parte The Earl of Ilchester*, 7 Ves. 381. In *Courtois* v. *Vincent*, Jac. 268, access to her children was allowed to the mother of illegitimate children, although a guardian was appointed by the Court.

Access will also be allowed to the friends of a deceased parent: *Hunter* v. *Macrae*, Macphers. 112.

It seems that every order respecting the custody of an infant, whether granting or refusing the petition as to its custody, is to be treated as a final judgment, and therefore subject to appeal: *Stuart* v. *The Marquis of Bute*, 9 Ho. Lo. Ca. 440.

The guardian will be allowed to regulate the mode and select the place for the education of his ward, whose obedience will be enforced by the Court. See *Hall* v. *Hall*, 3 Atk. 721, where a boy was compelled to return to Eton; *Mitchel* v. *Duke of Manchester*, Dick. 129, where the infant plaintiffs were ordered to return to the university to pursue their studies, and *Tremain's Case*, 1 Stra. 173, where, "being an infant he went to Oxford, contrary to the orders

of his guardian, who would have him go to Cambridge, and the Court sent a messenger to carry him from Oxford to Cambridge; and upon his returning to Oxford there went another *tam* to carry him to Cambridge, *quam* to keep him there."

Where the guardians differ as to the mode of education, the Court will decide (*Duke of Beaufort* v. *Berty*, 1 P. Wms. 702; and see *Stuart* v. *Marquis of Bute*, 9 Ho. Lo. Ca. 440); and in the appointment of guardians by the Court, much weight will be given to the wishes of the deceased father (*Campbell* v. *Mackay*, 2 My. & C. 34); of which parol proof was received in *Anon.*, 2 Ves. 56, but rejected in *Storke* v. *Storke*, 3 P. Wms. 51.

Although the father may have appointed a testamentary guardian, if he has by his will desired that some one else should have the custody of his children, his wishes as to the custody will be complied with. See *Knott* v. *Cottee*, 2 Ph. 192; *Duke of Beaufort* v. *Berty*, 1 P. Wms. 706; see also *Hartley* v. *Smith*, 10 W. R. (L. J.) 763; reversing *S. C.*, Ib. (V. C. S.) 750.

Where a female infant has arrived at years of discretion, the Court will consult her wishes as to which of her guardians she desires to reside with (*Storke* v. *Storke*, 3 P. Wms. 50), and has even allowed her at her option to remain in the custody of a person who was not a guardian, in preference to the legal guardian (*Bridget Hide's Case*, 3 Salk. 178; and see *Anon.* 2 Ves. 374). But in such a case the Court would order the person so chosen to have the custody to enter into recognizances not to allow her to marry save by leave of the Court. *Bridget Hide's Case*, 3 Salk. 178; and see *Re Lyons*, 22 L. T. N. S. 770.

The wishes of the father, whether expressed or implied, as to the religion in which his children are to be educated, will be attended to by the Court; and the Court will not control a guardian in bringing up a child in a different faith from that of the Established Church, if it be the religion of the father. Thus, in *Talbot* v. *The Earl of Shrewsbury*, 4 My. & Cr. 672, where a Roman Catholic father, whose wife was a Protestant, had appointed *a Roman Catholic priest sole testamentary guardian* of his children, Lord *Cottenham* refused to interfere with the discretion of the testamentary guardian as to the faith in which he educated his wards. "In the first place," said his Lordship, "I find this child born of a Roman Catholic father, who, though he married a Protestant lady, did not, on that marriage, enter into any stipulation as to the faith in which his children should be brought up. I find the father, who had the power of regulating the method of bringing up his children, and of extend-

ing that power after his death, appointing, as a testamentary guardian, a clergyman of the Roman Catholic Church, and I think it impossible that the father could more distinctly indicate his wishes as to the faith in which his child should be brought up. Although the father has not the power of regulating, after his death, the faith in which his child should be brought up, the Court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of that faith. When, therefore, a Roman Catholic father appoints a Roman Catholic guardian, there can be no doubt as to the father's intention; and if I were to interfere with the exercise of the guardian's discretion as to the faith in which the child should be educated, I should be doing an act of very great injustice. Nothing can be more dear to a father than regulating the religious education of his child; and if I were to interfere in the manner which is desired, I should adopt a course to induce those dissenting from the Established Church to suppose that this Court would interfere to control the education of their children." See *In re Cornwalls, Minors*, 2 Ir. Jur. N. S. 148; *In re Browne, a Minor*, 2 Ir. Ch. Rep. 151; *In re Kellers*, 5 Ir. Ch. Rep. 328; *Davis* v. *Davis*, 10 W. R. (V. C. K.) 245.

Where the father has not left or expressed any direction or instruction as to the religion in which his infant children are to be educated, the Court will presume that his wishes were that they should be educated in his own religion: *Re North*, 11 Jur. 17; *In re Newbery*, 1 L. R. Eq. 431; 1 L. R. Ch. App. 263; *Re Austin*, 34 L. J. N. S. (Ch.) 192, 499; *Austin* v. *Austin*, 34 Beav. 257; *Hawksworth* v. *Hawksworth*, 6 L. R. Ch. App. 539.

No pecuniary benefit will, it seems, induce the Court to interfere with the course of religious education pointed out by the father. The religious faith in which a child is to be brought up will not be a matter of barter in the Court. See *Talbot* v. *Earl of Shrewsbury*, 4 My. & Cr. 672, 686, 688, 689.

Where a father has acted in such a manner as altogether to abandon during his lifetime the duty of controlling the religious education of his children, and has intrusted it to his wife, a person of a different religion, the Court has not treated as imperative the directions of the father's will that the children must be brought up in his own faith: *Hill* v. *Hill*, 10 W. R. (V. C. W.) 400; *In re O'Malleys, Minors*, 8 Ir. Ch. Rep. 291; *In re Garnett*, 20 W. R. (L. C. Ir.) 222; *Andrews* v. *Salt*, 8 L. R. Ch. App. 622.

The circumstance, moreover, that children have for several years after the father's death, been brought up in a particular

faith, is one which should have weight with the Court as to those of the children who are of age to have formed opinions upon religious subjects. Thus, where an infant was brought up till he was fifteen in a faith different from that professed by his father and his testamentary guardian, and even contrary to the express injunctions of his father, as the infant expressed a preference for the faith in which he was educated, the Court undertook to see and converse with the infant before making any order with reference to his religious education: *Witty* v. *Marshall*, 1 Y. C. C. C. 68; and see *Stourton* v. *Stourton*, 8 De G. Mac. & G. 760; 3 Jur. N. S. 527; 26 L. J. N. S. (Ch.) 354; where the child was nine and a half years old, but was prematurely instructed by his mother, with regard to the matters in difference between her religious faith and that of his deceased father: *In re Meade*, 19 W. R. 313; *In re Fallons, Minors*, 5 Ir. Ch. Rep. 339, cited; *In re Kellers, Minors*, 5 Ir. Ch. Rep. 323; *Andrews* v. *Salt*, 8 L. R. Ch. App. 622.

But where a child is too young to have formed any religious impressions or feelings of a permanent character, the Court will follow the general rule, and order the child to be educated in the faith of the father, although the mother may have brought the child up in a different faith. See the recent case of *Hawksworth* v. *Hawksworth*, 6 L. R. Ch. App. 539, where the child was about eight years and a half old, and it was said that the case of *Stourton* v. *Stourton* carried the principle of examining into the feelings and the religious opinions of a child quite as far as the Court can safely go.

Where an order had been made by the High Court of Judicature in the north-western provinces of India, for the removal of a minor from the custody of her mother, a Mahomedan, who was educating her in the Mahomedan faith; it appearing that the question really involved the religious education of a ward, special leave was given to appeal from the decision of the High Court, without prejudice to any application to the Court below by the mother, as she might be advised to make, to have access, at suitable times to her daughter: *In re Skinner*, 3 L. R. P. C. 451. And see *Camilleri* v. *Fleri*, 5 Moo. P. C. C. 161, from Malta, where a similar order was made, giving leave to appeal against an order for the removal of children from the custody of their parents. Eventually, in the former case, nom. *Skinner* v. *Orde*, 4 L. R. P. C. 60, as it appeared that the father, a British subject, was a professed Christian, and married according to Christian rites, and that the daughter had been brought up as a Christian by her

mother until she had *contracted a Mahomedan marriage*, the Privy Council made an order, affirming the decision of the Courts in India, by which the infant was removed from the custody of her mother and placed under a Christian guardian.

An agreement by the husband before marriage, that the children shall be brought up in a particular religion, is not binding on him, and will not be enforced in equity (*In re Browne, a Minor*, 2 Ir. Ch. Rep. 151); but such an agreement will have weight with the Court in considering whether the father has abandoned his right to educate his children in his own religion: *Andrews* v. *Salt*, 8 L. R. Ch. App. 622, 637.

It will be observed that in the case of *Talbot* v. *The Earl of Shrewsbury*, a Roman Catholic priest had been appointed sole testamentary guardian; nor is there anything in our law which may prevent a dying father from committing the care of his children to the regulator of his conscience.

In other countries it has been found advisable to legislate upon this subject. Thus it appears in the Institutes of the Laws of Spain by Asso and Manuel, "that bishops, monks, and religious persons cannot be guardians." Though, "if the Clergy are relations of the pupil or minor, and pray the appointment within four months, they are eligible:" Asso and Man. Inst. by Johnstone, p. 8.

In general, the Court will not allow its wards to be taken out of its jurisdiction. And in *Mountstuart* v. *Mountstuart*, 6 Ves. 363, Lord *Eldon* is reported to have said, that the Court never makes an order for taking an infant out of the jurisdiction. And see *Stuart* v. *The Marquis of Bute*, 9 Ho. Lo. Ca. 440. And in *De Manneville* v. *De Manneville*, 10 Ves. 52, his Lordship restrained a father from removing his child to a foreign country.

Exceptions, however, are sometimes made to the rule; but Lord *Cottenham* has observed, that such exceptions are and ought to be very rare, and that, since he had held the Great Seal, he had had reason to lament that the rule had not been more strictly adhered to: 2 My. & Cr. 32.

But in such cases the Court will always take security for the return of the ward, if a stay of some duration will be for its benefit, or for its proper education. In *Jeffrys* v. *Vanteswarstwarth*, Barnard. Ch. Rep. 141, 144, two young ladies, wards of the Court, whose nearest relations resided at Dantzic, applied for leave to pay them a visit. Lord *Hardwicke* referred it to the Master to consider what would be a proper time for them to stay there, and what security should be given for their return into England within that time, and that they should not

marry without the leave of the Court. See *Re Medley*, 6 I. R. Eq. 339.

In an anonymous case, Jac. 265, n., on the petition of the father of infant wards of the Court, who, being appointed to a situation in the king's service, was about to reside abroad for several years, Lord *Eldon*, after much hesitation, ordered that he should be at liberty to take them abroad with him, undertaking to bring them, or such of them as should be living, back with him; and he was half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the infants, actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided; and see *Logan* v. *Fairlie*, Jac. 193; *Stephens* v. *James*, 1 My. & K. 627; *De Weever* v. *Rochport*, 6 Beav. 391; *In re Levinge*, 6 Beav. 392, n.; *In re Daly*, 6 Beav. 393, n.; *Hart* v. *Tribe*, 19 Beav. 149. In *Lethem* v. *Hall*, 7 Sim. 141, an infant, a native of Ireland, whose father (then afflicted with mental and bodily infirmity) and sisters were resident there, was desirous that he might be in his native country, and near them, was allowed to be placed at the University of Dublin during his minority, or until further order of the Court, the guardians entering into a recognisance, to be approved of and certified by the Master, to bring the infant within the jurisdiction whenever they should be required so to do, and that the allowance should be paid to them; and the fact of the infant's having been so placed at the university, and his continuing there, was to be, from time to time, verified by affidavit. In *Biggs* v. *Terry*, 1 My. & Cr. 675, Lord *Cottenham* made an order, that an infant, of the age of eighteen, might be at liberty to go abroad for a short period to visit his father, on satisfactory security being given that he should be restored to the jurisdiction within a limited time.

When the health of the ward imperatively requires another climate, the Court will allow a removal there (see *Wyndham* v. *Ennismore*, 1 Kee. 467); but when the ward's state of health does not require a permanent residence abroad, he will be allowed to remain there only so long as it will be beneficial to him; see *Campbell* v. *Mackay*, 2 My. & Cr. 31, where Lord *Cottenham* observed, that, "independently of the well-established rule of the Court, and the principle on which it proceeds, he was convinced that scarcely anything could be more injurious to the future prospects of English children, and particularly of English boys, than a permanent residence abroad; without the proper opportunities of attending the religious services of the Church to which they belong,

separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should hereafter occupy in their native land."

The clandestine removal of a ward of Court from the custody of the person with whom such ward is residing, under the authority of the Court, is, in its nature, a criminal attempt, and privilege of Parliament will be no protection against an attachment for it. Thus, in *Wellesley* v. *Duke of Beaufort*, 2 Russ. & My. 639, a member of the House of Commons who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who, on being personally examined by the Court, admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.

It is a contempt of the Court to remove an infant out of the jurisdiction, even when he has enlisted in the army, without the leave of the Court (*Rochford* v. *Hackman*, Kay, 308; *Harrison* v. *Goodall*, Ib. 310, note (*a*); but where it appeared to be beneficial to the infant, he has been allowed to remain in the army. Ib.

As it is obviously impossible for the Court of Chancery, with the number of wards which it has under its care, to be aware of their conduct, it requires the guardians, from time to time, to give general information of what is taking place. If, for instance, a ward of the Court goes out of the jurisdiction, or from extravagant habits gets into difficulties, it becomes the duty of the guardians at once to apply to the Court in Chambers, where such assistance will be afforded as will extricate the ward from his difficulties, and put him in a better course of conduct: *Kay* v. *Johnson*, 21 Beav. 538.

A solicitor is bound to give to the Court any information which may lead to the discovery of the residence of a ward of the Court, whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment. Therefore, where the mother of wards of the Court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks: *Ramsbotham* v.

Senior, 8 L. R. Eq. 575; *Burton* v. *Earl of Darnley*, Ib. 576, n.

VI. *Foreign Guardians and Guardians appointed for foreign Infants.*]—If there be a foreign child in England with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians in England is or is not necessary, and would or would not be beneficial to the child, make an order for the appointment of English guardians (per Lord *Campbell* in *Stuart* v. *Marquis of Bute*, 9 Ho. Lo. Ca., 440, 464; see also *Nugent* v. *Vetzera*, 2 L. R. Eq. 704,), who, however might be the foreign guardian, though some one within the jurisdiction would generally be appointed, over whom the Court could exercise an effective control. *Johnstone* v. *Beattie*, 10 C. & F. 42; *Stuart* v. *Marquis of Bute*, 9 Ho. Lo. Ca. 470, and see *Ex parte Watkins*, 2 Ves. 470.

In dealing with guardians appointed by foreign Courts, the Court of Chancery will have regard to the principles of international law, and the course that all Courts have taken in recognising the proceedings of the regularly constituted tribunals of all civilised communities, and especially of those in amicable connection with this country. Hence our Courts will carry out the orders of a foreign Court, provided they do not conflict with our own laws, and will remove guardians appointed here who do not carry out such orders; as, for instance, by bringing up a child being a subject of the country to which such Courts belong, in a religion not authorised by them. *Di Savini* v. *Lousada*, 18 W. R. (V.C.J.) 425.

The Court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country. But the Court will refuse to discharge an order by which guardians had been appointed over the children in this country: and will merely reserve to the foreign guardian, the exclusive custody of the children to which he was entitled by order of the Court of his own country: *Nugent* v. *Vetzera*, 2 L. R. Eq. 704.

The case of *Dawson* v. *Jay*, 3 De G., Mac. & G. 764, in which the Court refused to send back to the United States, upon the application of a guardian appointed there, may seem opposed to the decision of *Nugent* v. *Vetzera*. But in *Dawson* v. *Jay* the infant was a British subject, though born in the United States, and had

been brought to England with the concurrence of the person who was there her guardian, and the application was made by a guardian who was appointed by the judge of a merely local Court—the surrogate of New York—while another person had been appointed guardian for the same infant by the State of Maryland, whereby some practical inconvenience and disturbance of comfort might be apprehended from orders pronounced by those conflicting jurisdictions, and the infant desiring to remain in England, the Court decided that she ought not to be sent out of the jurisdiction.

VII. *Marriage of Infants and of Infant Wards of Court.*]—Under the Marriage Acts (4 Geo. 4, c. 76 and 6 & 7 Will. 4, c. 85), the consent to the marriage of an infant must be given by the father, or if he be dead, by the guardians or one of them, and if there be none, by the mother if unmarried, and if not by the guardians appointed by the Court of Chancery or one of them.

And although the infant has no property, a guardian for the purpose of giving consent may be appointed by the Court of Chancery on petition, as where the father and mother are dead and there is no guardian (*Re Woolscombe*, 1 Madd. 213; *Ex parte Becher*, 1 Bro. C. C. 556), or if the father, guardian, or mother be non compos or beyond seas, or unreasonably refuse to consent to the marriage, 4 Geo. 4, c. 76, s. 17. But it seems that after a considerable lapse of time a presumption arises that consent has been given. That presumption, however, may be rebutted by evidence to the contrary: *Harrison* v. *Mayor of Southampton*, 22 L. J. Ch. (N. S.) 722.

In the case of wards of the Court whether male or female, even when they have parents living, or guardians, it is necessary to apply to the Court by petition, for leave for them to marry, which will only be granted upon its appearing that the marriage is suitable, and that the settlement proposed is proper (*Smith* v. *Smith*, 3 Atk. 305; *The Earl of Plymouth* v. *Lewis*, 2 Dick. 861; *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 29); and the Court will prevent, as far as it can, a clandestine marriage, by ordering that the ward shall not be married without leave of the Court, and that the person desirous of marrying the ward shall not have access, by letter or otherwise. *Pearce* v. *Crutchfield*, 14 Ves. 206; and see *Beard* v. *Travers*, 1 Ves. 313; in which case Lord *Hardwicke* observed, "that, in cases relating to clandestine marriages, hearsay evidence and declarations are no defective proof, but have weight with the Court, especially when uncontradicted by anything on the other side."

And the guardians or father of an infant seeking a clandestine marriage with a ward of the Court,

will be ordered not to suffer the marriage to take place without the consent of the Court. In *Lord Raymond's Case*, Ca. t. Talb. 58, the testamentary guardians of Lord Raymond presented a petition to Lord Chancellor *Talbot*, stating that their ward was seduced by Mr. Chetwynd, in order to marry his daughter Mrs. Mary Chetwynd, who was much inferior to him in family and fortune, and that they had been forced to keep him close in their custody for some time, to prevent their marrying; wherefore, they in general terms prayed the assistance of the Court. It seems that Mr. Chetwynd had only consented to the marriage. The Lord Chancellor made an order, preventing the marriage. "In order," said his Lordship, "to strengthen the guardians' hands, I order that the Lord Raymond shall continue in their care and custody, and that they do not permit him to marry without the consent of the Court. As to Mr. Chetwynd, the match not having taken effect, there is no necessity of looking so minutely into the affair in order to censure him. He would have done well not to have consented to this marriage, unless the guardians had done so too. But it had been said, that it would be cruel and unnatural in a father not to suffer his daughter to marry to her advantage, and she would have reason to blame him for it ever after. Now, to prevent that charge upon Mr. Chetwynd, I order him not to suffer his daughter to marry the Lord Raymond without the consent of the Court; which prevents any imputation or charge upon Mr. Chetwynd from the lady, or any one else; since, if there be any fault in it, it will fall upon the Court, and I shall be very willing to bear it."

Where a guardian connives at an intended marriage of a ward, the Court will interfere against the guardian by committing the ward, even in the case of a testamentary guardian, against whom the Court proceeds with some reluctance, to the care of others. See *Vernon* v. *Vernon*, cited ante, 641, 652, where an order was made upon petition, that an infant who was conversant with the daughter of the guardian should be immediately sent for, and ordered forthwith to Eton School. And in *Toombes* v. *Elers*, Dick. 88, Lord *Hardwicke* took the care of the infant from her testamentary guardian, and ordered that she should not marry without the leave of the Court. In *Lord Shipbrook* v. *Lord Hinchinbrook*, Dick. 547, Lord *Thurlow* referred it to the Master, to appoint a guardian in the room of Mrs. Donaldson, the infant's mother, and ordered that she should continue with Mrs. Donaldson until further order; and that she should be restrained from giving her consent to the marriage of the infant, without leave of the Court; and that the infant should not be married without the leave

of the Court. The order also restricted her from receiving any letters or messages, &c., from one Leoni, a Jew singer; and see *Foster* v. *Denny*, 2 Ch. Ca. 237; *Roach* v. *Garvan*, 1 Ves. 157; 1 Dick. 88; and in *Smith* v. *Smith*, 3 Atk. 307, a gentleman who had been corresponding with a young lady, a ward of the Court, was ordered to "produce such letters as contained a promise of marriage, but not billet-doux, or letters of civility."

Formerly there was a disinclination on the part of the Court to sanction the marriage of an infant ward, where it was impossible for him by reason of his infancy to settle his real estate so as to go along with his title, and to make a provision for his younger children: *Honywood* v. *Honywood*, 20 Beav. 451.

Infants, however, are now enabled by The Infants' Settlement Act (18 & 19 Vict. c. 43,) with the approbation of the Court of Chancery to make binding settlements of their real and personal estate on marriage; but the Act is not applicable to any male infant under the age of twenty years, or any female infant under the age of seventeen years (sec. 4). And as it does not make the infant a ward of Court (*Ex parte Dalton*, 3 Sm. & G. 331; 6 De G. Mac. & G. 201, 205), the Court does not inquire into the propriety of the marriage, but what is the proper settlement to be made thereon.

The person who, although an infant (*Edes* v. *Brereton*, West., Ca. t. Hardw. 348), marries a ward of the Court without obtaining leave, and also those who contrive or assist at the marriage, are guilty of a contempt of Court, and may be committed to close confinement in prison (*Herbert's Case*, 3 P. Wms. 116; *Hill* v. *Turner*, 1 Atk. 515; *More* v. *More*, 2 Atk. 157; *Butler* v. *Freeman*, Amb. 301; *Stevens* v. *Savage*, 1 Ves. jun. 154; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Winch* v. *James*, 4 Ves. 386; *Priestly* v. *Lamb*, 6 Ves. 420; *Millet* v. *Rowse*, 7 Ves. 419; *Pearce* v. *Crutchfield*, 16 Ves. 48; *Ball* v. *Coutts*, 1 V. & B. 292; *Birkett* v. *Hibbert*, 3 My. & K. 227; *Baseley* v. *Baseley*, 4 C. & F. 378; *Wortham* v. *Pemberton*, 1 De G. & Sm. 644; *Martin* v. *Foster*, 7 De G. Mac. & G. 98; *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356; *Re Tweedale's Settlement*, Johns. 109, 111); and if they be peers or peeresses a sequestration will be ordered against them, as was the case against the Countess of Shaftsbury in the principal case: (ante, p. 658), and proceedings have been stayed in a suit by a person who has married a ward of the Court and would not appear: (*Brummell* v. *McPherson*, 7 Ves. 237; *In re Strong*, 5 W. R. 107; 26, L. J. Ch. 64); and the contempt is equally great, although the father of the ward be alive (*Butler* v. *Freeman*, Amb. 301), and whether the marriage

be valid or invalid (*Salles* v. *Savignon*, 6 Ves. 572; *Bathurst* v. *Murray*, 8 Ves. 74; *Re Walker*, L. & G. t. Sugd. 299). "I do not admit," says Lord *Eldon*, "that, as there is no marriage, there is no contempt. The endeavour to marry is a contempt:" *Warter* v. *Yorke*, 19 Ves. 453.

If it is doubtful whether a marriage is valid or not, an inquiry upon that subject will be directed, and all intercourse will in the meantime be restrained and if it be found that the marriage of a female ward is invalid, a valid marriage will be ordered (*Bathurst* v. *Murray*, 8 Ves. 74; *Re Walker*, L. & G. t. Sugd. 299; Sc. nom. *Hodgens* v. *Hodgens*, 4 C. & F. 323). This course may be adopted for the sake of morals, in the case of a male ward: *In re Murray*, 3 D. & War. 83. But where a *male* ward has been led into a marriage derogatory to his rank, which has turned out to be invalid, a different practice has prevailed. Thus in *Warter* v. *Yorke*, 16 Ves. 451, although it appeared that a woman who had gone through the ceremony of marriage, with an infant ward of the Court, was pregnant, Lord *Eldon*, upon the Master's report, pronounced an order, that, on the part of the infant, a suit should be instituted in the Ecclesiastical Court, for nullity of the marriage, at the expense of the infant's estate, and the parties to the transaction were to be restrained from all intercourse, personal, by correspondence, or otherwise, with the infant. And see *Bathurst* v. *Murray*, 8 Ves. 74.

It seems that, although the parties contriving or assisting at a marriage are not aware that the infant is a ward of the Court, their ignorance, although it may be urged in mitigation of the offence (*More* v. *More*, 2 Atk. 157; *S.C.*, Barnard. C. C. 404), will not be sufficient to acquit them of contempt of Court. Mr. *Herbert's Case*, 3 P. Wms. 116. See *King* v. *Harwood*, 2 Lev. 32; 1 Vent. 178; *Nicholson* v. *Squire*, 16 Ves. 259; *Martin* v. *Foster*, 7 De G. Mac. & G. 98. In *Salles* v. *Savignon*, 6 Ves. 572, although the bill, the object of which was to make the lady a ward of the Court, was only filed on the day of her marriage, Lord *Eldon* held, that the marriage in fact was sufficient to ground a contempt of Court.

Although the communication of the fact of a contempt having been committed by the marriage of a ward of the Court be not made to the Court until some years after the marriage, there is no doubt but that the Court has jurisdiction, and may feel it a duty to punish that contempt: *Ball* v. *Coutts*, 1 V. & B. 302. "Yet it would not," Lord *Eldon* there observes, "be a very wholesome exercise of discretion to visit that offence strongly, if, upon attention to circumstances, that have occurred

in the course of six, seven, or eight years, it is not very strongly called upon to vindicate the jurisdiction; and in these cases, where it is exercised really for the benefit of the party, the Court ought to look with great attention to all the circumstances of each case;" *Ball* v. *Coutts*, 1 V. & B. 302.

And the Court has restrained proceedings taken in the Ecclesiastical Court against the ward or his guardian in alimony and restitution of conjugal rights by a person who married the ward in contempt of the Court. *Hill* v. *Turner*, 1 Atk. 515.

The punishment for the contempt of Court by marrying or aiding in the marriage of a ward of the Court, is, as before observed, commitment to prison, by way of punishment; and in the principal case, Lady Shaftsbury being a peeress, a sequestration was issued against her. But it seems that privilege of Parliament will not shield a person from being committed for contempt of Court. See Mr. *Long Wellesley's case*, 2 Russ. & My. 639.

In *Ex parte Mitchell*, 2 Atk. 173, one Mitchell, who was a justice of the peace and a barrister, having formerly been a solicitor, was, under very aggravating circumstances, guilty of a flagrant contempt of Court, by contriving a marriage of a ward of the Court; he was committed a close prisoner to the Fleet, was struck out of the commission as justice of the peace, and was *by his own submission*, prohibited from practising at the bar. And Lord *Hardwicke* said, that had Mitchell continued a solicitor, there would have been no difficulty; for the ready and proper way would have been to have struck him off the roll of solicitors. And see *Butler* v. *Freeman*, Amb. 301.

Punishment, however, for the offence is not the only object of the commitment, as it is frequently made use of by the Court as the means of compelling the husband to make a proper settlement (*Ball* v. *Coutts*, 1 V. & B. 300); and in cases where there are mitigating circumstances, the husband, upon petition, offering to make a settlement approved of by the Master, may obtain his discharge (*Stevens* v. *Savage*, 1 Ves. jun. 154; *Stackpole* v. *Beaumont*, 3 Ves. 89); but the husband will not, in a flagrant case, be discharged, upon his offering to execute a proper settlement until the Court considers him sufficiently punished (*Bathurst* v. *Murray*, 8 Ves. 79; *Baseley* v. *Baseley*, 4 C. & F. 378); nor, if the Court has ordered that he should be indicted for a conspiracy in procuring the marriage (*Priestley* v. *Lamb*, 6 Ves. 424); at any rate, until he has either been acquitted, or upon being found guilty, has suffered the punishment awarded for his crime: *Millet* v. *Rowse*, 7 Ves. 419.

And in *Bathurst* v. *Murray*, 8

Ves. 74, Lord *Eldon* said, he should use the animadversion of the Court to compel the father, (if a man of property, as he was represented by the affidavit of his son, and unless he should show that he was not implicated,) to make such provision as might have been expected upon a marriage properly contracted; as Lord *Thurlow* wished to do in a case where the husband's father was a man of considerable property in the city; but it could not be made out that he was a party concerned in bringing about the marriage.

Settlement on Marriage of a Ward of Court.]—Where the marriage takes place *by the leave of the Court*, a settlement will be directed to be made. As to the nature of the settlement generally made, see Martin's Conveyancing, by Davidson, Vol. 4, pp. 728, 740, 2nd ed.

It is difficult, perhaps, to lay down any rule upon the subject, as so much depends upon the circumstances of the parties; but, in general, notwithstanding the consent of a female ward and her guardians (*Gordon* v. *Irwin*, 4 Bro. P. C. 355, Toml. edit.), her property will not be settled entirely upon the issue of her first marriage: as provision will be made for her issue by a future marriage; see *Winch* v. *James*, 4 Ves. 386; *Wells* v. *Price*, 5 Ves. 398; *Millet* v. *Rowse*, 7 Ves. 419; *Bathurst* v. *Murray*, 8 Ves. 76; *Halsey* v. *Halsey*, 9 Ves. 471; *Long* v. *Long*, 2 S. & S. 124; *Rudge* v. *Winnall*, 11 Beav. 98. But it seems, where there has been an antenuptial settlement upon a ward under age, if, after she attains her majority, she comes into Court and consents to it, the Court may confirm it without a reference: *Leeds* v. *Barnardiston*, 4 Sim. 538, and *Re Anne Walker*, L. & G. t. Sugd. 326; *Day* v. *Day*, 11 Beav. 35.

In general, a female ward of the Court *when of age* may make whatever settlement of her property she pleases; she can, however, only effectuate this by consenting personally in Court, or under a commission for the purpose. Where this is not done, her property will not be discharged from the protection of the Court, except by the order of the Court; and, consequently, until such proceeding, she and her property must always be considered as having the protection of the Court still around her. Per Lord *Eldon*, in *Austen* v. *Halsey*, 2 S. & S. 123, n., in which case his Lordship referred it to the Master, to inquire whether a settlement made before marriage upon a ward who had attained twenty-one was a proper settlement.

Where proposals for a settlement on the marriage of a ward have been entertained by the Court, the parties will not be allowed to defeat the intention of

the Court, by deferring the marriage until the ward comes of age. Thus, where a female infant had been made a ward of the Court, and in contemplation of her marriage, terms for the settlement of her property, and that of her intended husband (which were for the benefit of the intended husband and wife and the issue of the marriage), had been approved by the Master, and his approval had been confirmed by the Court, it was held not to be competent to the husband and wife, by delaying the marriage till after the wife had attained her majority, and entering into fresh settlements, to defeat the settlement of the Court: *Hobson* v. *Ferraby*, 2 Coll. 412.

So, likewise, in *Money* v. *Money*, 3 Drew. 256, proposals of marriage with an infant ward of the Court, not being such as the Court would approve, were made six months before her marriage. The parties waited till she attained her majority, and a few days afterwards, a settlement was executed pursuant to new proposals made a very short time before her majority. The terms of the settlement appear to have been pursuant to the instructions; and, in fact, the wish of the ward's mother, and were such as the Court would not have approved of. It was held by Sir *R. T. Kindersley*, V. C., that the jurisdiction of the Court over the ward had not ceased, and ordered the settlement to be rectified, so as to make it what the Court, looking at the position of the parties would have made. See also *Re Donne*, 2 Moll. 490; *Biddle* v. *Jackson*, 26 Beav. 282; *Cook* v. *Fryer*, 1 Hare, 498.

An improper settlement, though the marriage takes place after a female ward comes of age, will be rectified, unless she consent to it. Thus, in *Long* v. *Long*, 2 S. & S. 119, a lady entitled to a fund in Court married the *day after she came of age*. After the marriage a settlement of her property was made on her and her husband for their lives, and on the children of the marriage absolutely; but the wife never consented in Court to a transfer of the fund to the trustees. After the husband's death, and the birth of a child, the settlement was, at the suit of the wife, declared void, because it contained no provision for a second marriage, and because the rights acquired by the husband were, on account of the precipitation of the marriage a surprise on the wife. In the case, however, of *Re Hoare's Trust*, 4 Giff. 254; 11 W. R. (V. C. S.) 181. Sir *J. Stuart*, V. C., refused to rectify a settlement by inserting a provision for children of a second marriage, observing that the husband had married upon the faith of the settlement as it stood.

An improper settlement will be varied or rectified by the Court after the lapse of a considerable length of time, subject neverthe-

less to the due protection of the rights and interests of persons who have come into esse since the time of the marriage (*Cave* v. *Cave*, 15 Beav. 227). So, where, on the marriage of a ward, no clause against anticipation was attached to her separate life estate which she afterwards incumbered, it was held by Sir *J. Romilly*, M. R., that the settlement could not be rectified to the prejudice of her incumbrancers: *Blackie* v. *Clarke*, 15 Beav. 595.

Where a female ward of the Court marries *after* she is of age the Court cannot, except in such cases as have been before mentioned, enforce a settlement: (*Longbottom* v. *Pearce*, 3 De G. & Jo. 545, n.; *White* v. *Herrick*, 4 L. R. Ch. App. 345, overruling *Biddles* v. *Jackson*, 26 Beav. 282; 3 De G. & Jo. 544); but if any property belonging to her is in the power of the Court, it will not part with it, unless the wife waives her equity to a settlement. See *Lady Elibank* v. *Montolieu*, and *Murray* v. *Lord Elibank*, ante, Vol. 1, p. 464, 471, and note.

Where the marriage takes place *in contempt* of the Court, the nature of the settlement will depend in a great measure upon the fortune, position, and conduct of the husband. If the case be that of a beggar marrying a ward of the Court for the sake of her fortune, the Court is in the habit of not permitting him to touch that fortune, which was his object; but it has never gone the length, that, if this species of indiscretion has occurred, which the Court must punish by commitment, but which brings together persons of equal rank and fortune, and as considerable a settlement is made by one as by the other, of giving no attention to an equivalent provision made by the husband for the wife and issue: *Ball* v. *Coutts*, 1 V. & B. 303.

The almost invariable rule in modern practice, in case of a marriage with a ward, in open contempt of the Court, is to frame the settlement in such a manner as to exclude from it altogether all marital estate and interest, and the rule would only be departed from in cases where it could be clearly shown that the departure would be clearly for the benefit of the lady: *Wade* v. *Hopkinson*, 19 Beav. 613, 619; *Hodgens* v. *Hodgens*, 4 C. & F. 323; *Baseley* v. *Baseley*, Ib., p. 378, n.; *Field* v. *Brown*, 19 Beav. 176; *Field* v. *Moore*, 7 De G. Mac. & G. 691.

Where the husband was ignorant at the time of the marriage that his wife was a ward of the Court, and there are "alleviating circumstances" attending the contempt, the settlement will be more favourable to the husband: *Richardson* v. *Merrifield*, 4 De G. & Sm. 161.

The mere fact, however, of marriage with a female ward of Court, without the Court's consent, will confer upon the Court a jurisdic-

tion to *decline, during the joint lives of the husband and wife, to part with* a fund in its own power and custody belonging to the ward, even upon the application of the husband and wife and upon the consent of the wife in Court, until such settlement should have been made thereof as should appear advisable and proper under the circumstances of the case (*Martin* v. *Foster*, 7 De G. Mac. & G. 98; *Biddles* v. *Jackson*, 3 De G. & Jo. 544; 26 Beav. 282; *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356). It seems, however, to be doubtful whether the Court in such a case would have power to correct or enforce a settlement against the wishes both of the husband and wife: *Martin* v. *Foster*, 7 De G. Mac. & G. 98, 101. See Vol. 1, pp. 515, 516, and cases there cited.

It may be here mentioned that when a proper case is made out, the legislature has annulled marriages where infants have, by fraud, misrepresentation, or violence been induced to go through the ceremony of marriage. See cases collected in the report of the proceedings in *Field's Marriage, annulling Bill*, 2 H. L. Cas. 48.

The Court has no jurisdiction to compel a male ward, with whom a marriage had been solemnized without its consent, on attaining his full age to execute a settlement of his estate so as to exclude his wife from all participation in the property: *In re Murray*, 3 D. & War. 83.

A settlement made by an infant ward does not, independently of the Infants' Settlement Act (18 & 19 Vict. c. 43), derive validity from the sanction of the Court, which it would not otherwise have. Thus, the real estate of an infant ward would, unless she attained her majority, descend to her heir, notwithstanding it was agreed on her marriage to be put in settlement: *Savill* v. *Savill*, 2 Coll. 72. So where a man married a female ward of the Court without leave, and under an order of the Court a settlement was afterwards made, by which the husband covenanted to convey all the real estate of the wife to trustees upon trusts, excluding him and giving his wife a power to devise. It was executed by the wife, *but not acknowledged by her.* On her death during coverture, having made a will devising the property, it was held by Sir *John Romilly*, M.R., that the wife's heir-at-law was not bound by the incomplete settlement, and that therefore her will was ineffectual to disinherit him: *Field* v. *Moore*, 19 Beav. 176; and see *Barrow* v. *Barrow*, 4 K. & J. 418.

As a man on marriage becomes entitled to a woman's personal estate not settled to her separate use, his covenant to settle it will be binding upon her as well as upon him. But in a case where a female ward, entitled to leaseholds for her sepa-

rate use, made a settlement under the order of the Court, giving a power of sale to trustees, it was held, that a sale made by the trustees during her minority was not valid: *Simpson* v. *Jones*,, 2 Russ. & My. 365. However, by the Infants' Settlement Act (18 & 19 Vict. c. 43, explained by 23 & 24 Vict. c. 83, infants are now enabled, with the approbation of the Court of Chancery, to make binding settlements on marriage of their real and personal estate, whether it be in possession, reversion, remainder, or expectancy. See Morgan and Chute's Chancery Acts and Orders, 233, 4th edit., *Re Olive*, 11 W. R. (V. C. K.) 819.

The Court has no power under 18 & 19 Vict. c. 43, to make a settlement *after* marriage upon an infant. When, therefore, an infant married woman, *not being a ward of Court*, filed a petition for a settlement of her property, it was held that the Court had no jurisdiction to order a settlement to be made. *In re Potter*, 7 L. R. Eq. 484. See remarks on *Wortham* v. *Pemberton*, 1 De G. & Sm. 644, ante, Vol. 1, p. 486.

As to confirmation by a woman after the death of her husband of a voidable settlement made upon her marriage, while an infant. See *Davies* v. *Davies*, 9 L. R. Eq. 468.

A settlement made with the sanction of the Court on the marriage of an infant, of certain funds alleged to represent the infant's share under a will, does not operate as a confirmation of prior dealings by the trustees of the will, so as to preclude the *cestui que* trust under the settlement from filing a bill charging the trustees under the will with breaches of trust: *Zambaco* v. *Cassavetti*, 11 L. R. Eq. 439.

Where a marriage has been solemnized between parties, one or both of whom is or are under age, by a false oath or fraud, the parent or guardian whose consent has not been obtained, may, by information in the Court of Chancery, obtain a forfeiture of the property the offending party takes by the marriage, and the Court has power to make a settlement thereof (4 Geo. 4, c. 76, s. 25), any agreement or settlement by the parties inconsistent with that to be made by the Court being void (sect. 24); and the principle upon which the Court acts in carrying into effect the directions by the act is to prevent the offending party from deriving any pecuniary benefit from the marriage, as far as may be, without prejudicing the pecuniary interests of the innocent party and the issue of the marriage. See *The Attorney-General* v. *Lucas*, 2 Ph. 753; *Attorney-General* v. *Read*, 12 L. R. Eq. 38; and see *Attorney-General* v. *Mullay*, 4 Russ. 329; *Attorney-General* v. *Mullay*, 7 Beav. 351; *Attorney-General* v. *Severne*, 1 Coll. 313. And in a recent case where the fund in possession was small, the Court, in-

stead of ordering a settlement, after declaring the forfeiture, directed the trustees to transfer the residue of the fund into Court, and declared the trusts : *Attorney-General* v. *Clements*, 12 L. R. Eq. 32.

As to form of order declaring trusts of the funds both in possession and reversion, see Ib. 36.

VIII. *Maintenance.*] — The Court of Chancery has ample jurisdiction with regard to maintenance, in all those cases where infants have property (*Wellesley* v. *Beaufort*, 2 Russ. 21) by applying the income for their benefit, and accumulating the surplus (*Wellesley* v. *Wellesley*, 2 Bli. N. S. 133) even although they may be lunatics (*Volans* v. *Carr*, 2 De G. & Sm. 242) ; and guardians or trustees whose duty it may be to see to the maintenance of an infant according to his rank, fortune, and expectations will, in all cases when there is any difficulty, act wisely in applying to the Court, and acting under its directions.

The Court itself will grant maintenance out of rents and profits (*Dormer* v. *Dormer*, Rep. t. Finch. 432 ; *Re Howarth*, 8 L. R. Ch. App. 415), or out of the income of personal property, provided the fund be clear. Thus, when it is doubtful whether anything is coming to a residuary legatee, who is an accounting party, nothing will be allowed him for maintenance (*Warter* v. ——, 13 Ves. 92, 94) ; but where the Court can see clearly that there will be a clear fund, the residuary legatee will have an allowance for maintenance in the meantime : Ib. and see *Wear* v. *Wilkinson*, 13 Ves. 93, cited ; *Jervoise* v. *Silk*, Geo. Coop. 52 ; *Coster* v. *Coster*, 1 Keen, 199).

Maintenance, moreover, cannot be allowed out of a fund unless it be vested in possession, but it must be remembered that a legacy upon a contingency, if, for instance, it be given to a person when he attains a certain age, may be vested by a direction on the part of the testator that the intermediate interest is to be given to, or to be applied for the benefit of, the legatee. See *Lane* v. *Goudge*, 9 Ves. 225 ; *In re Sanderson's Trust*, 3 K. & J. 497, 503, 504, and cases cited in the note to *Hanson* v. *Graham*, 2 Lead. Cas. R. P. 752 ; *Spencer* v. *Wilson*, 16 L. R. Eq. 501 ; *Fox* v. *Fox*, 19 L. R. Eq. 286.

So, where an infant has a vested interest in a fund, he will, although it is defeasible in a certain event by a condition subsequent, be entitled to the interest, and therefore in a proper case to maintenance thereout, until the happening of the event. See *Taylor* v. *Johnson*, 2 P. Wms. 504. There a testator bequeathed a legacy to an infant, with a proviso that if he died before twenty-one, then the legacy should go over to another, *The Master of the Rolls*

said, "The infant's death before twenty-one will only defeat the legacy from the time it happens, consequently in the meanwhile, it shall carry interest, at least, from the end of the year after the death of the testator." See also *Shepherd* v. *Ingram*, Amb. 448; *Chaworth* v. *Hooper*, 1 Bro. C. C. 82.

As a vested legacy, payable at a future day, does not carry interest until the arrival of that day, no maintenance can be allowed in the meantime (*Descrampes* v. *Tompkins*, 4 Bro. C. C. 149, n.; *Crickett* v. *Dolby*, 3 Ves. 10) except in the case of a residuary legacy (*Nicholls* v. *Osborn*, 2 P. Wms. 419; *Chaworth* v. *Hooper*, 1 Bro. C. C. 81; *Hawkins* v. *Combe*, 1 Bro. C. C. 335; *Skey* v. *Barnes*, 3 Mer. 335). But maintenance cannot be given out of the income of a contingent legacy, inasmuch as the interest must accumulate until the happening of the contingency (*Butler* v. *Freeman*, 3 Atk. 58; *Bullock* v. *Stones*, 2 Ves. 520; *Ellis* v. *Ellis*, 1 S. & L. 1; *Glanvill* v. *Glanvill*, 2 Mer. 38; *Gotch* v. *Foster*, 5 L. R. Eq. 311); unless the non-happening of the contingency can be provided against.

An important exception takes place to the rules before laid down, where a parent or a person *in loco parentis* leaves to a child or to children as a class (*Incledon* v. *Northcote*, 3 Atk. 438; *Brown* v. *Temperley*, 3 Russ. 263); who are unprovided for, a vested legacy, the payment of which is postponed, or a contingent legacy, for in such cases interest on the legacy will be allowed as maintenance from the death of the testator. (See note to *Ashburner* v. *Maguire*, ante, p. 293, and cases there cited.) *Secus* where the testator has made provision independently for the maintenance of the legatee (Ib. and see *In re George an Infant*, W. N. 1877, p. 94).

And upon the principle of compensation, where there are equal legacies to a class of children, even with a direction for accumulation, the principal, with the accumulations, for instance, to be paid at twenty-one, with survivorship in case of the death of any under that age to the others: the chance of all taking or the survivor being equal, the Court takes the fund, which belongs to all, and must go to all or some of them, and maintains them all out of the interest: *Marshall* v. *Holloway*, 2 Swanst. 436, and cases cited in note.

But this is said to be a rule of Court, and does not enable trustees so to apply the income when the estate is not under administration. *In re Breed's Will*, 1 Ch. D. 226. *sed vide Franklin* v. *Green*, 2 Vern. 137.

But the principle cannot be applied where property is not given absolutely to the children and the survivor; but in certain events there is a gift over to a stranger. Thus in *Ex parte Kebble*, 11 Ves. 604 (overruling *Greenwell* v.

Greenwell, 5 Ves. 194), a residue was bequeathed to five infants, with survivorship among them in case of the death of any under the age of twenty-one; and, in case all of them should die under that age, *the whole was given to their sister*, who took no interest directly in that residue; but a legacy was given to her by the same will, and in case of her death under the age of twenty-one, that legacy was given over to the other five children. Lord *Eldon* refused an application of the five infants for maintenance, there being no direction for it in the will. "By this will," said his Lordship, "five children have this residue given to them, with survivorship among them, and the sixth has nothing given to her in that fund, unless all the five die under the age of twenty-one. So the five would be maintained at her expense, for she has no interest in common with them. Where is the difference between her and a mere stranger? She is not a legatee of this residue with the other five; but it is given over to her as to a stranger, only in the event of the death of all the five under the age of twenty-one; and while it remains contingent, she has no interest with them. The circumstance that she has a legacy by another part of the will cannot alter it. If no legacy was given to her, it could not be contended; for this has not been allowed, except where all had a chance and an equal chance, and there is no instance of setting off one legacy against another in this way. There is no case in which interest of property directed to accumulate, has been applied to maintenance, except where it was one principal sum in which all were interested." See also *Errington* v. *Chapman*, 12 Ves. 20.

Nor will the principle be applied where property is not given absolutely to a class of children and the survivor; but in case of the death of a child under a certain age there is a limitation to the issue, who, for that purpose, are strangers: see *Ex parte Kebble*, 11 Ves. 606; *Turner* v. *Turner*, 4 Sim. 430: see also *Errington* v. *Chapman*, 12 Ves. 20; *Ex parte Whitehead*, 2 Y. & J. 243; *Parsons* v. *Coke*, 10 W. R. (V. C. K.) 641. Maintenance was, however, allowed under such circumstances by Lord *Thurlow* in *Fendall* v. *Nash*, 5 Ves. 197, n.; but this case has been disapproved of by Lord *Eldon*: 14 Ves. 203.

Nor will maintenance, if not directed by the will, be ordered, where the children making the applications are not all the persons among whom the property is to go: where, for instance, unborn children may form part of the class. In *Sir Frederick Eden's Case*, indeed Lord *Rosslyn* allowed maintenance; but upon an application to Lord *Eldon* for an increase of the allowance, he observes, "I did not think myself justified in following that, and re-

fused it, as those children might be the persons to take the whole; but future children, then unborn, might be the persons to take a part of it:" *Ex parte Kebble*, 11 Ves. 604.

In *Lomax* v. *Lomax*, 11 Ves. 48, a petition was presented for maintenance out of the interest of a legacy to the children of the testator's daughter, when the youngest should attain the age of twenty-one. Lord *Eldon*, however, refused the application. "Upon a legacy," observed his Lordship, "when they shall attain twenty-one, and to such of them as shall attain twenty-one, is not the meaning, that such as do attain twenty-one shall have it at that time; and what right has the Court to give the interest before that time? If all die under twenty-one, and a child not yet in existence should come into existence, and attain that age, that child clearly would take the whole, interest as well as principal. Therefore, I may give it to these children, who may never become entitled to it. In the case of Sir Frederick Eden's children, I refused to increase the maintenance, or even to continue it, under an order made by Lord *Rosslyn*." The application was renewed, but Lord *Eldon* refused it, saying, "The interest could not be given for maintenance, in the face of the will."

However, in *Haley* v. *Bannister*, 4 Madd. 275, a testator directed that the dividends of stock should accumulate until one of the children then born, or thereafter to be born of his daughter, should attain twenty-one; and upon his or her attaining that age (if there should be only one child who should attain that age), his executors should transfer the whole to such only child; and if more than one such child were then living, to transfer to such children one equal part of the said stock and accumulations, in proportion to the number of such children then living. The residuary personal estate was given upon the same limitations. Upon an application during the life of the father and mother, Sir *J. Leach*, V. C., held, that the children were entitled to maintenance. "I take," said his Honor, "the principle to be, that wherever the children have a common interest on a fund, the income of the fund, if necessary, may be applied for their maintenance. In this case, children born or to be born have a common interest; and therefore the income of the fund, if necessary, may be applied to their maintenance. So, in *Errat* v. *Barlow*, although no order for maintenance was made by Lord *Eldon*, where the interest of a legacy charged upon real estate was given in trust to the younger children of the testator's daughter, to accumulate during their minority, and to be payable equally among them at their ages of twenty-one (see 14 Ves. 202), yet Sir *William*

Grant, M.R., it seems, afterwards ordered it upon an ex parte application." The authority, however, of *Haley* v. *Bannister*, and of Sir *W. Grant's* decision in *Errat* v. *Barlow*, is at least doubtful. In *Cannings* v. *Flower*, 7 Sim. 523, where the shares of children in a legacy were contingent on the son's attaining twenty-four, or dying under that age, leaving issue, and on the daughter's attaining twenty-four or marrying, but the legacy was not given over in the event of no child acquiring a vested interest, Sir *L. Shadwell*, V. C., refused to order maintenance for the children, saying, he considered that the rule was established in the manner stated in his judgment in *Turner* v. *Turner* (4 Sim. 430), that the chances of obtaining a vested interest in the fund appeared not to be equal amongst the children themselves; and that, at all events, he could not make the order without the consent of the testator's next of kin.

But even although there be an express direction for accumulation, where the Court sees that it is for the benefit of the infants, the chances of survivorship being equal, and can procure *the consent of all* persons interested in remainder, maintenance will be allowed, the Court taking the chance of controverting the direction of the will. Thus, in *Cavendish* v. *Mercer*, 5 Ves. 195, n., there was a residuary bequest of a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and be paid with the capital; and in case of the death of all before the time of payment, there was a gift over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, Lord *Bathurst* directed a maintenance, taking that assent of the mother. See 14 Ves. 92; *Re Arbuckle*, 14 W. R. (V. C. K.) 535.

Moreover, although there is a gift over, maintenance will be allowed, if there is a fair inference from the whole will, that it was the testator's intention to give it: *Lambert* v. *Parker*, G. Coop. 143.

Where there are two funds out of which an infant might be held entitled to maintenance, it will be allowed out of that fund which it is most for his benefit to be applied for that purpose: *Bruin* v. *Knott*, 1 Ph. 572; *Lygon* v. *Lord Coventry*, 14 Sim. 41; *Martin* v. *Martin*, 1 L. R. Eq. 369.

And where an infant has been maintained out of the wrong fund, he will be recouped out of the one which ought to have been applied for that purpose: *Furley* v. *Hyder*, 41 L. J. (Ch.) N. S. 583.

If the rents and profits be insufficient for the purpose, an allowance for maintenance may be charged on real estate where there is a direction for that purpose by the instrument under which the

property is settled (*In re Corker's Minors*, 3. J. & L. 377; *Williams* v. *Edwards*, 2 Coll. 176); such charge may also be made even in the absence of such direction, if an infant be entitled to real property in fee (*Sergison* v. *Sealey*, 2 Atk. 412, 416; *Re Howarth*, 8 L. R. Ch. App. 415); or remainder in fee with the consent of the tenant for life (*In re Allen*, 8 L. R. Ch. App. 417, n.), or even if he is entitled in fee only upon a contingency, if the return of the money so charged can be provided for, as for instance by insurance, in the event of the contingency not happening. See *De Witte* v. *Palin*, 14 L. R. Eq. 251; *Ring* v. *Jarman*, Ib. 252, cited.

Where the income arising from property is left to a person for the maintenance of children, he will be entitled to receive it for that purpose so long as he continues properly to maintain them (*Hadow* v. *Hadow*, 9 Sim. 438; *Jubber* v. *Jubber*, 9 Sim. 503; *Berkeley* v. *Swinburne*, 6 Sim. 613; *Thurston* v. *Essington*, Jac. 361, n.; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; *Leach* v. *Leach*, 13 Sim. 304; *Hart* v. *Tribe*, 19 Beav. 149; *Browne* v. *Paull*, 1 Sim. N. S. 92); and in *Hammond* v. *Neame*, 1 Swanst. 35, under a bequest of stock, in trust to pay the dividends to M. H. H., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M. H. H., until he, she, or they shall attain twenty-one," and then to transfer the principal equally among the children, with a bequest over, in default of such issue, to the nephews and nieces of the testator living at the death of M. H. H., it was held by Sir *Thomas Plumer*, M.R., that the dividends were payable to M. H. H., although she had no child.

But where a person puts himself in such a position as to be incapacitated from performing the trust, he will be entitled to a share only for his own maintenance. See *Castle* v. *Castle*, 1 De G. & Jo. 352: there a widow, who was entitled to the income of property for the maintenance of herself and her family, and the education of her children, having eloped with a married man, was held to be entitled only to part of the income for her own maintenance.

Where the *income* of property is given to a widow for her maintenance and support, and the maintenance, education, clothing, and support of herself and children, without being confined to minors, the parent in these cases is a trustee for the children, but only so far as is required for their maintenance and support (*Carr* v. *Living*, 28 Beav. 644; 33 Beav. 474; *Scott* v. *Key*, 35 Beav. 291, 293), and such gift, *primâ facie*, does not apply to married daughters or adult sons, but only to the children living at home with their

mother: *Carr* v. *Living*, 28 Beav. 645. And see *Ryan* v. *Keogh*, 4 I. R. Eq. 357.

Whether in cases of this kind a child being willing to reside with the mother after attaining the age of twenty-one would thereby lose a right to participate in the fund, is, in the absence of express directions, which would of course be binding (*Gardner* v. *Barber*, 18 Jur. 508; *Wilson* v. *Bell*, 4 L. R. Ch. App. 581), somewhat doubtful (*Thorp* v. *Owen*, 2 Hare, 610; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 370); but where a son or daughter leaves the house of the widow, and becomes forisfamiliated, and may perhaps have a family, it can scarcely be conceived to have been the intention of the testator, that the widow should apportion a certain part of her income for such son or daughter, and no longer spend her income in one establishment, but divide it into as many incomes as there are children, possibly not leaving enough for her own support: per *Wigram*, V. C., in *Thorp* v. *Owen*, 2 Hare, 613; *Bowden* v. *Laing*, 14 Sim. 113; *Carr* v. *Living*, 28 Beav. 644. And it seems to be just where the children are otherwise provided for, that they should not be entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education, and support: *Carr* v. *Living*, 28 Beav. 647.

Where the income of property has been applied pursuant to a trust for the maintenance and education of infants, no account will be directed as to its application unless a special case is made out, showing that some of the children have not been properly maintained (*Hora* v. *Hora*, 33 Beav. 88; and see *Leach* v. *Leach*, 13 Sim. 304; *Browne* v. *Paull*, 1 Sim. N. S. 92; *Carr* v. *Living*, 28 Beav. 644); and the Court will not deprive the widow of the honest exercise of the discretion vested in her (*Raikes* v. *Ward*, 1 Hare, 450); but it will give her, if required, its assistance to inquire into or to sanction any reasonable arrangements she may desire to make: *Ib.*

And where a widow takes for life the income of a fund, for the maintenance of herself and the maintenance and education of her children, the Court will not, even with her concurrence, sanction a transfer, to children who have come of age, of their share of the fund, unless the income of what remains is clearly enough for the maintenance at any time of the other children: see *Berry* v. *Bryant*, 2 Drew. & Sm. 1, in which case, however, part of their shares were paid to two adult sons upon an arrangement that they were each to undertake to continue to pay to their mother, for the benefit of those who were to be maintained, such annual sum as would make up the income to the amount at which it then stood, and that what remained in Court, as the residue

of the share of those two sons, should be held as a security for the payment of that annual sum.

What remains after answering the purpose of maintenance and education, belongs to the widow or her assignees, and the Court, if necessary, will, in a suit, direct a reference to ascertain its amount: *Carr* v. *Living*, 28 Beav. 644, 647. And see *Hammond* v. *Neame*, 1 Swanst. 35; *Bushnell* v. *Parsons*, Prec. Ch. 219; *Cape* v. *Cape*, 2 Y. & C. Exch. Ca. 543.

Where the *fund* is itself given to a person for the maintenance of children, the Court may safely and properly pay it over to such person, who, although it is in some respects to be looked upon as a gift conferred upon himself, will nevertheless be accountable for the proper application of the fund to those for whose benefit it was particularly given, if the intention was to create a trust in their favour, but he will not be so accountable where no trust was intended (*Andrews* v. *Partington*, 2 Cox, 223; *Robinson* v. *Tickell*, 8 Ves. 142; *Woods* v. *Woods*, 1 My. & Cr. 409; *Raikes* v. *Ward*, 1 Hare, 445; *Crockett* v. *Crockett*, 2 Ph. 553; *Webb* v. *Wools*, 2 Sim. N. S. 267; *Joddrell* v. *Joddrell*, 14 Beav. 397; *Biddles* v. *Biddles*, 16 Sim. 1; and see *Presant* v. *Goodwin*, 6 Jur. N. S. 404; *Lambe* v. *Eames*, 6 L. R. Ch. App. 597; *Mackett* v. *Mackett*, 14 L. R. Eq. 49); but if it was, the fund is not assignable to creditors or others, without regard to the interests of the children (*Wetherell* v. *Wetherell*, 1 Keen, 80). In *Brown* v. *Casamajor*, 4 Ves. 498, a legacy was given to a father, "the better to enable him to provide for his younger children." He *consented to secure the capital*, but was held entitled to the interest. And in *Hamley* v. *Gilbert*, Jac. 354, where there was a gift of a residue to a lady for the education of her son, Lord *Gifford*, M. R., held her to be only entitled to it subject to the application of so much as the Court might think fit during his minority, although it was declared in the will that she should not be liable or subject to account for the disposal or application of the residue. In *Collier* v. *Collier*, 3 Ves. 33, where the testator gave his wife 400*l.* a year, in addition to 500*l.* a year under her marriage settlement in consideration of the expense and care she would incur in the maintenance of their children, it was held by Lord *Rosslyn*, that she ought to maintain them when at home, but was not to be charged with their maintenance or education when at school.

The presumption in favour of a gift being intended is much stronger in the case of a father than a mother, for when a fund is given in aid of the performance of a duty which the donee is already legally bound to perform, it is a gift to, and a beneficial interest in, the person to whom it is made.

Thus, in *Byne* v. *Blackburn*, 26 Beav. 41, a testator bequeathed a sum to trustees for his daughter for life, and afterwards to pay the dividends to her husband "during his life, nevertheless to be by him applied for or towards the maintenance, education, or benefit" of the daughter's children. There was a gift to the children after the decease of the survivor of the daughter and her husband. It was held by Sir *John Romilly*, M. R., that the husband took beneficially. "In this case," said his Honor, "the testator himself appointed trustees of the fund, and he therefore could not have intended the father to act as a subtrustee, and if he intended the children to have a direct and positive interest in the fund during the life of their father, he would have directed his own trustees to make the payment to the children. . . . I think that this was a beneficial gift to the father, to assist him in the performance of his parental duties, and that he was to be the judge how to perform it. He had such a discretion as the Court could not control, and subject to that obligation, which lies between him and his own conscience, I think he has a beneficial gift."

In general, where infants are interested, in property, either under wills or settlements, there are powers for their maintenance and advancement inserted, upon which the trustees can apply, either the whole or a part of the income or capital of such property for the benefit of the infants (3 David. Conv. 130, 556, 2nd ed.); and it will be their duty to exercise such powers, bonâ fide, and for the end designed by the testator or settlor: *Talbot* v. *Marshfield*, 3 L. R. Ch., App. 622, varying the decree of *Malins*, V. C., 4 L. R. Eq. 661; *Roper-Curzon* v. *Roper-Curzon*, 11 L. R. Eq. 452; *Lowther* v. *Bentinck*, 19 L. R. Eq. 166.

A power authorising an allowance for "maintenance and support," has been held to justify an allowance to meet the expenses of education: *In re Breed's Will*, 1 Ch. D. 226.

Where trustees are authorised by a power, if they see fit to apply the income of shares to which children are presumptively entitled toward the maintenance of the children, notwithstanding the father of the children may be of sufficient ability to maintain them, the Court will not control the discretion of the trustees if they think fit that the income should be paid to the father for the maintenance of the children: *Brophy* v. *Bellamy*, 8 L. R. Ch. App. 798, and cases there cited.

In order that the necessity of inserting such powers in all instruments should be dispensed with, it was enacted by Lord Cranworth's Act (23 & 24 Vict. c. 145), that "In all cases where any property is held by trustees in trust for an infant, either abso-

lutely, or contingently, on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the *guardians* (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be *entitled* in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income, by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen. Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year" (sec. 26). This power, however, cannot be exercised if it is expressly negatived by the instrument creating the trust, and can only be exercised subject to such limitations and variations, if any, as are contained in such instrument (sec. 32). The Act does not empower any trustees to deal with or affect the rights of any person soever, except to the extent to which they might have dealt with or affected such rights, if the instrument under which the trustees are empowered to act had contained express powers for such trustees so to deal with or affect such rights (sec. 33). Moreover, the provisions of the Act extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of the Act, (28th August, 1860,) or under a will or codicil confirmed or revived by a codicil executed after that date (sec. 34). See observations in 3 David. Conv. 193, 2nd ed.

It seems that the power of maintenance which by sect. 26 of Lord Cranworth's Act (23 & 24 Vict. c. 145) is given to trustees stops short at minority; *In re Breed's Will*, 1 Ch. D. 228, per Sir *J. Jessel*, M. R.

It has been recently decided that under the 26th sect. of Lord Cranworth's Act, trustees may apply for or towards the maintenance of an infant, the income of property held on trust for the infant contingently on attaining the age of twenty-one years (*In re Cotton*, 1 Ch. D. 232), and may pay it to the infant's father, as the expression "guardians" in the 26th section of the Act includes the father as guardian by nature (*Ib.* 234).

But the 26th section of the Act only applies to a case in which the infant is either absolutely or contingently entitled to the income of a legacy: *In re George, An infant*, W. N. 1877, p. 94.

Even before the passing of Lord Cranworth's Act, a trustee could safely advance out of the *interest* of a legacy left to an infant, sufficient to maintain him, if his parent were unable so to do, because the Court of Chancery would do the same upon an application being made to its jurisdiction. And in taking his accounts, the trustee would be allowed to set off the gross amount of the maintenance against the gross amount of interest, although in some years the amount allowed for maintenance exceeded the amount of interest in those years: *Carmichael* v. *Wilson*, 3 Moll. 79; *Edwards* v. *Grove*, 2 De G. F. & J. 210, and see *Lee* v. *Brown*, 4 Ves. 369; *Sisson* v. *Shaw*, 9 Ves. 288; *Maberley* v. *Turton* 14 Ves. 499; *Ex parte Darlington*, 1 B. & B. 240; *Cotham* v. *West*, 1 Beav. 380, overruling *Andrews* v. *Partington*, 3 Bro. C. C. 60; *Sisson* v. *Shaw*, 9 Ves. 288; *Prince* v. *Hine*, 26 Beav. 634.

In cases arising out of instruments before the Act came into operation, where there was no power conferred upon the trustees; in cases subsequent to, but not strictly coming within its provisions; and in other cases where, from peculiar circumstances, trustees cannot venture to act upon their own responsibility, it becomes necessary for them to apply to the Court of Chancery. The Court ordinarily acts upon the principle, that a father is bound to maintain his children, and will not, if he be of ability to maintain them, make him any allowance out of *their* property for that purpose (*Faukner* v. *Watts*, 1 Atk. 408; *Jackson* v. *Jackson*, 1 Atk. 513; *Butler* v. *Butler*, 3 Atk. 60; *Darley* v. *Darley*, 3 Atk. 399; *Stocken* v. *Stocken*, 4 My. & Cr. 98); notwithstanding there be a provision for their maintenance: *Mundy* v. *Earl Howe*, 4 Bro. C. C. 224; *Hughes* v. *Hughes*, 1 Bro. C. C. 387; *Andrews* v. *Partington*, 3 Bro. C. C. 60; 2 Cox, 223; *Hamley* v. *Gilbert*, Jac. 354; *Thompson* v. *Griffin*, 1 Cr. & Ph. 317.

The result of the authorities appears to be this, that where the trust property is derived from the bounty of a *stranger*, the father, if of sufficient ability, is not entitled to have the income applied to the maintenance of his children (*Thompson* v. *Griffin*, Cr. & P. 317); but if the trust property is the subject of marriage settlement, and therefore the creation of the trusts is *matter of contract*, then, if the language of the settlement is so framed as to express a trust to apply the income, or any part of the income, in maintaining the children, although the quantum of income to be so applied is left

to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children, applied for that purpose, without reference to his ability to maintain them (*Mundy* v. *Earl Howe*, 4 Bro. C. C. 224; *Meacher* v. *Young*, 2 My. & K. 490; *Ransome* v. *Burgess*, 3 L. R. Eq. 773; *White* v. *Grane*, 18 Beav. 571), but if the language of the settlement expresses merely a power so to apply the income, or any part thereof, then the father is not so entitled. Per *Kindersley*, V. C., in *Ransome* v. *Burgess*, 3 L. R. Eq. 780, and see *Thompson* v. *Griffin*, Cr. & Ph. 317.

And where a father provides a fund, of which he makes a voluntary settlement after marriage upon his wife and children, and creates a discretionary trust for maintenance of the children out of the income of the fund, and afterwards maintains them himself without calling for any contribution from the income of the fund, neither he nor his trustee in bankruptcy, will be entitled to receive any portion of the accumulations of the income which might have been so applied: *In re Kerrison's Trusts*, 12 L. R. Eq. 422.

Where the question turns upon the ability of the father to maintain a child, the rule is not that maintenance is allowable only, upon the father's absolute insolvency, but where the father is not in such circumstances as to be able to give the child such an education as is *suitable to the fortune which he expects*. Per Lord *Thurlow*, in *Buckworth* v. *Buckworth*, 1 Cox, 81. And see *Ex parte Williams*, 2 Coll. 740. And in *Jervoise* v. *Silk*, G. Coop. Rep. 52, an allowance of 1400*l.* a year was made to the father for the education of six children, who were entitled to an estate, the rental of which was 8600*l.* a year, although the father had an income of 6000*l.* a year. "On the outside," said Sir *Wm. Grant*, M. R., "6000*l.* a year would seem enough; at the same time the expenses of the father's establishment and his children's expectations are things to be looked to;" see also *De Witte* v. *Palin*, 26 L. T. Rep. (N. S.) 825.

But the reference *as to the ability* of the father will be omitted when the Court is satisfied that he is in reduced or insolvent circumstances, or has deserted his family; and the only question then to be considered will be what is a proper allowance: *Ex parte Mountfort*, 15 Ves. 449; *In re England*, 1 Russ. & My. 499.

And where the property is small (*Walker* v. *Shore*, 15 Ves. 122; *Ex parte Swift*, 1 Russ. & My. 575; *Payne* v. *Low*, 1 Russ. & My. 223; *Ex parte Dudley*, 1 J. & W. 254, n.), or no allowance for maintenance is asked (*In re Neale*, 15 Beav. 250), a reference will be altogether dispensed with.

The ability of the father to maintain his children will not be taken into consideration, when, in consequence of his ill conduct, his children have been taken away from him. See *Wellesley* v. *Duke of Beaufort*, 2 Russ. 29, where Lord *Eldon* observes, "I am not aware of any case in which the Court, where it has taken away from the father the care and custody of the children, has called in aid of their own means the property of their father."

A wife during the life of her husband, formerly being under no legal obligation to maintain the children, the Court would not, in determining upon the ability of the father to maintain them, take into consideration her separate estate: *Haley* v. *Bannister*, 4 Madd. 275. And see *Hodgens* v. *Hodgens* 4 C. & F. 323; 11 Bligh, N. S. 62, affirming the decree of Lord Chancellor *Sugden* (L. & G. t. Sugd. 259), and reversing that of Lord *Plunkett* (L. & G. t. Plunk. 137, 148), where the House of Lords decided, that a married woman having property settled to her separate use was not bound to maintain her children, even although she might have eloped from her husband, and he was incapable of maintaining them.

A married woman, however, now having separate property is subject to all such liability for the maintenance of her children as a widow is by law subject to the maintenance of her children, but her husband is not relieved from liability to maintain her children. 33 & 34 Vict. 93, s. 14. See ante, vol. 1, p. 586.

After the death of her husband, a woman, whether she remain unmarried (*Lanoy* v. *Duchess of Athol*, 2 Atk. 447; *Ex parte Lord Petre*, 7 Ves. 403; *Beasley* v. *Magrath*, 2 S. & L. 35), or marries again (*Greenwell* v. *Greenwell*, 5 Ves. 194; *Billingsly* v. *Critchet*, 1 Bro. C. C. 268), will have maintenance allowed to her to support her children, without regard to her ability. And see *Douglas* v. *Andrews*, 12 Beav. 310.

In allowing maintenance for an infant, regard will be had to the state and condition of his family. Thus, where there are younger children, especially if they are numerous and totally destitute, upon an application for maintenance for the eldest son, the Court will make a liberal allowance to him, that he may be the better able to maintain his brothers and sisters, considering him in the light of the head of the family. See *Pierpoint* v. *Lord Cheney*, 1 P. Wms. 493; *Harvey* v. *Harvey* 2 P. Wms. 22; *Lanoy* v. *Duchess of Athol*, 2 Atk. 447; *Ex parte Lord Petre*, 7 Ves. 403; *Tweddell* v. *Tweddell*, T. & R. 13; and see *Ex parte Williams*, 2 Coll. 740: but in *Petre* v. *Petre*, 3 Atk. 511, as the eldest son had been conveyed away clandestinely to Douay, out of the hands of the

guardian, the Court, as he could not be brought before them, could make no order of that kind, but directed, that after Lady Mary Petre's jointure was satisfied, the surplus rents and profits should be laid out for the benefit of the eldest son. In *Bradshaw* v. *Bradshaw*, 1 J. & W. 647, a more liberal allowance was made for an infant, in consideration of the circumstances of an illegitimate brother, born of the same father and mother, and who had lived with them, but was totally unprovided for.

A liberal allowance also will be made for infants, in order to relieve their father or mother when in distressed circumstances. See *Roach* v. *Garvan*, 1 Ves. 160; *Hill* v. *Chapman*, 2 Bro. C. C. 231; and in *Heysham* v. *Heysham*, 1 Cox, 179, the mother, who was testamentary guardian, being insolvent, the Master certified that he approved of N. W. to have the care of the maintenance and education of the infant, and that he conceived the sum of 130*l.* per annum, part of 250*l.* (which was allowed for the maintenance and education of the infant), to be necessary for that purpose. This report was confirmed, and it was ordered that 130*l.*, part of the said 250*l.* per annum, should be paid to the said N. W. for the maintenance and education of the infant, and that the residue should be paid to his mother, till further order. So also, in *Allen* v. *Coster*, 1 Beav. 202, where the father was in great indigence, and, in consequence of the misconduct of himself and wife, the guardianship of his children had been committed to others, Lord *Langdale*, M. R., increased the maintenance of the children, for the support of their parents; observing, "I feel reluctant in doing it, for the conduct of the parents has been of the worst kind; but I think, that without saying anything as to the construction of the will, I may give to the infants the benefit of the income of the property, so as to assist the parents. To do so is evidently for the benefit of the infants themselves." It must be remarked, as to this case, that the counsel for the parents had contended, that upon the construction of the will under which the infants took, the surplus, after the performance of trusts for their maintenance and education, belonged to the parents.

An allowance will even be made for charitable purposes. Thus in *Langton* v. *Brackenburgh*, 2 Coll. 446, where the infant's estate was 1600*l.* a year, and the allowance to himself and his brother was 260*l.* a year, 20*l.* a year of the income was ordered to be applied in charity.

Where it will be for the benefit of the infant, maintenance will sometimes be allowed, although there be an express direction to accumulate, and although there

be a limited gift of interest for maintenance, with an express direction to accumulate the rest, the Court will allow such further sum as may be deemed adequate to maintain the infant: *Stretch* v. *Watkins*, 1 Madd. 253; *Evans* v. *Massey*, 1 Y. & J. 196.

And even where a testator has provided for the maintenance of a child up to a certain period, leaving the interval before payment of a legacy unprovided for, the Court may infer that the testator did not mean that the child should have nothing during the interval, and will make an allowance to him for maintenance. Thus, in *Chambers* v. *Goldwin*, 11 Ves. 1, A. directed trustees to maintain and educate his sons during their minorities, and his daughter until her age of twenty-one years, or *day of marriage*, and he gave his daughter a legacy in case she should live to attain the age of twenty-one years. The daughter married at the age of eighteen years. It was held by Lord *Eldon*, C., that she was entitled to a reasonable maintenance from that age until she attained twenty-one. See also *Martin* v. *Martin*, 1 L. R. Eq. 369.

And in addition to a fixed annual sum for maintenance directed by a testator, an allowance for keeping up a mansion has been made to a minor entitled to settled estates under a will, when it appears to have been the intention of the testator that he should reside there: *Griggs* v. *Gibson*, 14 W. R. (V. C. W.), 538.

As a general rule, the Court will not permit trustees, of their own authority, to break in upon an infant's capital; and it appears that the Court has rarely sanctioned such conduct in a trustee: *Davies* v. *Austen*, 1 Ves. jun. 247. In *Walker* v. *Wetherell*, 6 Ves. 473, it appeared by the Master's report, that the fortunes of the children did not amount to more than 300*l.* each; and that one of the executors, who, after their father's death, married their mother, claimed sums considerably exceeding the interest of their respective fortunes for their maintenance, education, and advancement, and also the sum of 24*l.* as the fee for placing one of the children with a surgeon, and other expenses incident to that situation. The Master having allowed the claim, exceptions taken to his report were allowed by Sir *Wm. Grant*, M. R. "Whatever," said his Honor, "might be done upon particular circumstances, *it is impossible to sanction a trustee in breaking in upon the capital.* There are no particular circumstances in this instance upon the one side or the other. It is not shown that there were expectations of fortune, which made it necessary to provide a suitable education. The capital might be exhausted in a few years. On the other hand, no particular extravagance upon the part of the executor appears. On the con-

trary, applications were made to him by some of the executors, stating that the children could not live upon the interest. This claim is therefore ungracious; but it is better that an individual should suffer a hardship than that a general rule of the Court should be broken through in a point that would endanger the interests of all children." Sir *Wm. Grant*, however, in *Walker* v. *Wetherell*, lays down the rule of the Court too strictly, and it seems now, that the Court would sanction the trustee in breaking in upon the capital if the Court, upon application being made to it, would have done so. See *Carmichael* v. *Wilson*, 3 Moll. 79; *Barlow* v. *Grant*, 1 Vern. 255; *Bridge* v. *Brown*, 2 Y. & C. C. C. 181; *Prince* v. *Hine*, 26 Beav. 634.

Trustees, however, should be cautious in making such advances, for if their allowance is disputed in a suit, the costs of the suit, if there be a deficiency of assets will have priority over the allowance to the trustees. See *Robison* v. *Killey*, 30 Beav. 520, there a testator authorised his executor to advance any part "not exceeding one half of the presumptive share" of his children, towards their maintenance and advancement. The estate being very small the executor advanced more than the whole. The estate being insufficient to repay the amount to the executor, the Court, in a suit by a child for administration, gave priority to the costs of the suit, but gave the surplus to the executor in part payment of his advances.

Where a person has maintained children out of feelings of kindness and benevolence, he can make no claim afterwards for the money thus expended: *Worthington* v. *M'Craer*, 23 Beav. 81, 83; *Grove* v. *Price*, 26 Beav. 105.

So, where a mother makes advances to a son during his minority, and not with the intention of afterwards claiming as a creditor against his estate, there will be no debt due to her for maintenance from his estate (*In re Cottrell's estate*, 12 L. R. Eq. 566), nor will the mother, in the absence of a contract be able to support a claim for the maintenance of her son during a period after he attained his majority. *Ib.*

It seems there is a difference when a stranger advances money to an infant for necessaries, as "he will have a little more consideration than a trustee, charged with the care of paying an infant, when of age, a sum of money, would be allowed": per *Lord Thurlow* in *Davies* v. *Austen*, 1 Ves. Jun. 249.

As a general rule, the Court itself will not break in upon the capital for the maintenance and education of an infant (*Barlow* v. *Grant*, 1 Vern. 255; *Davies* v. *Austen*, 1 Ves. Jun. 247; *S. C.*, 3 Bro. C. C. 178; *Beasley* v.

Magrath, 2 S. & L. 35); and it will only do so where the interest would be too small for those purposes. Thus, in *Re England*, 1 Russ. & My. 499, where the father had separated from his wife, and was resident in England, in very reduced circumstances, and not of ability to maintain his children, whom he had deserted, and the mother was willing to maintain them if they were returned to her in India, 300*l.*, part of a residuary estate to which they were absolutely entitled, was ordered to be raised out of their shares, in order to defray their expenses to India. So, where the capital was only 60*l.* stock, it was broken into: *Ex parte Swift*, 1 Russ. & My. 575. And see *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 Russ. & My. 577; *Bridge* v. *Brown*, 2 Y. & C. C. C. 181; *Davies* v. *Davies*, 2 De G. Mac. & G. 53.

There is a distinction between the allowance made for prospective maintenance and past maintenance. In the former case, the allowance is made upon a scale corresponding with the fortune of the infant; in the latter, only for what has been actually properly expended. See *Bruin* v. *Knott*, 1 Ph. 572; *Ex parte Bond*, 2 My. & K. 439; *Stephens* v. *Lawry*, 2 Y. & C. C. C. 87; *Parsons* v. *Parsons*, 13 W. R. (V. C. K.) 214.

And it has been held that the Court of Chancery had jurisdiction, without suit, to charge the expenses of past maintenance of an infant, and the costs of the applications on the *corpus* of a freehold estate to which he was entitled: *In re Howarth*, 8 L. R. Ch. App. 415. But although an infant is liable to the re-payment of money advanced to him and expended on necessaries, any deed executed by him to secure the repayment of such money is voidable: *Martin* v. *Gale*, 4 Ch. D. 428. "The Court," said *Jessel*, M. R., "may, by acting under a delegated power which the Crown possessed, being the guardian of all infants, be enabled to charge an infant's property when he could not charge it himself; and the very reason which may render it necessary for the Court to do it is, that the infant could not do it." *Ib.*

Where money on account of maintenance is ordered to be paid to a person on his undertaking to satisfy another, the Court will enforce the undertaking. Thus, in *Sirdefield* v. *Thacker*, 18 Beav. 588, where money had been ordered to be paid to a person for past maintenance of an infant, on his undertaking to pay the schoolmaster's bill; but as he showed a disposition not so to apply the money, the Court stayed the payment, and ultimately, on the application of the schoolmaster, ordered payment to him out of the fund.

Where an infant is residing out

of the jurisdiction of the Court, in general, some one resident within the jurisdiction must be appointed guardian, to have the care and maintenance of the infant, and to whom the money may be paid, to be applied for his maintenance: *Logan* v. *Farlie*, Jac. 193.

However, in *Daniel* v. *Newton*, 8 Beav. 485, where guardians were appointed in Ireland to infants brought up and domiciled there, and their fortunes were in court in England, the Court adopted the proceedings in Ireland, and appointed the same persons guardians, notwithstanding they resided out of the jurisdiction, and ordered payment to them of the maintenance-money.

In *De Weever* v. *Rochport*, 6 Beav. 391, where an infant was residing with her father out of the jurisdiction, Lord *Langdale*, M. R., ordered the father to appoint an attorney to receive the maintenance, and that, upon the appointment of such attorney, the dividends of the funds in court should be paid to such attorney half-yearly, upon his production to the Accountant-General of an affidavit that he had duly applied, in the maintenance and education of the infant, all monies received by him on that account, up to the time of making such affidavits respectively. See *In re Morrison*, 16 Sim. 42; *Hart* v. *Tribe*, 19 Beav. 149.

In order indirectly to compel parents residing abroad to bring an infant within the jurisdiction, the Court may refuse any allowance for the infant's maintenance: *Lockwood* v. *Fenton*, 1 Sm. & G. 73. See also *Symonds* v. *Symonds*, 2 L. R. P. & D. 447.

In *Volans* v. *Carr*, 2 De G. & Sm. 242, a mother who was residing with her children in the United States of America (one of whom had been found a lunatic), being unable to maintain and educate them in a manner suitable to their fortunes, Sir *J. L. Knight Bruce*, V. C., ordered that the whole income, including the income of the share of the lunatic, should be paid to the mother.

IX. *Advancement.*] — Maintenance, as we have already seen, is generally allowed out of the income of a fund to which the infants are entitled, although the capital may be sometimes broken into for that purpose (ante, pp. 713, 714). Advancement under a power is generally made payable out of capital, and even in the absence of a power, will more frequently be allowed out of capital by the court, than maintenance: *Walker* v. *Wetherell*, 6 Ves. 474. See also *Swinnock* v. *Crisp*, Freem. Ch. Rep. 78; *Ex parte M'Key*, 1 B. & B. 405.

The law relating to advancement may be most conveniently considered, first, when made under a power contained in an instrument by which property is settled; secondly, when made in the absence of any power.

1. *Under a Power*].—Where an advancement is made under a power, it ought to be strictly followed. Thus, where a power was to be exercised with the concurrence of two trustees, an advancement made by one only was not allowed in passing the accounts (*Palmer* v. *Wakefield*, 3 Beav. 227). It ought also to be made *bonâ fide* for the benefit of the infant: *Simpson* v. *Brown*, 13 W. R. (V. C.W.) 312. In general the instrument creating the power shows what proportion of the capital may be applied for the purposes of advancement, and if the party advanced be not absolutely entitled to the fund, the sum there mentioned as applicable cannot be exceeded, except with the consent of the persons entitled thereto in default of appointment (*Therry* v. *Henderson*, 15 L. T. 452). Moreover, although it is not usually the case, advancement may, by the terms of the instrument creating the power, be confined to minority: *Clarke* v. *Hogg*, 19 W. R. (L. J.) 617.

When there is a power of advancement in the instrument by which property is settled, showing for what purposes it is to be made, it is the duty of trustees to be guided in its exercise by the terms of the power. The words "preferment or advancement" —both large words—have a well-known legal meaning, and have been held to justify an advance for purchasing a commission in the army (*Cope* v. *Wilmot*, 1 Coll. 396 n.), for apprenticing an infant to a sea captain (*Warr* v. *Warr*, Prec. Ch. 213), for the settlement of a fund on the marriage of a daughter (*Lloyd* v. *Cocker*, 27 Beav. 645), for a post-nuptial settlement of a son (*Roper-Curzon* v. *Roper-Curzon*, 11 L. R. Eq. 452), and to enable a family to emigrate (*Re Long*, 38 L. J. Ch. 125), but not to purchase a farm in a colony, in the absence of evidence showing that it was likely to be successful. *Ib.*

Where the words "preferment or advancement" are followed by such words as "otherwise for his benefit," the latter words will not be restricted to something *ejusdem generis* with the former, and have been held to justify, an advance to the husband of the *cestui que* trust on his personal security for the purpose of setting him up in trade (*In re Kershaw's Trusts*, 6 L. R. Eq. 322, and see *Phillips* v. *Phillips*, Kay 40), and even the payment of the debts of the *cestui que* trust in a case where the interest absorbed nearly the whole of his income: *Lowther* v. *Bentinck*, 19 L. R. Eq. 166.

A power of advancement for setting up the children of the testator in "business" will justify the advance of a share for the purpose of setting up a married daughter in a farming business, her husband covenanting that the

business should be to her separate use (*Talbot* v. *Marshfield*, 3 L. R. Ch. App. 622), but will not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts. (*Ib.*)

Where the power of advancement is discretionary with the trustees, the Court will not, it seems, interfere with it (*Livesey* v. *Harding*, Taml. 460; *Edgeworth* v. *Edgeworth*, Beatt. 328; and see *French* v. *Davidson*, 3 Madd. 396); but if the trustees either refuse altogether to act, or decline to exercise their discretion, the Court will direct an inquiry whether any and what advancement ought to be made: *Lewis* v. *Lewis*, 1 Cox, 162; *S.C.* 15 Ves. 527, cited; *Robinson* v. *Cleator*, 15 Ves. 526; *Kilvington* v. *Gray*, 10 Sim. 293.

If a tenant for life of a fund has power to appoint a part thereof for the advancement of his children in his lifetime, he cannot, after having assigned his life interest as a security, be at liberty to lessen that security by exercising the power of advancement: *Noel* v. *Lord Henley*, M'Clel. & Y. 306; see also *Hinds* v. *Hinds*, 2 Ir. Ch. Rep. 227.

As, however, a husband takes his wife's property liable to all its incidents, an assignment by him of her life interest in stock in the funds not settled to her separate use, even although she joins therein, is, it seems, liable to be defeated, by the exercise with her consent by trustees of a power of advancement contained in a settlement by which on a former marriage the stock was settled: *Whitmarsh* v. *Robertson*, 1 Coll. 570.

Where the amount of a fund to be given by way of advancement out of a fund is entirely in the discretion of the trustees, the object of the power can only claim such part thereof, if any, as the trustees may give him: *Pink* v. *De Thuisey*, 2 Madd. 157; *French* v. *Davidson*, 3 Madd. 396.

Where, however, the purpose for which the power was given to the trustees has failed, they cannot exercise it in any other way for the benefit of the cestui que trust. Thus in a recent case where F. W. had a life-interest in a fund, and a power was given to trustees to apply any portion of the fund not exceeding 2000*l.* towards effecting the promotion of F. W. in the army, they applied part of the 2000*l.* for that purpose; but purchase in the army having been afterwards abolished, it was held by the Lords Justices that the purpose for which the power was given to the trustees having failed, the residue of the 2000*l.* could not be raised and applied in any manner for the benefit of F. W.: *In re Ward's Trusts*, 7 L. R. Ch. App. 727. See and consider *Palmer* v. *Flower*, 13 L. R. Eq. 250.

But where there is an absolute bequest to a party, and a particular mode is pointed out in which it is to be laid out, the bequest will be good although the money cannot be laid out in that particular mode. Thus, where 30*l.* was given to an infant to bind him an apprentice, and the infant died before he attained a competent age to be placed an apprentice, the Lord Keeper held that it ought to go to the personal representatives of the infant: *Barlow* v. *Grant*, 1 Vern. 255.

So, if a legacy be given for the benefit of an infant in one way, and it cannot be so applied, it may be applied in another way,—as, if it were given to put him into holy orders and he became a lunatic: *Barton* v. *Cooke*, 5 Ves. 461; see also *Green* v. *Spicer*, 1 Russ. & My. 395; *Furley* v. *Hyder*, 41 L.J. (Ch.) 583.

And if the trustees should not in such a case exercise their discretionary power, the Court will declare that the fund belongs to the person in whose favour they ought to have exercised it: *Noel* v. *Jones*, 16 Sim. 309; *Gough* v. *Bolt*, 16 Sim. 45; *Leche* v. *Kilmorey*, T. & R. 207; *Cope* v. *Wilmot*, 1 Coll. 396; *Gude* v. *Worthington*, 3 De G. & Sm. 389; *In re Coe's Trusts*, 4 K. & J. 199; *Palmer* v. *Flower*, 13 L. R. Eq. 250.

Where an advance is made for a particular purpose, without fraud, and the infant is able to sell the subject upon which the money has been expended, as, for instance, a commission in the army formerly, the money arising from such sale will belong to him: *Laurie* v. *Banks*, 4 K. & J. 142; *Andrew* v. *Andrew*, 22 W. R. (V. C. B.) 684.

2. *Advancement in the absence of a Power.*]—Where there is no power of advancement, either in the instrument creating the trust or by Statute, it seems that the Court would not call a trustee to an account for having made an advancement to an infant out of the infant's own property, if it were such that the Court itself would have authorised (*Lee* v. *Brown*, 4 Ves. 369); but where the Court would not have authorised an advance the trustee will be liable to replace it (*Lee* v. *Brown*, 4 Ves. 362, 368), and as a trustee makes such advances at his own peril an application to the Court should in all cases, where there is any doubt, be made.

The following, however, have been considered proper advances and have been allowed: a sum to purchase a commission in the army (*Evans* v. *Massey*, 1 Y. & J. 196, 198); to pay for articles to a solicitor (*Re Welch*, 23 L. J. Ch. 344); for an apprentice fee (*Franklin* v. *Green*, 2 Vern. 137; *Swinnock* v. *Crisp*, Freem. 78); to bring an infant home from a foreign country (*Stephens* v. *James*, 1 My. & K. 627, 629); a sum to-

wards furnishing a house for the residence of the infant, his mother and brothers (*Perry* v. *Perry*, 18 W. R. (M. R. Ir.), 482); for payment of arrears of rent in order to save an ejectment (*Ex parte M'Key*, 1 B. & B. 405). Under special circumstances the Court has ordered an infant's legacy of small amount to be paid to the father about to emigrate with the infant to Australia, upon the solicitor for the petitioner communicating with him personally, for the purpose of undertaking to see that the fund should be duly applied in fitting out and transferring the father and the infant to Australia: *Walsh* v. *Walsh*, 1 Drew. 64; see also *Ex parte Hays*, 3 De G. & Sm. 485; and the case of *In re Salter's Trusts*, 17 I. Ch. Rep. 176, where an order was made to pay to the guardian of an infant a small legacy, on an undertaking to apply it for an outfit and for his passage to New Zealand.

As it is the duty of a father to advance a child out of his own property, he will not be allowed to repay himself out of the property of the child. See *Darley* v. *Darley*, 3 Atk. 399; there an infant having filed a bill against his father praying for payment of a legacy of 50*l.* and interest, Lord *Hardwicke*, C., although the father insisted that he had laid out more than 105*l.* in putting the child out as an apprentice, made an order in accordance with the prayer, observing "that a father must provide for his child out of his own pocket; nor can he set him out in the world, or put him out an apprentice or clerk, with money arising from a legacy, and if he does it, he shall not be allowed it." It is clear, however, if a father is not of ability to advance a child, an advance may be made out of the child's property: *Ex parte Hays*, 3 De G. Jo. & Sm. 485; *Re Lane*, 17 Jur. 219.

Whether an advance made by the mother of an infant, after the death of his father, will be repaid to her out of the infant's property is doubtful. In the case of *Smee* v. *Martin*, Bunb. 136, where a widow who had spent more than one hundred pounds in fitting out and apprenticing her son, then an infant, for the East Indies, insisted, after the death of her son, that she ought to be repaid out of a legacy of 100*l.* to which her son was entitled under the will of his father, who left him that sum not to be paid until he came of age, with an allowance of 5*l.* in the meantime for maintenance; but Barons *Page* and *Gilbert* held that the executors of the son were entitled to 100*l.* and interest. They decided against the mother upon two grounds; first, that she was bound to provide for the maintenance and education of her own son; and secondly, that it was the intention of the testator that the 100*l.* left to the son should not be

touched till he came of age, that there was an allowance in the meantime of 5*l.*, and that it was therefore at her peril that she exceeded that allowance.

As a general rule advancement cannot be made to an infant out of a fund to which he is not absolutely entitled, but it can as in the case of maintenance be done so (see ante, p. 700) when there is a gift to a class (of which the infant is one), in a certain event, as on attaining the age of twenty-one or marriage, with a limitation over to the survivors or survivor in case of the death of any under that age unmarried. See *Franklin* v. *Green*, 2 Vern. 137. There legacies of 100*l.* a-piece were given to four children, payable at twenty-one or marriage, and a maintenance not exceeding the interest in the meantime, with a limitation over of every 100*l.* for the benefit of the other children as should attain twenty-one or marry (Lewin Trustees, 6th ed., 493, note). The trustee paid 20*l.* out of the 100*l.* of one of the children for placing him out as apprentice. He died an infant, and the sum was allowed in the trustee's accounts. But see the remarks of Sir E. *Jessel*, M. R., in *In re Breed's Will*, 1 Ch. D. 228.

But a trustee cannot safely advance part of the capital of an infant, even for his advancement, if it be limited over in certain events to third parties; for in such case the Court itself would not break in upon the capital (*Lee* v. *Brown*, 4 Ves. 362); but this may be done at any rate by the Court if the parties entitled in remainder appear and give their consent (*Evans* v. *Massey*, 1 Y. & J. 196); or it is possible to insure against the contingency of the infant not becoming entitled to the funds: *De Witte* v. *Palin*, 14 L. R. Eq. 251, *Ring* v. *Jarman*, Ib. 251, cited.

Although a trustee would be liable to replace a fund where the contingency never happened upon which the infant was to become entitled to it, if the contingency happened the infant could not compel him to do so. See *Worthington* v. *M'Craer*, 23 Beav. 81. There a trustee *bonâ fide* advanced a sum of money to apprentice an infant, in the life of his father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation. It was held by Sir John *Romilly*, M. R., that in taking the accounts against the trustee the amount ought to be allowed to him.

X. *Provisions relating to Infants in the Divorce and Matrimonial Causes Act* (20 & 21 Vict. c. 85)]. —There are in this statute some important provisions relating to infants, which it will be well to bear in mind. With regard to the damages which a husband

may obtain from an adulterer, the Court for Divorce and Matrimonial Causes has "power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof, shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife." Sect. 33.

And "in any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, *before making its final decree*, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." Sect. 35.

And "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them." Sect. 45. See *Milne* v. *Milne*, 2 L. R. P. & D. 295.

By 22 & 23 Vict. c. 61 (An Act to make further provision concerning the Court for Divorce and Matrimonial Causes, amended by 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; and 31 & 32 Vict. c. 77), the Court may, *after a final decree*, make orders as to the custody, maintenance, and education of the children of the marriage (sect. 4), and also as to the marriage settlements of the parties (sect. 5).

The jurisdiction with regard to the custody of children, given by the Act constituting the Divorce Court, does not in the least affect the jurisdiction of the Court of Chancery, or the principles upon which it is exercised: *In re Curtis*, 28 L. J. (Ch.) 458.

Where a wife succeeds in her suit against her husband in the Divorce Court for a dissolution of the marriage, she will generally be entitled to the custody of the children: *Boynton* v. *Boynton*, 2 Sw. & Tr. 275.

The Divorce Court, it seems, has no jurisdiction, under the 35th section of the Divorce Act, to make any order as to the custody of children upwards of sixteen years of age: *Ryder* v. *Ryder*, 2 Swab. & Tr. 225.

With regard to the decisions of

the Divorce Court as to the custody of children, see *Curtis* v. *Curtis*, 1 Sw. & Tr. 75; *Seymour* v. *Seymour*, Ib. 332; *Suggate* v. *Suggate*, Ib. 489, 492; *Whieldon* v. *Whieldon*, 2 Sw. & Tr. 388; *Cartlidge* v. *Cartlidge*, Ib. 567; *Chetwynd* v. *Chetwynd*, 1 L. R. P. & D. 39; *Mallinson* v. *Mallinson*, 1 L. R. P. & D. 93, 221; *Milford* v. *Milford*, 1 L. R. P. & D. 715: *Symington* v. *Symington*, 2 L. R. (Sco. App.) 415.

All deeds whereby property is settled upon a woman in her character of wife, come within the 5th section of 22 & 23 Vict. c. 61, s. 5, and the Court has power to deal with them (*Worsley* v. *Worsley*, 1 L. R. P. & D. 648), if it be for the benefit of the children of the marriage or their parents: *Sykes* v. *Sykes*, 2 L. R. P. & D. 163.

As to the variation in settlements made on a dissolution of marriage, see *March* v. *March*, 1 L. R. P. & D. 440; *Milne* v. *Milne*, 2 L. R. P. & D. 295; *Paul* v. *Paul*, 2 L. R. P. & D. 93.

But the Court has refused to vary a settlement with the object of compelling a guilty wife to bring her child within the jurisdiction: *Symonds* v. *Symonds*, 2 L. R. P. & D. 447.

The Court, however, has no power under the 5th section of 22 & 23 Vict. to deal with marriage settlements unless there is issue of the marriage living at the date of the order, although there may have been such issue living at the date of the decree for dissolution: *Graham* v. *Graham*, 1 L. R. P. & D. 711; and see *Corrance* v. *Corrance*, *Ib.* 495; *Bird* v. *Bird*, *Ib.* 231; nor has the judge any power to vary a marriage settlement by depriving an infant child of the marriage of an interest secured to it by such settlement (*Crisp* v. *Crisp*, 2 L. R. P. & D. 426), nor to vary the provisions for appointing new trustees contained in a deed of settlement executed in anticipation of the marriage the dissolution of which it has decreed: *Hope* v. *Hope*, 3 L. R. P. & D. 226.

WARMSTREY *v.* LADY TANFIELD.

4 *Car.* 1.

[REPORTED 1 CH. REP. 29.]

L. A., fol. 151; 1 Eq. Ca. Ab 46, pl. 10; 10 Co. 47.

POSSIBILITY ASSIGNABLE IN EQUITY.]—*A grant of a future possibility not good in law, yet a possibility of a trust may be assigned in equity.*

THE plaintiff's title appeared to be, that one William Freeman, being possessed of the third part of the parsonage for the whole term to come, granted all his interest therein to one Alborough, in trust for the use of the said William Freeman and Alice his wife, during their lives, and after to the use of such issue male of their two bodies as the said William should by will appoint; and after, the said William appointed the premises after the death of the said Alice unto Richard Freeman, son of the said William and Alice; and that the said interest in law of the said Alborough came by mesne conveyance unto John and Robert Palmer; and that the said Richard Freeman, during the life of the said Alice, who not long after died, assigned the premises unto the plaintiff, and also released to the plaintiff, and the said Palmers assured their interest in law in the said premises to the plaintiff.

The defendant insists, for title, that the said Richard Freeman, about two years after his assignment aforesaid to the plaintiff, made a lease of the premises to Walter Thomas and John Makerith, who passed their estate to one Evans, and Hawkins, in trust for the defendant the Lady Tanfield, and had possession given her.

(*a*) Lord *Coventry* was Lord Keeper.

This Court (*a*), with the Judges, taking consideration of the said assignments, grants, and release, were of opinion, and declared, that *howbeit a grant of a future possibility is not good in law* (*b*), *yet a possibility of a trust in equity*

(*b*) See *Lampet's case*, 10 Co. 47 a, 48 b.

might be assigned, and the said Richard Freeman's assignment of his said trust unto the plaintiff is also confirmed by the assignment of the said Palmer, who had the interest in law, and the said plaintiff's assignment is also precedent to the deed made to the said Thomas, by which the said defendant, the Lady Tanfield, claimeth the said lease.

ROW *v.* DAWSON.

November 27th, 1849.

Reg. Lib. 1749, B., fol. 89.

[REPORTED 1 VES. 331.]

CHOSE IN ACTION ASSIGNABLE IN EQUITY.]—*A. borrows money of B., and gives him a draft upon a fund due to him (A.) out of the Exchequer, which was deposited with the officer from whom the fund was payable. A. afterwards becomes bankrupt; this is an assignment thereof to B. for valuable consideration, which shall prevail against the general assignees under the commission of bankruptcy.*

A chose in action, though not assignable at law, is assignable in equity, and no particular form of words is necessary.

TONSON and Conway lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz.: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway, value received."

Gibson became bankrupt; and the question was whether the defendants Tonson, and the executors of Conway, were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs, the assignees under the commission, are entitled to have the whole sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy, in law or equity.

LORD CHANCELLOR HARDWICKE.—At first I a little doubted about my own jurisdiction, and whether the plaintiffs ought not to have gone into the Exchequer, as

being a Court of revenue; for this is not a personal credit given to, or demand upon the officer, but to be paid out of that money issued out of the Exchequer to the officer; and this is on warrant, to be paid out of the revenue of the Crown for public services. But there is something in the present case delivering it from that: the officer admits he has received a sum of money applicable to this demand, which brings it to the old case of a Liberate, (*a*) which a person has under the Great Seal for the payment of money; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give Courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

(*a*) A Writ that lay for the payment of a yearly pension or other sum of money, granted under the Great Seal, and addressed to the Treasurer and Chamberlain of the Exchequer.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft, not to pay generally, but out of this particular fund, which creates no personal demand; therefore, not a draft on personal credit, to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment, to be paid out of his growing subsistence. Then what is it, for it must amount to something? *It is an agreement, for valuable consideration beforehand, to lend money on the faith of being satisfied out of this fund;* which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, *it is a credit on this fund, and must amount to an assignment of so much of the debt:* and, *though the law does not admit an assignment of a chose in action* (*b*), *this Court does; and any words will do, no particular words being necessary thereto.*

(*b*) And so is a possibility for valuable consideration: 1 Ves. 391. And see *Warmstrey* v. *Lady Tanfield*, ante, p. 724.

In the case of a bond, it may be assigned in equity for valuable consideration, and good, although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it, "Whereas I have

received the principal and interest from such a one, do you the obligor pay the money to him." This is just that case; only it is not a debt arising from specialty: therefore, like an assignment of rent, by direction to a tenant or steward, to pay so much of a year's rent to a third person.

(a) 1 Ves. 348. See next page.

The case of *Ryall* v. *Rowles* (a), now under the consideration of the Court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission; and it is clear that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause (10 & 11) in the statute, 21 Jac. 1, c. 19.

But this is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which amounts to an assignment, *is deposited with the officer* Swinburn, and therefore it attached immediately upon it; so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.

RYALL *v.* ROWLES.

February 24, 1747-8; *January* 27, 1749-50.

[REPORTED 1 VES. 348.]

S. C., 1 Atk. 165; nom. *Ryall* v. *Rolle*.

ASSIGNMENT OF DEBTS WITHOUT NOTICE TO DEBTOR, INVALID AGAINST ASSIGNEES IN BANKRUPTCY.]—*Assignee by way of mortgage of goods and chattels, or choses in action, allowing the assignor to continue in the possession or in the order and disposition of them, will, upon the construction of* 21 *Jac.* 1, *c.* 19, *ss.* 10, 11 (*a*), *have no specific lien on them against his assignees in bankruptcy.*

(*a*) Repealed, but, with some modifications, re-enacted. See note, post.

WILLIAM HARVEST, a trader within the several statutes concerning bankrupts, in June, 1732, borrowed from Benjamin and Joseph Tomkins 1500*l.*, and, as a security, conveyed and assigned his dwelling-house and brew-house at Kingston, and all the coppers and utensils in trade belonging thereto, by way of mortgage, subject to redemption.

He afterwards took Jonathan Stephens into partnership with him, and in less than a month after the partnership, December 22, 1736, made a second mortgage to Potter, in trust for Jonathan Stephens, of his moiety of not only the utensils, but the stock in trade, *debts*, *profits*, &c., for securing a sum of money then lent to him by Jonathan Stephens, and any future sums that should be lent.

December 10, 1737, he made a third mortgage of the seventh part of his undivided moiety of all the stock in trade, utensils, *debts due, or to grow due*, to Sir James Reynel.

April 24, 1738, he made a fourth mortgage of the seventh part of his undivided moiety, with the same description, to Skip.

September 7, 1738, he made a fifth mortgage to Jonathan Stephens, for securing to him 2000*l.*, which Stephens had paid to one Baugh, who had the original mortgage on the freehold estate; the real premises, which were conveyed by way of lease to Tomkins, having been mortgaged to Philip Stone in 1725, and assigned to Baugh, who assigned to Stephens upon being paid the 2000*l.*

He afterwards made a sixth mortgage to George Harvest, his son, of the seventh part of his undivided moiety of the partnership, stock in trade, *debts*, utensils, *and profits*, in consideration of a sum of money lent.

Notwithstanding these several mortgages, *he continued in possession of the utensils and stock in trade as before*, altered, disposed, and mortgaged them as his own, and *received the debts in partnership* with Stephens, without any control from any of the mortgagees till 1740, when he failed and became bankrupt.

Then the assignees and mortgagees insisted on the right to the several goods, stock, &c., comprised in their several assignments, in opposition to the general creditors claiming under the commission.

The cause was heard before Lord Chancellor *Hardwicke*, the Seal after Michaelmas, 1747, and it being a new case, his Lordship ordered it to be argued by two counsel on each side, assisted by the Judges, upon the question, whether all or any and which of these mortgages came within the stat. 21 Jac. 1, c. 19, particularly the latter part of the tenth, and the whole of the eleventh section, or not? It was argued February 24, 1747-8.

Feb. 24, 1747-8. *Solicitor-General* (the Hon. William Murray (*a*)), and Mr. *Noel*, for the *assignees under the commission*.—The questions upon the construction of this statute are two: first, whether any conveyance of goods or chattels by way of mortgage, or with condition of redemption, is within that statute? The second, if the Court should think so, whether any of these six mortgages are within the clause as to any of the goods comprised therein; the consequence of which is, that they must be as creditors under

(*a*) Afterwards Lord *Mansfield*.

the commission, and not to be preferred to the other creditors ?

The first will depend on the true construction of the Act itself: to find out which three things are to be resorted to : the circumstances at the time of making the Act,—for to them the law was adapted,—the remedy intended, and the mischief designed to be prevented thereby, and judicial explanations of the Act since. It will appear, that some conditions of redemption are within this clause, and that it was calculated for this. When this Act was made, fraudulent conveyances were sufficiently guarded against by 13 Eliz. cc. 5, 7. *Twyne's Case*, 3 Co. 80, upon the construction of that Act, was considered so strongly within it, that the party was punished criminally; and particular provisions are made by that statute in case of bankruptcy. Fraudulent conveyances, then, being provided for before, were never intended by the Act now in construction, but the thing intended was an equal distribution amongst creditors, which was very unequal, some creditors getting prior liens several ways, as by bond, judgment, &c. ; to take away which priority, unless where satisfaction by execution and recovery before the bankruptcy, was the intention of the Act, and to reduce creditors who had trusted the bankrupt generally to equality. Another way creditors had of gaining a priority was by pledged goods : and after that, a new way, by conveyance without delivery of the goods. Anciently, as appears from the Year Books, 5 Hen. 7, fol. 1, delivery was necessary to a sale, and was often done by parol. The pledge must be delivered over to the pawnee himself at the time of borrowing, otherwise no property vested in him. But that doctrine was afterwards exploded, as in Yelv. 164, and 2 Leon. 30 (*Clark's Case*), where the property was held vested, though no delivery at the time. And Owen, 124, held, that such pawnee might assign over his property ; so that wherever the conveyance was under hand and seal, it was not necessary to vest the property by delivery of goods pledged. There is no real distinction between the words *mortgaging* and *pledging:* the first

being generally applied to lands, the other to goods; and they are in effect synonymous terms. As to lands, the mortgagee holds by title; and the title-deeds always are, or should be, in his possession. But as to goods, there is no hold where the pawnor keeps them in his possession. The *end* of the Act, therefore, being to reduce creditors to equality, it is but reasonable to put such creditors who took pledges and left them in the hands of the bankrupt or pledger, to dispose of and alter them as he pleased, upon equality with other creditors; for the mortgagees give the bankrupt a general credit. Suppose a diamond pledged for a large sum, and the pawnor keeps possession of it, if he sells the diamond, as he may do the next day, the creditor must come in under a commission. The inconvenience in allowing a preference in cases of these secret conveyances, is greater than that of judgments, which are public and open; not that the Act intended to restrain the pawning and selling goods generally: and there might be a sale of goods where possession could not be given; as of ships at sea, and goods and merchandise that are bringing home. Such conveyances, then, by way of mortgage, are within the reason of the Act; and the question is, whether within the letter? The word *convey* in the preamble, extends to all conveyances in general, whether absolute or by condition. Mortgages of lands or goods are in this Act called *conveyances*. And where a general word is mentioned to take in all, it is not usual afterwards to specify particular words which come after it. The mischief recited in the preamble is material, *often happening*. It never was a frequent practice to buy goods absolutely, and to leave them in the possession of the vendor to do as he would with his own; which case never happens without fraud. And the preamble supposes a good consideration, not upon fraud; against which case, if the legislature had intended a provision, it would have put it upon that. But they knew that would be void by 13 Eliz. c. 5, and were, therefore, providing against conveyances by way of mortgage, the mortgagor keeping possession, and exercising all acts of ownership.

The enacting part is very carefully penned, and every word deserves to be weighed. The goods must be originally the property of the bankrupt, and conveyed by him, and must continue in the order and disposition of the bankrupt. It is objected, that a mortgagee or grantee on redemption cannot be called owner or proprietor; but the Act considers him as such. The words take in all ownerships whatsoever: some for greater interests, others for less; and the pawnee or mortgagee is, in point of law, considered as proprietor, and may maintain *trover* upon it, although that action is founded in property. Such conveyance by pledge has been held to be good against extent of the Crown, because the property is altered. 3 Bul. 17, shows, that pawnee has a special property, so that no act of pawnor can affect it by outlawry or felony. So, if a lease for years is made of goods, a scire facias for the King upon a subsequent outlawry, shall not affect them till the lease ended. It is objected, that the word *true* is added to *owner or proprietor*, and that mortgagee never was deemed such; but *true* is never put in opposition to *special*, but *false*, owner; and it is so meant in this Act. It is said, that mortgages are allowed and excepted out of the Act, power being by another clause given to the commissioners or assignees to redeem. But though a trader may mortgage, his goods must be delivered to the mortgagee, or in the hands of a third person, and not remain in mortgagor, besides, that clause only gives the same power as the assignees had before, in place of the bankrupt. As to judicial expositions upon this statute since, it has been held, that the preamble shall be taken into construction, and the enacting part controlled by it. So held by Chief Justice *Holt*, in *L'Apostre* v. *L'Plaistrier*, cited in 1 P. Wms. 318.

Chief Justice Lee.—My account of that case is different from that in Peere Williams, evidence having been given of the alteration of the diamonds by taking them out of the sockets. It was held by the Court, that, offering to sell generally was sufficient evidence of offer-

ing to sell as owner; but no judgment was given, it being adjourned for further argument, although the Court said, if this was not within the Act, they knew not what was. I had occasion to cite this case before Lord *Raymond*, at Guildhall, and it was then said, there was no determination upon it.

Lord Chancellor Hardwicke.—I have seen another note of that case; and it appears to have been argued a second time, when Sir *Edward Northey* took the distinction, that the enacting part was controlled by the preamble. Search was directed to be made for the rule, which was found; and this matter was determined Pasch. 9 Anne; but whether upon the point in question or not, did not appear.

For the general assignees.—In August, 1744, *Ex parte Marsh* (*a*), his Lordship held, that plate in trust for benefit of the wife was not within the statute, not being of the bankrupt, or conveyed by him. The preamble then makes part of the enacting clause, and is the key to it (1 P. Wms. 317), notwithstanding the general Act of Parliament may take its rise from a particular case, and ought to be construed to prevent the mischief, and advance the remedy. The question of the mortgage of goods being within this Act of Parliament has been in judgment before. The case of *Stephens* v. *Sole* (*b*), July 5, 1736, which was solemnly argued, is in point. There William Tappenden, indebted to the plaintiff in 1400*l.*, for securing payment thereof mortgaged to the plaintiff some leasehold estates, wharfs, and three hoys, but kept possession of the hoys, and sometime after became bankrupt. The plaintiff brought an ejectment, and got possession of the leasehold estate, but the assignees got the hoys. The leasehold not being sufficient to pay the plaintiff his principal and interest, he brought a bill to foreclose, and to compel the assignees to redeem the hoys, or that they might be sold to pay his demands. The assignees admitting the leasehold not sufficient to pay the plaintiff, insisted on their right to the hoys under the statute, the bankrupt having the possession, and acting as owner thereof till declared

(*a*) 1 Atk. 158.

(*b*) Cited 1 Atk. 157, 161.

bankrupt. Lord *Talbot* decreed that the plaintiff might be at liberty to come in under the commission for his deficiency;* dismissing the bill so far as it required account of the profits of the hoys, which were ordered to be sold for the benefit of the creditors in general. No case has since occurred where it was held that a mortgage by way of condition is not within this clause; and wherever it has come before the Lord Chancellor, with proper facts so as to create a doubt, it has been sent to be tried; as in *Bourne* v. *Dodson* (*a*), 5th December, 1740; but it never was. So, upon the bankruptcy of *Raymond*, *Ex parte Page*, where the mortgagees gave it up, coming in under the commission.

(*a*) 1 Atk. 154.

If, then, any or some mortgages may be within this Act, the second question is, whether the six mortgages, or any of them, are within the statute, which will depend on three considerations: the nature of the chattels, the interest conveyed, the persons to whom or for whose benefit they are conveyed. The chattels are, stock and utensils in trade, the debts due and to be due; and yet, possession of the whole was left with the bankrupt, who had the order and disposition of them as before, sold, altered, and disposed as owner, was reputed as such; and all this with the express consent of the mortgagee, who might have prevented this, the nature of the conveyance being so. Nor was he to account with the disponee for what he should sell, nor for any of the debts he should recover, for that might probably have altered the case. As to the specific goods that were to be, the assignments of them are merely void at law, and only to be supported in equity by way of agreements to be performed, when the goods come in esse, this Court considering it as done from the time it ought; whereas Courts of law only give reparation by damages. As to the debts, present and future, they cannot be assigned at law; and in equity, it can only be supported where the assignees have a proper power to sue for, recover, and receive the debts assigned; whereas here, the bankrupt after conveyance is to sue, &c., and not to come to any account; and

debts come within the words and meaning of the Act, within the word *chattels*, and would pass in a will thereby. As to the interest conveyed, they are all, except one, shares of the stock; and the Act requires delivery, and that possession should be altered. The mortgagees of part ought to come into the trade and act as part owners; and then it will be notorious who are the true owners, which answers the objection, that delivery could not be given of parts of the goods. As to the persons claiming the benefit of the assignments, it must be admitted, that each partner has a pledge on the partnership effects for what is due to him, upon adjusting the accounts, and the surplus must be divided. But here the money advanced by Stephens has nothing to do with the partnership, being an entire separate loan; and if this is suffered to stand against the rest of the creditors, it will elude all the act of bankruptcy, for most trades of the City are carried on in partnership. Stephens was, after the conveyance, owner of the whole, redeemable as to one moiety; yet Harvest continued to act in the partnership, and sold and disposed of his moiety as he pleased. Then, as to the general expediency, the policy of the law has been always to level creditors, except such as have recovered satisfaction, or got such possession as cannot be defeated; whereas, if this method of mortgaging were allowed, one or two favourite creditors would sweep away the whole, nor would creditors know what to trust to. Trade cannot be carried on without credit, which would be destroyed if such liens are allowed to give a priority; and for above a *century* have the legislature been guarding against it. It is no injustice to turn aside such mortgagees, who trust the credit of the bankrupt, and would, in cases of insolvency, set up their conveyances to defeat others, who were induced to trust on the credit of his stock and trade: not, indeed, that all mortgages of goods without delivery are void, as of ships or cargo at sea; but then, everything is done to enable the taking possession upon arrival, as invoices, bills of lading, &c. So, in case of bulky goods, delivery of the key of the warehouse to

the mortgagee; but these cases fall not within the Act, nor the mischief intended to be remedied.

Attorney-General (Sir *Dudley Rider*), and Mr. *Wilbraham*, for all the mortgagees.—The general question is, whether any and which of these mortgages are securities, under which the several defendants claim, are made void in the whole or in part by 21 Jac. 1, c. 19? Upon which, two considerations arise: whether the particular interest claimed by the mortgagees in goods be such as made them true owners within the clause of that Act; secondly, as to the goods assigned, what possession could be given? The true view of the laws relating to bankruptcy is, that all conveyances to defeat creditors shall be absolutely void. The real ground of the conveyance was to be inquired into, to rebut the general charge of fraudulent conveyance; and it would be an odd construction, that, in all events, although a valuable consideration were paid, it shall be absolutely void, because the possession was left in the conveyer. Though strong evidence of fraud, it was only evidence, and capable of being rebutted; and the consideration, if good, was a strong circumstance to be opposed thereto. The meaning of the Act was to prevent false credit, by a person having goods which did not belong to him, being sold absolutely. Not a word in the Act about pledges, but only general conveyances. A mortgage is the appropriation of a specific thing to certain purposes, not only for payment of money but for indemnifying on divers occasions. A pledge requires delivery of the thing; a mortgage does not. That they differ, may be seen by Justinian's Inst., lib. 4, tit. 6, s. 7, and by the definition of *Hypotheca* and *Pignus*, Bro. 271, Trespass. It is no pledge, unless delivered at the same time. But the mortgagor is presumed and understood to have possession; nor was the retaining possession ever evidence of fraud, where the conveyance was intended only as a mortgage: 2 Bul. 226. It is the same with regard to goods as to lands: Prec. Ch. 285; where a redemption was intended, the produce of goods may be granted, as

well as the goods themselves. The words *owner* and *proprietor* are to be limited by the nature of the conveyance, and extend not to mean the real owner in all cases. Though the preamble is the key, Lord *Cowper*, in *Copeman* v. *Gallant*, 1 P. Wms. 314, would not allow that the preamble should restrain the enacting clause. A factor, having goods sent him from abroad to sell, is not owner within the Act; because, if he becomes bankrupt, the Court will take the goods out of the hands of the assignees for the right owner. It is common to have general Acts of Parliament from particular cases; and sometimes the legislature recites the particular, and sometimes a general reason. The preamble, therefore, where general, ought to be considered with the enacting part; but where a particular reason is given, it would be odd to construe the remedy for that case only, and not take the Act in general. The mortgagor is generally considered as *true owner;* so in common-law courts and in the Acts concerning mortgages and the redemption of estates, he is called owner. The word *owner* is indeed sufficient to take in special owner; but that this Act does not interfere in this case, appears from *Meggot* v. *Mills*, 1 Lord Ray. 286, and *Jacob* v. *Shepherd*, cited in 2 P. Wms. 431 (*a*). If possession was to be altered, it would in this case defeat the mortgage; for it was intended that the trade should be continued, and not to put the mortgagee in possession. The nature of the mortgage was proper to have the possession kept in the mortgagor; therefore, like the case of a leasehold estate for years, a mortgage of which, though a chattel, is not within the Act; and there is a great distinction between the possession of goods being in the person who is real owner, and one who is only conditional owner: 1 Lord Ray. 724. As to the things assigned, it could be of no use to the mortgagee to take these utensils, being fixed to and continued as part of the premises. A share in trade is a mere chose in action: *Small* v. *Oudley*, 2 P. Wms. 427. Some of the things are to be *in futuro*, and of which the mortgagees could not possibly have possession. This Court

(*a*) See this case stated at length by Lord *Mansfield*, 1 Burr. 480.

will bind property which the law will not bind; and this Act can affect nothing but what means a legal conveyance. If the general Acts of Parliament, or the common law, give not these kinds of debts or goods to the general assignees, this Act cannot; and the mortgagees will have a lien and priority; not that the creditors of the partnership shall be hereby prevented, but the plaintiffs are private creditors, and these are only assignments of the residue, after payment of the partnership debts, of what shall be taken hereafter, which can be assigned in equity but not in law. In notion of law, the possession of one partner is the possession of the other. It is common to have a covenant in a partnership, that one partner shall not assign without consent of the other; and the assignee of part of the partnership effects cannot maintain trover, for the partnership may be given in evidence, and the assignee has no remedy but in equity. Had it been to Stephens instead of Potter, it could not have been within the Act: for there, to all intents, Stephens would have been in possession. In the very deed, the assignment is said to be in trust for Stephens; and then it will be presumed that Potter suffered Stephens to continue in the possession which he had before, viz., real owner as to one moiety, and special owner as to the other. Then, as to the exigencies of trade, money is often wanted at an hour's warning, and then it is frequent to borrow upon goods for a limited time; and if a man was in that case to put another in possession of his shop, or to deliver the key of his warehouse, it would be publishing himself a bankrupt to the world. Credit is a very tender thing; and if the method was to deliver possession in all cases, it would be so great an inconvenience, as to destroy all credit and trust whatsoever.

Reply. The clause in this Act extends indeed to absolute sales, but not to that case only. Allowing that the enacting part shall not be restrained by the preamble, yet, that it goes as far as the case in the preamble can be no question, but whether it shall go farther? The case stated in the preamble, that many convey and still

retain, is the present case, for in absolute conveyances it would not often happen without fraud. Chattels are no real pledge or security unless a delivery; it is otherwise in case of lands, the title being a security without the rents and profits. The distinction between mortgagee and pledgee is nominal only, and alters not the nature of the contract: the Roman law says, *hypotheca* and *pignus* are the same; so Calvin's *Lex*, and so is the nature of the contract.

Lord Chancellor Hardwicke.—The power of a master to bind a ship is called *hypotheca*, yet there is no delivery of possession, and it differs from *pignus* or pledge.

Reply. It does so; but the master has a particular lien by way of security for what might be due to him, and those cases are exactly the same as absolute sales, where delivery may not at all times be necessary. 2 Bul. 226, relating to mortgage of lands, is quite out of the case. The general proprietor here acts with consent of the special. Hale in his Analysis, in his division of special property, says, that a pledge and grant on condition is a special property: the report in 1 Lord Ray. 286, has only stated some *dicta;* as to 1 Lord Ray. 724, the fourth point, the only question was, whether the execution was fraudulent?—not a mortgage by a bankrupt, but the putting goods into the hands of another, to sell on his account. In *Jacob* v. *Shepherd*, if the Act had been thought of, that case was not within it, nor was it truly referred to in 2 P. Wms. 427.

Lord Chancellor Hardwicke.—It was not. Sir *Joseph Jekyll* set aside the assignment of goods as fraudulent, without taking notice of this clause. But Lord Chancellor *King* was of a different opinion, because there was a consideration, and that he could not make a bankruptcy where the law did not. But the assignment being so extensive, he sent it to law to see whether the assignment itself was not an act of bankruptcy, but still took no notice of this clause.

Reply. Then *Small* v. *Oudley*, 2 P. Wms. 427, falls

under the same consideration; the present statute was not under consideration, nor could it be. No chattels were ever intended to be excepted out, but some chattels cannot come within the circumstances of the Act, as leaseholds, which are governed by the same rules as real estates. It is objected, that the Act extends only to legal, and most of the things here assigned are equitable chattels. But where the Act set aside all conveyances, it means both in law and equity, and equity must follow the law. The only case in which, as to the rules of property, this Court does not follow the law, is, that a widow is not entitled to dower out of a trust estate (*a*), which obtained at first without being attended to. Possession of debts assigned may be given by delivery of the securities, and by giving power to receive and recover; but here, all those powers are left in the bankrupt, and to apply the debts to his own use. Certainly he that lends money on goods in a ship, and not taking possession, will lend without that security, and on the general credit, for such goods are really no security, because the moment they are sold the lender becomes a general creditor. The line how far the Act extends, and where to stop, is easily drawn by the Act itself, for where possession of the bankrupt is without consent of the mortgagee, it is out of the Act, otherwise not. It is said this will prevent the assignment of stock in trade, but an absolute assignment of all stock in trade would hardly be good in cases of bankruptcy, even laying it out of this Act; it was so said by the Master of the Rolls, in *Small* v. *Oudley*, it being only ideal, and carrying a badge of fraud.

(*a*) But see now 3 & 4 Will. 4, c. 105, s. 2.

The Court, having taken time to consider, now delivered their opinion.

Mr. Justice Burnet.—This case is of so extensive a consequence to trade in general, it may be attended with such inconvenience either way, and in most respects is so wholly new, and no judicial determination, that I shall endeavour to lay my thoughts in as clear a light as possible.

On stating the case, as far as it relates to the question

as it stands on the pleadings, and the Master's report, the general question seems to be, whether these six mortgagees, or any of them, will be entitled to resort to the utensils, &c., for a satisfaction of their debts? Or whether, like the rest of the creditors, they must come under the commission for a distributive share of those debts? Which depends on a more restrained question, whether these six mortgagees, or any of them, did not permit the bankrupt to continue in the possession, order, and disposition, so that by the statute 21 Jac. 1, c. 19, the commissioners were entitled to sell and dispose of these several mortgaged chattels for the benefit of all the creditors.

It is natural from the mortgages to consider this in three distinct lights. First, the nature of a mortgage or conditional sale of specific goods—things in possession of which there may be actual delivery where the bankrupt continues in possession of these goods, and it is necessary to consider such mortgage to a stranger and to a partner. Next, the nature of three of these mortgages to strangers as conditional sales of things partly in possession, as utensils and stock in trade, and partly choses in action, as debts and future profits. Lastly, whether the general rule will extend to it, supposing these mortgages to strangers are within the same rule as mortgages of specific goods, whether there is any difference between a mortgage to a partner and to a stranger? And although the present question must wholly receive a determination from the clause in the statute, yet it is necessary to consider conveyances to creditors before that statute.

Pawns. But previously, it is proper to clear the question with relation to pawns. It was contended, that pawns, by the Roman and English law, required delivery, but that hypothecation or mortgage did not. As to the Roman law there was an authority cited, Just. Inst., lib. 4, tit. 6, s. 7, which passage, if it stood alone, might go a good way to prove what it was cited for. But there is another Roman authority, proving *pignus* to be as valid without delivery; and the true distinction between them is only that *pignus* is of movables capable of delivery, the other of immov-

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ables only: Domat., lib. 1; Wood, lib. 3, chap. 2, 219; Digest, 50, tit. 16, Law 238; 13 lib. Pandects, tit. 7, Law 1; 20 lib. Pandects, tit. 4, Law 12, s. 10; where a pawn to two and delivered but to one, and where the pledge is concurrent in point of time, the preference to the person to whom a delivery is stated there, that he will have a better remedy by way of action than the other. Delivery, then, is not necessary by the Roman law; and the other nations, receiving this Roman law, corrected the inconvenience of this law as to that point, that if a pawn is not delivered, it shall not affect a purchaser for valuable consideration, as it certainly did in that law. But, supposing that distinction true, it could have no influence in the present case, unless the Roman hypothecation and English mortgage were the same, which they are not. No property was transferred in the hypothecation; an English mortgage is an immediate conveyance, with power to redeem; and equity, at any time, admits redemption, notwithstanding forfeiture; but that does not alter the conveyance, therefore there is no comparison between them; and in the Roman law there is a place, where it is held, that suppose there is an hypothecation, with condition, that if the money is not paid at the day, the pawnee shall enjoy the goods, that is a conditional sale: Just. Code, lib. 4, tit. 44, Law 2; and the other *liber* of the Code, relating to conditional sales of movables, Law 7. All that can be inferred from the Roman law, with respect to pawns and hypothecation, will be foreign; and from the English law, as to pawns, as foreign. I admit delivery necessary to a pawn: the Year Book, cited 5 Hen. 7, is an express authority in point, and therewith agrees 2 Roll. Rep. 439, *Ross* v. *Bramsted*, that is no pawn where no possession is transferred at the time. 2 Leon. 30, and Yel. 164, are cases not of pawns, but bailment to third persons, to sell goods for the use of a particular creditor, who will have an interest in the performance of that contract, and may sue the bailee, which has nothing in common with the case of a pawn. All the books treating of pawns treat them as in the possession of pawnee, where

a pawn is compared to distress, and suppose that the custody of the pawn must be in the pawnee: Owen, 123; 2 Ld. Ray. 917; 2 Sal. 522. But there is one case more, where the proper distinction between mortgage and pawns is taken: *Ratcliffe* v. *Davis*, Noy, 137; Cro. Jac. 244; Yel. 179; 1 Bul. 29; where the Court held there was a special property in pawnee, entitling to the custody till the condition is performed, but that on payment the whole property vested in pawner, distinguishing it from a mortgage, which is a conveyance of the thing; that, therefore, must be laid out of the case, because it has nothing in common.

Fraudulent conveyances.

The next consideration, then, is, in what condition the creditors stood in relation to conditional sales or mortgages by their debtors, to their prejudice, where the mortgagor continued in possession of the goods mortgaged; and the statute governing this matter is 13 Elizabeth, c. 5, in which there is no distinction between conditional and absolute sales, provided they are fraudulent. This statute being made to protect creditors against all conveyances to defraud them, it was incumbent on a Court of equity, or a jury at common law, upon considering the whole circumstances, to pronounce whether the conveyance was made with such intent or not. Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud where left in his hands. But if, from concurrent circumstances, it appeared the title-deeds were not left to defraud creditors, but upon reasonable and honest purposes, or left with the vendor not so as to deceive touching his substance, that, being accompanied with other circumstances, could not be pronounced a badge of fraud. Therefore, it lay open upon this, to determine whether fraudulent or not. The leading case on this is *Twyne's Case* (*a*), where it is held, that it was upon a valuable consideration, but not *bonâ fide*, from the continuing in possession and trading therewith. It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor unless to procure a collusive credit; and it is the

(*a*) 3 Co. 80.

same whether in absolute or conditional sales, neither the statute nor the reason of the thing making any difference. If no delivery is necessary on a mortgage, they may be mortgaged three times over above the value, and then it is just the same as if they remained in his hands after one absolute sale. But it is insisted, there are several cases where there is a distinction as to this possession after sale between conditional and absolute conveyances of lands or goods. That of lands is not applicable to a case of goods; the case cited for this was *Stone* v. *Grubham*, 2 Bul. 226, and 1 Rol. Rep. 3; but there is no argument from thence, unless the possession of lands and goods after a conveyance was on the same foot. Possession is not otherwise a badge of fraud, unless as calculated to deceive creditors. There is no way of coming at the knowledge of who is owner of goods but by seeing in whose possession they are; the possession of lands is of a different nature: there may be a possession as tenant at will, as every mortgagor is of a mortgagee before the condition is broken. Every one desiring credit entitles to an inquiry into his substance; and therefore, because the possession of land is of an ambiguous nature, as it may be in the hands of the tenant as well as the owner, the title-deeds, &c., may be required, but never at what market goods were bought, the possession and usure of them being all. Therefore, in equity, where deeds are left with a second mortgagee and the first mortgagee neglects to take them into his possession, the first mortgage is postponed. The reason is given by Lord *Talbot*, in *Head* v. *Egerton*, 2 P. Wms. 280, he suffering for his fraud. The next case cited for this was *Bucknal* v. *Roiston*, Prec. Ch. 285; but no distinction was taken there between conditional and absolute sales, by Lord *Cowper*, but that there was no evidence in the case before him of a possession calculated to acquire a false credit which would not make it void. The next case in support of this distinction was *Meggot* v. *Mills*, 1 Lord Ray. 286, and cases in the time of King William, 159; from both which books it appears the case was so imperfect that the Court

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sent it to a new trial. What reason weighed with *Holt* is not clear; but it is clear that it was not this distinction distinguishing only bills of sale to a landlord from any other creditor. But though from all these cases it does appear, that, in the construction of the 13th Elizabeth, c. 5, there is no distinction between conditional and absolute sales of goods if made with intent to defraud creditors, yet a Court of equity or a jury are left at large to construe whether it was made with such intent or not.

Then, to consider the statute of 21 Jac. 1, c. 19, the 10th section is, by misprint, connected with another part to which it has no connection, when it is the preamble to the 11th; no distinction is made in this preamble between absolute or conditional conveyances; nor is there any reason, as the thing may be mortgaged twice or thrice over. Undoubtedly, as the preamble makes no such distinction, so the enacting clause will, in its descriptive words, take in one as well as the other. The only question which can arise is, whether the mortgagor and not the mortgagee, shall be construed the true owner and proprietor. The conditional vendee is so, and the contrary can be no other principle than that of confounding pawns and mortgages. There might be some doubt, perhaps, in the case of a pawn, and 3 Bul. 17 was cited. But how can that be doubted in the case of a mortgage, which is an immediate sale, although, by performing the condition, the thing may be redeemed afterwards by indulgence of a Court of equity? But, till performance, the conditional vendee, though subject to be divested thereof, is the absolute proprietor. A pawn is complete by the delivery; but an absolute sale is complete by the contract, and the party is entitled as soon as the money is paid. If a conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods, and therefore should come in the same case with the other creditors, especially as he has been the bait to draw other creditors in. But there is an express case in point, destroying every such distinction: *Stephens* v. *Sole* (*a*). It was urged, there were subsequent

(*a*) Cited 1 Atk. 157, 161.

cases impeaching the strength of this; but none such have I seen. As to *Bourne* v. *Dodson* (*a*), December 4, 1740, it is sufficient to say, there was no judicial determination. But the Lord Chancellor said, the assignment, if void, was void at law, and directed a trial; but then considered the great inconveniences which might accrue, if ships and a cargo at sea should be liable to the bankruptcy of the party in the meantime, and, on the other hand, if mortgages and conditional sales should be construed out of the statute, so that it was not determined, but sent to law. Another case for this was *Brown* v. *Heathcote* (*b*), Mich. 1746, where it was contended, there was no delivery of possession, which remained in the bankrupt till the ship's return, so that it was within the statute of 21 Jac. 1, c. 19; but the Lord Chancellor held not, the case not being within the description of the statute; for the assignor could not be said to have the order and disposition, there being no possibility of putting Heathcote in possession, nor could he consent or dissent as to the possession continuing as it did, of a ship and cargo at sea. Nor does it come within the reason of the statute, which was intended to hinder the acquiring false credit or substance, which could not be where an ownership could not be shown. And a delivery of all the muniments and means of reducing a ship or cargo at sea into possession is in law a delivery of them. So, a delivery of the key of a warehouse is a delivery of those goods which are bulky, being the only immediate delivery the things are capable of; so that this is not within the intent or words of the Act, as *Stephens* v. *Sole* is. Then, a conditional sale is the same as an absolute sale, where the possession is left in the bankrupt, in order to acquire a reputation of ownership, and so a false credit. It is necessary to apply this to these mortgages, though Jonathan Stephens will be preferred in point of mortgage upon the real estate to Tomkins; yet, as to any lien upon the utensils fixed, the mortgage of Tomkins will be preferred to Jonathan Stephens. The mortgage of Tomkins is of a double nature, of a lease of the house, with the fixed and movable

(*a*) 1 Atk. 154.

(*b*) 1 Atk. 160.

goods. As to the fixed, there is no title to remove them till the mortgagee is satisfied; for though they might be seized according to *Poole's Case*, 1 Sal. 368, yet, where a trader erects fixtures to his house and leaves it, neither he nor any other can remove them during the term, any more than he can cut down trees during the term he had leased, if they are part of the lease, and not excepted thereout. Those which are not fixed will be liable to the seizure in a lease of the house with the movables, the whole rent issuing out of the house, and not out of the chattels: 5 Co. 17, 1; and 4 Dyer, 212 b. It is true that a partner is possessed *per mie* and *per tout* of the chattels; and therefore no actual delivery is requisite; but the offence of the statute is not that, but the permitting to continue in possession after a sale to another, and that other is entitled to the possession of the whole in *entirety*, as Jonathan Stephens was entitled, who therefore, permitting William Harvest to continue as half owner, is within the case described in the statute. Next consider the other three mortgages of a seventh share of the bankrupt's moiety in the partnership stock, utensils, debts, stock, and profits in trade, partly things in possession, partly in action. But I will first consider the case of an assignment of a mere *chose in action*. The simplest case I know is of a debt on bond, which is only assignable in equity, not at law. The reason why assignable in equity, is because the assignor can furnish the assignee with all the means to reduce it into possession, giving authority to sue in his name, and the bond into his hands to prove the debt, when he does sue. Why is not delivery, then, as requisite on such an assignment as a delivery in the conveyance of a thing in possession? Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself at law? A bond debt is certainly a chattel, although some doubt was formerly made of that, so that, in a grant of all goods and chattels, a bond debt would not pass; but that is not because it is not a chattel in its nature, but because of the forfeiture to the king, who

takes the obligation and duty thereof: Bro. Prerog. 20; 3 Inst. 55; Finch's Law, lib. 2, c. 17. But the conclusive case is *Ford's Case*, 12 Co. 1, that personal actions are included in the word *goods* in an Act of Parliament, as goods in possession. Then the debt by the assignor's continuing it in his hand, is in his order and disposition, as he may receive the money due and cancel the bond, and assign it over again to another creditor, and cannot have this bond but by consent of the true owner in equity; and therefore, as he is not obliged to accept a defective security, it is his own fault. As to bulky goods, the means of reducing into possession has been held sufficient; why not, then, in the case of a *chose in action?* But this case will not need that express determination, this being an assignment of things partly in possession, partly in action. It has been said, a share in trade is a mere *chose in action*, and *Small* v. *Oudley* cited for it; but that could not come within the statute. There is no distinction between the trade of the same and of another man; and every act must be construed largely and beneficially in favour of creditors. If goods are assigned to a factor, who, before he breaks, sells them, money has no ear-mark, and the merchant must come under the commission; but if he lays out the money in fresh new goods, to be sent to that merchant, those goods may be followed: 1 Sal. 160. Suppose the bankrupt had sold these goods, and takes notes, payable to himself, for the money, and breaks before they are payable, the assignee receiving the money on these notes, it would be money had and received to the merchant's use, because it arose from the sale of goods of that merchant: *Surman* v. *Scot*, C. B., Hill. 16 Geo. 2. As the goods themselves would be liable, why should not the profits arising from the sale thereof be in the same condition? As to the three assignments of the seventh share of a moiety, they, permitting the bankrupt to act and intermeddle as owner of the whole moiety, must come as other creditors under the commission, forfeiting any right to resort to these mortgages themselves for satisfaction.

The last point is in relation to the assignment of the whole moiety to Potter, in trust for Stephens: which will either fall under the consideration of an assignment to Potter, as distinct from Stephens, or in the same light as if an assignment to Stephens directly; and in either light it will not vary the determination. If as an assignment to Potter, he will be a trustee for Stephens till redemption; and there will be a resulting trust after redemption for William Harvest, who in such case ought to have delivered the partnership deed over to Potter, if he was distinct from Stephens, because that is part of his title, and Potter ought to have been admitted partner for a moiety; for it is difficult to say why William Harvest was permitted, after a conveyance of his whole moiety to Potter (which was all his substance), to continue acting as owner, and with the partnership deed to show that he was owner for a moiety, unless for the purpose of gaining a delusive credit. But, if it is considered as an assignment to Stephens himself, he, being seised *per mie* and *per tout*, will indeed require no actual delivery · but the permitting to act, after parting with all the interest till redemption, is the very thing the statute was intended to prevent. The partnership deed might be insisted on to be deposited; for William Harvest was secure without having the deed in his possession. Stephens, then, is the true owner of this moiety, and has permitted the bankrupt to continue in the order and possession as if owner; and he has been reputed owner, and has taken upon him the order and disposition of this moiety as owner, and comes within the express words of the mischief and intent of 21 Jac. 1, c. 19, otherwise a door would be open to fraud, by a partner being permitted to retain all the badges of ownership, to deceive the rest of the world. It was insisted, the partnership stock was a security; but they are on the same foot as strangers. If one partner lends money to another partner on a separate account, it is never held that his moiety in the stock would be a security for that. The general rule, in *Lord Craven's Case* (2 Ch. Rep. 226) (*a*), and *Richardson* v. *Goodwin* (2 Vern. 293), and

(*a*) *Craven* v. *Knight.*

Croft v. *Pike* (3 P. Wms. 180), is strong against such a rule. It may be said, it will lay trade under great restraint, if a trader cannot mortgage his whole stock without admitting into his trade. That may be inconvenient, but the inconvenience on the other side is greater. If it is once established, that the friends of a sinking man may secure themselves by a mortgage on everything he has which is valuable, without running a risk themselves, commissions of bankruptcy will become useless, when nothing is left to the creditors. As to movables, therefore, these six mortgages, notwithstanding they will be liable to the disposal of the commissioners by the statute 21 Jac. 1, c. 19, as to the fixtures, no removal can be till satisfaction of the mortgage to Tomkins.

Lord Chief Baron Parker.—I will take this case upon the general question, as it has been stated. There are four questions: First, whether any mortgage, or sale upon condition of redemption, is within this clause? Secondly, whether mortgages, or sales on condition of specific chattels, are within it? The third, whether a mortgage or sale on condition of a particular part or share of trade is within it? The fourth, whether the mortgage or sale to Potter, in trust for Stephens, is within it?

As to the first: laying out what was offered at the bar relating to hypothecation or pawns, as not affording any light in this case, let us consider how the law stood before the statute of 21 Jac. 1, c. 19.

Fraudulent deeds are made void by 13 Eliz., c. 5, in which there is a proviso not to extend to conveyances on good consideration *bonâ fide*. *Twyne's Case* was held not *bonâ fide*, because accompanied with a trust. Although the clause in 21 Jac. 1, c. 19, does not in its introduction expressly speak of frauds, yet the reason of the legislature was to prevent that false credit which was destructive to trade, and a further remedy was intended than by 13 Eliz. c. 5, and a mortgage or sale on condition is within this clause, and within the mischief. But the principal difficulty on this part arises from these words

in the clause, "*by consent of the true owner and proprietor.*" But in this clause they are put in opposition to a *false or seeming ownership:* and therefore a mortgagee or vendee upon condition may be said to be true owner, and a contrary construction would defeat this clause. But this point was settled in *Stephens* v. *Sole.* The thirteenth clause of this Act, giving the assignees of the bankrupt's estate a right to redeem, only relates to mortgages regularly made, and not to such as are void for want of delivery of the goods; therefore no argument for the defendants.

As to the second: we must consider, first, whether the bankrupt's own goods only, or the goods also of persons left with the bankrupt for sale or safe custody, are within this clause?

The preamble, speaking of bankrupts only, is narrower than the enacting part, which speaks of any goods: then, as to the effect of it, I admit, in many cases, the preamble will not restrain the general purview, as in 1 Jones, 163; Pal. 485. But it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience, it shall restrain; and here would be an inconvenience, if not restrained, from the hazard to trade. In *L'Apostre* v. *Le Plaistrier* the preamble governed. So in *Godfrey* v. *Furzo,* 3 P. Wms. 185. So in *Ex parte Marsh,* August, 1744 (*a*). I own, in *Copeman* v. *Gallant,* Lord *Cowper's* reason for holding it not within the clause of the statute was, that the assignment was not with an honest intent, for payment of the debts of the assignor, and he decreed for the plaintiff. I have a great reverence for his memory, but though I approve of his decree, I cannot agree to the reason; for though an honest intent will entitle to regard, yet if an honest intent is sufficient to take it out of this clause, both the letter and intent will be overturned. As to the objection, on the part of the defendant, from the case of factors, the reason of it is not well founded, because it must relate either to persons acting by commission only, or in their own right

(*a*) 1 Atk. 186.

and by commission, in neither of which is there any deceit; so that the reason fails: in the former there is no pretence that the lender advances his money on the visible stock: it is on the general credit. Then, consider whether any of these goods in the Master's report are within this clause. As to the goods fixed, they are like trees, considered in law as part of it: but as they are capable of being severed (I do not mean by severance a cutting down), they are capable of being re-united: *Stukely* v. *Butler*, Hob. 168, and Owen, 49. Things fixed to the brewhouse had been several times mortgaged distinct from the brewhouse, but were vested in William Harvest afterwards, and no occasion to deliver to Tomkins; but they will pass by the mortgage of the brewhouse with the things fixed. I admit *Poole's Case* (Salk. 368), that during the term the goods may be sold; but the present is distinguishable, there being a mortgage; nor could he remove the fixtures, because of the mortgagee's interest, otherwise great inconvenience would follow, as lessor of a brewhouse with his own fixtures would be liable to be stripped thereof. As to the utensils unfixed, where the goods mortgaged are of such a nature as to be capable of delivery [there ought to be an actual delivery]; but if no delivery can be at the time of the mortgage, it is sufficient if the proper means of reducing into possession are given. If bulky goods in a warehouse are mortgaged, delivery of the key will be sufficient. I agree also with *Heathcote's Case;* but there the Lord Chancellor determined it not within stat. 21 Jac. 1, c. 19, chiefly because the ship and cargo could not be delivered but by delivery of invoices, &c. It is objected, for defendant, that an undivided share of stock will not admit a separate property and possession; and therefore, of necessity, the possession of mortgagor must be possession for mortgagee: but though it is true that a partner has a joint interest, these interests are severable; as appears by a fieri facias against one partner, which will not affect the other's moiety; the consequence of a sale under that will be, that the vendee of the sheriff will be tenant in common with the other partner: 2 Mod.

279, 1 Sho. 173, Sal. and 2 Ray. 871. To consider the cases cited: in *Meggott* v. *Mills* (*a*), this statute appears not by the report of Lord *Raymond* to be considered, though it might properly; the other statutes were only considered, which differs it from the present. Next, *Cole* v. *Davis*, 1 Raym. 724, admits the same answer; and I doubt whether the sale there was not accompanied with a trust, like *Twyne's Case*, so as to be avoided by 13 Eliz. c. 5; but that was not within the clause of the stat. 21 Jac. 1, c. 19, because the bankrupt there did not take on him the sole alteration, as owner (which is required by the clause), but the sheriff. As to *Small* v. *Oudley* (*b*), a distinction was taken by Sir *Joseph Jekyll* between a man's own trade and another's; this clause was overlooked both by Court and counsel. *Bucknal* v. *Roiston* (*c*) is rather an authority against the defendants than for them. In the present, all the requisites in 21 Jac. 1, c. 19, concur to bring the case within it, as the possession of the goods was not delivered, though capable thereof, William Harvest having the possession, and the articles of partnership and evidence of his title in his hands, and taking upon him the whole alteration as owner.

(*a*) 1 Lord Ray. 286.

(*b*) 3 P. Wms. 427.

(*c*) Prec. Ch. 285.

On the third question, it is objected for defendant, that this clause extends not to things in action, as are mortgages of parts of shares, speaking only of goods and chattels which a person has, at the time of bankruptcy, in his possession; but goods and chattels include debts: Stran. 188; *Slade's Case*, 4 Co. 95; and things in action are considered as goods and chattels in a person attainted, and so the Crown entitled: Litt. 80; *Clayton's Case*. So, 12 Co. 1. If, then, goods and chattels comprehend things in action, in the construction of any Act of Parliament, it ought in this; for otherwise he might assign without notice to others, and so have the order and disposition within the meaning of this clause; and this is enforced by the first clause, that the most beneficial construction for creditors under the commission should be made. But it is said, there can be only an equitable assignment of a chose in action, which is true; and yet in the case of

bonds assigned (for bills of exchange or promissory notes are assignable at law), they must be delivered; and such delivery of the bond and notice of the assignment will be equivalent to the delivery of the goods; for the debtor cannot afterwards justify payment to the assignor: Domat, lib. 1. This clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee; for no notice appears to be given. The assignees, therefore, have power to dispose of it for the benefit of the creditors.

As to the fourth and most difficult question, it is objected, for the defendants, that, though Potter did not take possession, he was merely nominal, and Stephens to be considered as a vendee of Harvest's moiety, and was a partner with him, and so continued and in possession *per mie* and *per tout* with him; and I agree he was at first. But when Stephens became entitled to the other moiety, the question is, whether he should not have had the sole, and not a joint possession only, to take it out of this statute. As Potter did not interfere, Stephens should have taken possession, which, not having done, Harvest continued in possession as visible partner, received the debts, &c., by consent and permission of Stephens, had the order and disposition, and was one of the reputed owners as much as Stephens. It is objected, that the law would judge Stephens to be in possession according to his right; but there is no colour for it, where he permitted all this inconsistent with his own right. A further difficulty arises, from the several determinations in this Court, that one partner borrowing or embezzling any partnership effects, his own share is liable; as held in *Meliorucchi* v. *The Royal Exchange Assurance Company*(*a*). The reason of those determinations relating to partnership is, that each is liable to the whole of the partnership debts; and if one is charged further than he ought, equity gives him a lien on the partnership effects. That is true, but not applicable to the present. Here Harvest did not borrow money or embezzle the effects of the partnership. This is not a partnership transaction, but as distinct as if

(*a*) 1 Eq. Ca. Ab. 8, pl. 8

strangers had done it. Nor is it applicable in point of reason, all the partnership debts being paid. There is no instance where this rule of equity extends to private loans, all the cases relating to partnership transactions, and so should be confined.

I agree, therefore, that none of the mortgages in the Master's report, except the mortgage to Tomkins, and those secured by buildings on land, are out of 21 Jac. 1, c. 19.

Chief Justice Lee.—I concur entirely. These securities are to be considered as mortgages, not as hypothecations, &c., as has been properly observed by *Burnet*, J. And this is a question which must receive its determination from 21 Jac. 1, c. 19, 13 Eliz. c. 5, being only declaratory; and all the cases offered on that head have been already answered. I shall, therefore, confine myself to the statute 21 Jac. 1, c. 19, as the *ne plus ultra*, the line being drawn thereby which is to govern here; and there are three points thereon.

First, Whether the mortgagee is not the true owner and proprietor, to whom there should have been delivery of the goods mortgaged? In the general preamble of this statute, notice is taken of divers defects in former statutes, in description of bankrupts, and in the power to commissioners to discover and distribute the bankrupt's estate; and, therefore, it enacts, that it should be taken most beneficially for that purpose; every word of the statute must be considered, both of the preamble and enacting clause. The present case is directly within the words of the preamble, the bankrupt himself having conveyed the goods to John Stephens; there is no occasion, therefore, to give any opinion in relation to that head of restraining the enacting clause by the words of the preamble, which is not material to the present, it falling within the preamble. To remove the difficulty with respect to commissioners of bankrupts, and to their power of making distribution, this short and plain direction is given to them in this statute, that, where persons are bankrupt, having in their possession, as reputed owners, and taking upon

them the alteration as owners (which differs from the case of factors, who dispose, not as owners, but for others), the commissioners may dispose of this for the benefit of the creditors. This statute, then, makes the reputed ownership as real, for the benefit of creditors in general: the persons' own misbehaviour depriving them of the benefit of the conveyance, though made for good consideration; and they shall not be in a better condition than other creditors. Consider, then, first, whether the mortgagee be the true owner and proprietor. There is a clause in 21 Jac. 1, c. 19, relating to redemption of a mortgage by assignees, not only mortgage of lands, but goods on condition. In Co. Litt. 210, the effect appears of a feoffment on condition; and the reason of the difference there is, that the feoffer has only a bare condition, and no estate in the land which he can assign over, but feoffee has; which is saying that he is owner of the estate, as having the interest in it. The true owner is, in this Act of Parliament, in opposition to reputed owner. As to the cases cited on this point, to make a distinction between conditional and absolute sales: *Stone* v. *Grubham*, 2 Bul. 226, was determined entirely on the statute of 13 Eliz. c. 5, and common law, though the plan of that statute differs greatly from the plan of the statute of 21 Jac. 1, c. 19, this Act supposing the conveyance to be on good consideration, and the party to be an honest creditor or mortgagee, but not to have any preference to other creditors, because he does not give notice to other creditors, by having that delivery to him to which he was entitled; so that this is more like the cases on the Register Act (*a*), where the person loses the benefit of the conveyance by not giving notice, arising from his own plain neglect. The donee is not to suffer donor, who has made the conveyance, to continue in the possession there described; which direction in that Act of Parliament is as necessary to be followed as in cases of the Register Act; and though *Stone* v. *Grubham* is not material to the present (nor is there anything from any part of that case inferring a difference between conditional and absolute

(*a*) See *Le Neve* v. *Le Neve*, ante, p. 32, and note.

sales), yet, what is said there may infer, that mortgagee must be considered as true owner; for if mortgagor is tenant at will to mortgagee, as said in Bulstrode, who is owner of this estate? If the property is transferred to mortgagee, the mortgagor can have only a condition, according to Co. Litt. 210; and the mortgagee has that interest as makes him owner or proprietor. The other cases cited for this have been fully answered already.

The second question is, whether the debts and chattels should not be delivered, as far as they are capable? Upon which *Stevens* v. *Sole* is in point, on the foot of a mortgage of a personal thing; and Lord *Cowper's* observation in the case, in the Precedents in Chancery (*a*), is agreeable thereto, which two cases determine that question on the specific goods; and it will be the same as to the shares of the partnership stock, which are partly in possession, partly in action, and as to all debts, &c., which are conveyable in equity. The inquiry on the second point is, whether choses in action are not included under goods and chattels? And I agree, some books countenance the contrary opinion, particularly Swinb. 407. *Calye's Case*, 8 Co. 32, is like that also. This opinion was grounded on the legal notion in respect of choses in action that they are not grantable as choses in possession; but this is now out of the question; choses in action will be included therein. *Fulwood's Case*, 4 Co. 65, proves that a chose in action (as an obligation) is a chattel. So, Staunf. Prerog. 45, c. 16, that chattels comprehend a right of action to goods. There is no word in the statute to give this right of action but the word "chattels;" and, if forfeited, they must be considered as chattels in the person forfeiting. The same interpretation has been made in other statutes. So, *Ford and Sheldon's Case*, 12 Co. 1. If, then, goods and chattels include choses in action, all the debts acquired to the partnership by sale of the joint stock must be distributable as the goods themselves; for which *Burnet*, J., has cited several cases, that the produce of specific goods follow the nature of the goods themselves. So in Swinb. 414.

(*a*) *Bucknal* v. *Roiston.*

The last question relates to the mortgage of Stephens, the partner, whether he has such a possession as will exempt him from being considered as owner or proprietor, by whose consent the bankrupt has had in his possession the goods, as owner, altered, &c. I mean goods severed; for the fixed are part of the freehold, and, when mortgaged, remain so till the mortgage is satisfied. This mortgage to Potter in trust must be considered as a mortgage to Stephens; and though endeavoured to be distinguished from other mortgages, because he was a partner and in possession, and wanted no delivery, the true answer has been given to that, that, though he held the possession, yet not such a possession as this statute requires; and, consequently, it is imputable to him, as owner, that he has let Harvest have possession in respect of that moiety, producing the same inconveniences, by creating a false credit. As to Stephens having a lien on the stock for the money due to him, and his being distinguished from other creditors, no case has been cited for that. That distinction would have been material in *Croft* v. *Pike* (*a*), but it was not taken there, nor can it be here; for it was a transaction not concerning the stock of the partnership: they are as much disunited as any others: nor was this debt a debt created on the joint stock; nor can he, therefore, have any lien on the joint stock; and, though no judicial determination, yet I may cite a civil law authority, as Dom. lib. 1, fol. 155, concerning partnership, though not as authority on which a judgment is to be founded in our courts; yet, as said by Lord *Raymond*, may they be used as the opinions of learned men.

(*a*) 3 P. Wms. 180.

I am of opinion, therefore, that the statute of 21 Jac. 1, c. 9, is the rule to be followed in this case; and the intent thereof was to prevent the bankrupt's acquiring false credit; that, for the benefit of creditors in general, these goods shall be esteemed his, and distributable as his, so that they must come under the commission. Whether this is a wise provision or no, in this statute, is not for the determination of the Court; for, while it continues a statute, it must be followed.

Lord Chancellor Hardwicke.—I am obliged to the judges for their assistance and endeavours to give light in so intricate a case, which intricacy arises in respect of the want of a number of authorities as to the construction of this Act of Parliament, though made so long ago. But a greater intricacy occurs in respect of the conduct of William Harvest, in making these securities. All the authorities giving light to this have been exhausted by the judges, and it would be mis-spending of time to repeat what has been said. It is sufficient, therefore, to say, I concur in the opinion delivered; but as this is a case of great expectation and consequence, I will reduce the grounds to some general principle.

There arise two general questions: first, whether any mortgages or conditional disposition or conveyance of any goods and chattels are within the statute 21 Jac. 1, c. 19, ss. 10 & 11, as it is by misprint described in the statute; secondly, if any are, which are? A third has been made by a distinction on the mortgage of Harvest's moiety in trust for Stephens, whether that be within this clause.

As to the first, I will not enter into a particular discussion and argument of two points made at the bar: the one, whether the enacting clause extends to all goods whatsoever in the custody of the bankrupt, (whether his own originally, or moving from others,) or whether it is to be restrained by the preamble, and to extend only to goods originally the bankrupt's; which I will not argue.

The other is, whether choses in action are within this clause. Let the construction of the clause as to this be what it will, whether to be confined or not to goods originally the bankrupt's, this case, as to this point, is undoubtedly within the Act, because it cannot be disputed but that all the goods now in question were originally the bankrupt's, moved from him, conveyed and mortgaged by him. But I strongly incline to concur with the opinion of *Holt*, that this clause must be restrained by the preamble, as Lord Chief Baron seems to do, and differ from Lord *Cowper*, though the decree made by him was undoubtedly right.

Choses in action are properly within the description of goods and chattels within this clause; and I will only add one argument, for the sake of which I mention it, which is, that this construction is strongly warranted by the next preceding clause, relating to bankrupts who by fraud make themselves accountant to the king, to defeat their private creditors, which plainly shows that the words *goods and chattels*, as used in this Act, take in all kind of personal property of the bankrupt, whether in possession or action only; which strongly supports the construction made by the Judges, and is agreeable to *Ford and Sheldon's Case*, 12 Co. 1, where it is held, that, in an Act of Parliament, *goods and chattels* take in *choses in action*. The reason of the other opinion in the books arises from hence, that this question has arisen on a grant or assignment, or bargain and sale, not being such goods and chattels as would pass by that assignment or conveyance; but in an Act of Parliament, which can pass anything, they are always included.

I go on four general principles in the construction of this Act.

First, the aim and intent of the legislature was, that an equal proportion of the effects of the bankrupt among his creditors should be attained as far as possible.

Secondly, that, to attain that end, these Acts of Parliament should be construed beneficially for the general creditors under the commission; and therefore it is, in an unusual manner, different from most Acts of Parliament, enacted, that all these statutes and laws shall be largely and beneficially construed for the creditors in general under the commission.

Thirdly, it appears, the general view and intent of the provision now under consideration was, to prevent traders from gaining a delusive credit, by a false appearance of substance, to mislead those who should deal with them.

Fourthly, the legislature judged they might do this by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission, because, where the vendee or assignee leaves such goods

in possession of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor who has only taken his bond or note. It is, in such case, put in the power of the bankrupt to sell the goods the next day; the former assignee could only have a personal remedy against the bankrupt.

All these grounds go to the substance of the case, and not upon niceties, and hold in case of a mortgage as well as an absolute sale; otherwise it would be contrary to the resolutions of *Stevens* v. *Sole*, and the opinion of Lord *Cowper*, in *Bucknal* v. *Roiston* (*a*), and to his implied opinion in *Copeman* v. *Gallant* (*b*), and would overturn this part of the statute, and restrain it to absolute sales. Traders, instead of absolute sales, would then make such mortgages, as there would be a greater opportunity; for traders might mortgage over and over again, as this case is a pregnant instance.

(*a*) Prec. Ch. 285.

(*b*) 1 P. Wms. 314.

As to the most material and operative expression, the legislature has explained their own sense, by putting the word *true owner* in opposition to *reputed*, not *special owner;* and then these last words can only mean a person, who, by specious acts of possession, order, and disposition, gives himself an appearance of property he has not really, (which is the present bankrupt's case,) till the mortgage money is paid.

Then it follows that the mortgages to Reynel, Skip, and George Harvest, and so much of the assignment to Stephens as relates to the utensils not fixed to the freehold, which are made a further security to him, must be void within this clause, so far as they are claimed to be specific liens.

The distinction endeavoured has been answered; and the distinction most laboured, that a share of a partner in a partnership stock is only a sort of proportion arising on the balance of the partnership account, and incapable of being delivered, would let in that false, delusive credit (intended to be prevented) in all trades in partnership, and would extend to particular goods in partnership.

As to choses in action comprised in these securities,

where it is admitted none could pass but in equity, equity ought to follow the law in this case, if in any. Where property is established by Act of Parliament, equity follows it in like manner as where established by common law; for if not, it would cause great confusion; and it is always so taken on Acts of Parliament made concerning real and personal estate, regulating that kind of property; for which there is a strong instance in the statutes relating to Papists; for, though subject to penal laws, equity regulates in the same way, by the same rule, as the statutes lay down concerning legal property.

The third and last point is in the construction of Potter's mortgage, which is said to be directly as if made to Stephens; and, I think, upon the whole, it would be so; though, perhaps, if it was nicely scrutinized, some difference might be taken; but whatever legal interest, that vested in Potter. And the law would not have taken notice of the trust if the question was at law; and, therefore, if this Act of Parliament has made it void at law, this Court would never set it up contrary to law for the sake of Stephens, because he was a partner, but would let the law take place for the benefit of the general creditors. As to any of these goods in that mortgage, which equity only could pass, equity will follow the law; for, as to the profits arising from trade and choses in action, there could not be an equity upon an equity: equity would vest them in Stephens, and it would undoubtedly be considered as if the assignment had been directly to Stephens. And here the principal objection arises; it being said, it vested in Stephens as to these particulars, and that Stephens was partner then, and if he had not taken this mortgage, he would be entitled to have an allowance out of what would be coming to Harvest's moiety, and would have a specific lien on that moiety; and therefore Stephens, taking a mortgage of the other's share, would not be put in a worse condition than without it. This was the most plausible thing urged for the defendant, and would be right if the foundation was right; but I dispute the foundation, which must be, that the party so lending

gains a special lien on the partner borrowing, and should be allowed a preference to his separate creditors; but for this there is no authority or precedent after a bankruptcy; it is a different consideration, what a Court of equity might do between the parties themselves, which both remained capable of transacting for themselves. But I might carry it farther; for it is so after the death of a partner, where his effects come to be distributable as assets. In the case of *Meliorucchi* v. *Royal Exchange Assurance Company* (*a*), the points determined are not material to the present; but there the attempt made was to subject stock after a bankruptcy to a debt contracted to the Company by a loan of money, and arguments were drawn from rules concerning partnership; but it was not contended for, that in case of a partnership, that could be carried farther. And the case cited, of *Croft* v. *Pike* (*b*), is as strong as any negative authority can be; for there it was not attempted to give the surviving partner a right of retainer, or bringing into the partnership account a bond debt, so as to be preferred to others, but only as executor; and therefore, the money taken by a deceased partner out of the partnership stock, was allowed to be brought into the partnership account, but the bond debt was not, because a separate loan and transaction. If, then, by a new determination now, it should be admitted, and that one partner, by lending money to another in a separate capacity, not relative to the partnership, should gain a specific lien on the effects of the partner so borrowing, it would open a door to fraud, and so defeat this statute; for then a person might be taken in as a partner into a moiety of a great stock and flourishing trade, and he may have a separate credit on that confidence, and yet may not have any in reality of the property in that stock, but the whole may belong to others; which tends plainly to great fraud and imposition on traders, and great mischief. It has been said, that great mischief might arise to trade and credit from such a determination as this, as tending to prevent making use of that credit persons have to support themselves in trade, as they cannot make a security

(*a*) 1 Eq. Ca. Ab. 8, pl. 8.

(*b*) 3 P. Wms. 180.

without exposing their circumstances to the world; and on the other hand it is contended, that the other construction would in fact repeal the Act of Parliament, and let in a mischief; some inconvenience might perhaps arise from a determination of this case on either side; but I agree with Chief Justice *Lee*, that, as this is a law, we must adhere to it, and while it is a law, be bound by it, and if any inconvenience results from it, that is for the consideration of the legislature. But this I will say, that, as some inconvenience may be to particular persons on one hand, great inconvenience may be on the other, by creating that appearance, as having the substance of which they remain in possession, though they have not at all the real property: and that this was the intent of the legislature, I am clear; and I may go so far as to say, that the simplicity of those times did not let in these large and airy notions of credit, as of late, which from the number of bankruptcies we have had of late years, is rather an evidence that the departing from the rule this law has laid down, and giving way to these notions, has been rather a mischief.

I agree, then, that these mortgages cannot prevail as specific liens and securities; therefore, as to the mortgages of lands and fixtures, they are not affected by the Act of Parliament: but what is affected by the direction therein is the assignment to Stephens (for Potter must be considered as a trustee for him) relating to any utensils not fixed to the freehold. So also are all the four mortgages of seventh part, by reason of the bankruptcy of William Harvest, made void by the statute, and can create no specific lien on the bankrupt's share of partnership stock, debts, and effects; but they must be considered only as general creditors.

"The great wisdom and policy of the sages and founders of our law," says Lord *Coke*, "have provided, that *no possibility, right, title, nor thing in action, shall be granted or assigned to strangers*, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-ten-

ants, and the subversion of the due and equal execution of justice: " 10 Co. 48. See *Lampet's Case*, 10 Co. 47.

Such things not being assignable at law, it followed that the person to whom they were assigned could not at law sue in his own name for them.

Formerly, it was doubted whether an annuity was assignable, though "assigns" were mentioned in the grant; the argument being, that it was a mere personal contract, and therefore a chose in action. See the cases in 2 Vin. Abr. 515, and 3 Vin. Abr. 151. But in a case in C. B., 3 Cha. 1, this objection, which, in strictness of law, carried force with it, was overruled: *Gerrard* v. *Boden*, Hetl. 80. It seems, too, that naming "assigns" is not essential to the making an annuity assignable, the principle of the objection to its being so being the same, whether "assigns" are mentioned or omitted. However, Perkins, in the special case of an annuity pro consilio impendendo, requires naming of "assigns:" Perk. s. 101. Even there, too, he questions the annuity being assignable. But this was settled in *Maund's Case*, 7 Co. 28, b, one point resolved being, that express words would make such an annuity assignable: Co. Litt. 144, b. n. It may here be remarked, that a possibility, *coupled with an interest*, was devisable, and might be released: Watk. Convey. 219.

But it is to be observed, that the king was always an exception to the rule laid down by Lord *Coke*, for he might always either grant or receive a possibility or chose in action by assignment: Co. Litt. 232, b, n. 1; Com. Dig. "Assignment" (D.), 555; *Miles* v. *Williams*, 1 P. Wms. 252; *Stafford* v. *Buckley*, 2 Ves. 177, 181.

A recent learned writer, with much force, questions the justice of Lord *Coke's* reason for the rule, and he cites authorities fully justifying his assertion that "there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor": Pollock's Principles of Contract, p. 196.

"The same rule," Mr. *Pollock* observes, "is very distinctly stated by Gaius, as prevailing in the Roman law: *Quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo, quibus res corporales ad alium transferuntur, id efficere possum; sed opus est, ut jubente me tu ab eo stipuleris: quæ res efficit ut a me liberetur et incipiat tibi teneri, quæ dicitur novatio obligationis. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.*" Gai. 2, 38, 39. Principles of Contract, by Pollock, p. 196.

The reasons which induced Courts of law to consider pos-

sibilities or choses in action as non-assignable, have been almost wholly disregarded by Courts of equity; and accordingly, from a very early period, assignments of a mere naked possibility, or of a chose in action *for valuable consideration*, have been held valid in Courts of equity, which have carried them into effect upon the same principle as they enforced the performance of an agreement when not contrary to their own rules or public policy. See *Anon.*, Freem. Ch. Rep. 145; *Squib* v. *Wyn*, 1 P. Wms. 381. "Such an assignment," observes Lord *Hardwicke*, "always operates by way of agreement or contract, amounting, in the consideration of the Court, to this, that one agrees with another to transfer and make good that right or interest: *Wright* v. *Wright*, 1 Ves. 412; and, like any other agreement, the Court will cause it to be specifically performed (not leaving the assignee to his action for damages) when the assignor is in a condition to transfer the property, or to cause it to be transferred, to his assignee."

Where an equitable assignment was made of property recoverable in Courts of equity, hence called *choses in equity*, such as the beneficial interest in personalty under a will or intestacy, stock standing in the names of trustees, or in the Court of Chancery, money in Court, judgments enforceable in equity, the beneficial interest in a legal debt assigned to trustees, the assignee could sue in his own name in equity for such property (Trower, Prevalence of Equity, p. 47); but where there was an equitable assignment made of things only recoverable at law—commonly called *choses in action*—the assignee could not sue in his own name, but he was obliged to do so in the name of the assignor, whom a Court of equity would compel to allow his name to be used for that purpose.

In process of time, some *choses in action* became assignable at law, either by custom, as bills of exchange (Byles' Bills, p. 2, 8th ed.), by statute, as promissory notes (3 & 4 Anne, c. 9; 7 Anne, c. 25), bail (4 Anne, c. 16, s. 20), and replevin bonds (11 Geo. 2, c. 19), railway (8 & 9 Vict. c. 19) and exchequer (Add. Contr. 312) bonds, bills of lading if endorsed (18 & 19 Vict. c. 111), East India Bonds (51 Geo. 3, c. 64, s. 4), mortgage debentures issued by the Land Companies under the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 20), things in actions of companies (Companies Act, 1862, 25 & 26 Vict. c. 89), transferable debentures under the County Debenture Acts, 1873 (36 & 37 Vict. c. 35), policies of life assurance (30 & 31 Vict. c. 144. See *Scottish Amicable Life Assurance Society* v. *Fuller*, 2 L. R. Eq. 58; and policies of marine insurance (31 & 32 Vict. c. 86; see *Lloyd* v.

Fleming, 7 L. R. Q. B. 299; *North of England Oil Cake Co.* v. *Archangel Insurance Co.*, 10 L. R. Q. B. 249), and the choses in action of bankrupts (32 & 33 Vict. c. 71, s. 22. See *Lloyd* v. *Fleming*, 7 L. R. Q. B. 299): and in all these cases the assignee may sue at law in his own name. And recently by the Supreme Court of Judicature Act, 1873, any debt or other legal chose in action of which express notice in writing shall have been given to the debtor trustee or other persons therein mentioned, is made assignable at law by an absolute assignment in writing, under the hand of the assignor, not purporting to be by way of charge only: sect. 25, subs. 6.

When *choses in equity* or *choses in action* are assigned, irrespective of any statute, it is obvious that it is necessary to give the trustees or other persons holding the funds, or the debtors, notice of the assignment, in order to prevent their paying the same to the assignor, and in the cases of successive incumbrances notice is necessary, in order that any person about to advance money upon such security might ascertain whether there was any prior incumbrance thereon, and a person who advanced his money upon the security of an assignment of a *chose in equity* or a *chose in action*, who by neglecting to give notice to the trustee or debtor of such assignment, was the cause of another person advancing money upon the same security, was in such case justly postponed to the second incumbrancer.

As the assignment of equitable *choses in action* does not appear to have been altered by the Judicature Act, and as legal *choses* in action only come within it when the assignment is of the character, and made in the mode there pointed out, it is still necessary to examine the law as to the assignment of equitable and legal choses in action, both irrespective of, and under the Judicature Act, 1873. It is proposed in this note to consider—I. What might be assigned in equity though not at law. II. What amounts to an equitable assignment. III. How far notice is requisite in order to perfect an assignment of choses in action. IV. To whom notice should be given of an assignment. V. Rights and remedies of an assignee under an equitable assignment. VI. Liabilities of assignee of chose in action in taking it subject to equities. VII. Choses in action how far made by statute assignable. VIII. What assignments are contrary to public policy, and herein of champerty and maintenance.

I. *What might be assigned in Equity though not at law.*]—A mere expectancy, as that of an heir-at-law to the estate of his ancestor (*Hobson* v. *Trevor*, 2 P. Wms. 191; *Wethered* v. *Wethered*, 2 Sim. 183, 192; *Smith* v. *Baker*,

1 Y. & C. C. C. 229; sed vide *Carleton* v. *Leighton*, 3 Mer. 671), or the interest which a person may take under the will of another then living (*Beckley* v. *Newland*, 2 P. Wms. 182; *Bennett* v. *Cooper*, 9 Beav. 252; and see ante, Vol. 1, 615, 652), or the share to which such person may become entitled to under an appointment (*Musprat* v. *Gordon*, 1 Anst. 34), or in personal estate, as presumptive next of kin of a person then living (*Hinde* v. *Blake*, 3 Beav. 235; *Meek* v. *Kettlewell*, 1 Ph. 347), is assignable in equity for valuable consideration; and when the expectancy has fallen into possession, the assignment will be enforced.

It is needless to cite any authorities to prove that in equity a person may assign a legacy or share of a residue. So, non-existing property, to be acquired at a future time, though not assignable at law (*Robinson* v. *Macdonald*, 5 Man. & Selw. 228), is clearly so in equity; the assignment, for instance, of future freight (*Brown* v. *Tanner*, 3 L. R. Ch. App. 597; *Wilson* v. *Wilson*, 14 L. R. Eq. 32), of future patent rights (*Printing and Numerical Registering Company* v. *Sampson*, 19 L. R. Eq. 462), of the future cargo of a ship (see *In re Ship Warre*, 8 Price, 269, n.; *Curtis* v. *Auber*, 1 J. & W. 526; *Douglas* v. *Russel*, 4 Sim. 524; *S. C.*, 1 My. & K. 488; *Langton* v. *Horton*, 3 Beav. 464; 1 Hare 549; *Lindsay* v. *Gibbs*, 22 Beav. 522; *Gardner* v. *Cazenove*, 1 Hurslt. & N. 423), of building materials to be brought on premises (*Brown* v. *Bateman*, 2 L. R. C. P. 272), or machinery at a future time to be added to or substituted for existing machinery (*Holroyd* v. *Marshall*, 10 Ho. Lo. Ca. 191, reversing the decision of Lord *Campbell*, C., 2 De G. F. & Jo. 596), is valid in equity. The able and instructive judgment of Lord *Westbury*, C., 10 Ho. Lo. Ca. 209, in which his lordship lays down the principle upon which Courts of equity act in cases of equitable assignments, deserves most attentive perusal.

Directors, however, under a power to charge existing property cannot assign property to be thereafter acquired. See *In re Sankey Brook Coal Company*, 9 L. R. Eq. 721, where it was held, that under a power to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company" in order to secure the repayment of moneys borrowed, the proceeds of a call already made, but not yet paid, might be charged, but not the proceeds of a future call. See also *Ex parte Stanley*, 33 L. J. N. S. (Ch.) 535.

An agreement for a bill of sale, if relied on as an equitable assignment of the property, requires to be registered under the Bills of Sales Act (17 & 18 Vict. c. 36), *Ex parte Mackay*, 8 L. R. Ch. App. 643; *Ex parte Conning, In re Steele*, 16 L. R. Eq. 414.

It may here be mentioned that, by 8 & 9 Vict. c. 106, s. 6, it was enacted, "that, after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility *coupled with an interest*, in any tenements or hereditaments of any tenure, whether the object of the gift, or limitation of such interest, or possibility, be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force *only* of this Act, defeat or enlarge an estate tail." It also enacts, that, dispositions by married women must be in conformity with 3 & 4 Will. 4, c. 74, and 4 & 5 Will. 4, c. 92.

This Act, it will be observed, does not render assignments of contingent interests, or possibilities in chattels, or mere naked possibilities *not coupled with an interest*, valid at law; the exclusive jurisdiction, therefore, of the old Courts of equity as to such assignments was untouched by the Act.

II. *What amounts to an equitable assignment.*]—Although it is usual in transferring a chose in action, as a debt or bond, to assign it by a deed in legal form, with a power of attorney to sue in the name of the assignor, it is clear, as is laid down by Lord *Hardwicke*, in the principal case of *Row* v. *Dawson*, that "no particular words are necessary." Any words, in fact, are sufficient which show an intention of transferring or appropriating the chose in action to or for the use of the assignee for valuable consideration. See *Thompson* v. *Spiers*, 13 Sim. 469; *Burn* v. *Carvalho*, 4 My. & Cr. 690; *Cook* v. *Black*, 1 Hare, 390; *M'Fadden* v. *Jenkyns*, 1 Hare, 458: 1 Ph. 153; *Malcolm* v. *Scott*, 3 Hare, 39, 52; 6 Hare, 570; 3 Mac. & G. 29; *Myers* v. *The United Guarantee, &c., Company*, 7 De G. Mac. & G. 112; *Chowne* v. *Baylis*, 31 Beav. 351; *Gurnell* v. *Gardner*, 4 Giff. 626, 680; *Frith* v. *Forbes*, 4 De G. F. & Jo. 409; *Ex parte Montagu*, 1 Ch. D. 554.

The principle to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor (*Rodick* v. *Gandell*, 1 De G. Mac. & G. 776), or an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds will create a binding equitable assignment of so much money: *Burn* v. *Carvalho*, 4 My. & Cr. 702. And a mere endorsement in blank of a debenture of a joint-stock company has been held to be a good "equitable assignment:" *In re Pryce, Ex parte Rensburg*, 4 Ch. D. 685. Nor is

it necessary in equity, as it would appear by some of the decisions at law (*Williams* v. *Everett*, 14 East, 582; *Baron* v. *Husband*, 4 B. & Ad. 611; *Ex parte Heywood*, 2 Rose, 355), that the party receiving the order should, in some way, enter into a contract to hold the funds for the equitable assignee: *Burn* v. *Carvalho*, 4 My. & Cr. 702, 703.

In *Yeates* v. *Groves*, 1 Ves. jun. 281, Dawson being indebted to Yeates and Browne upon a note of hand, in September, 1789, they gave up to him the note, upon his giving to them an order, directed to Groves and Dickinson, who had agreed to purchase some leasehold property of him, to pay the amount of the note and interest to Browne out of the purchase-money. The order was not accepted in writing, although it seems Groves and Dickinson verbally agreed that, when the assignments were prepared and the purchase-money was to be paid, Browne should receive notice to attend. In December, 1789, the assignments being prepared, Browne attended, in consequence of notice; but before the transaction could be gone through, Dawson went out of the room, and was arrested, and in January, 1790, a commission of bankrupt issued against him. Upon a bill being filed by Yeates and Browne, Lord *Thurlow* held, that the order was an equitable assignment of the purchase-money. "This," said his Lordship, "is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It is not an inchoate business. *The order fixed the money the moment it was shown to Groves and Dickinson.*"

In *Ex parte Alderson*, 1 Madd. 53, R. being pressed to discharge a debt on the 5th of August, 1813, gave to two creditors a draft on the executor of a debtor of hers, which draft the executor promised to discharge on receiving assets. A commission of bankrupt issued against R. on 17th of November, 1814. Upon a petition being presented by the two creditors, it was held by Sir *Thomas Plumer*, M. R., that they were entitled to the sum for which the draft was given, as against the assignees. "Is this draft," said his Honor, "to be considered in equity as an assignment of the debt, which is a chose in action? And did not the executor bind himself to pay it? I think this was a good equitable assignment of the debt, and that the executor bound himself to pay it when in possession of sufficient assets . . . If R. had remained solvent, the petitioner might, by a bill in equity, have obtained the benefit of the assignment: *S. C.*, 3 Swanst.

392; affirmed on appeal, nom. *Ex parte South;* and Lord *Eldon* said, that the debtor would be bound by the order being shown to him, and that a contract on his part to pay was, in equity, not necessary.

In *Lett* v. *Morris*, 4 Sim. 607, A., having contracted to pay to B. 2,360*l.* by instalments, B. signed and gave to C., for valuable consideration, an order authorising A. to pay parts of each instalment to C., and 460*l.* was to be reserved in A.'s hands out of the balance of the contract, and C.'s receipt was to be a discharge to A. A. was served with notice of the order on the day on which it was signed. It was held, by Sir *L. Shadwell*, V. C., that the order operated as an equitable assignment of the sums therein mentioned.

In *Burn* v. *Carvalho*, 4 My. & Cr. 690, A., having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct B. to deliver over the goods to D., as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A., under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy. Lord *Cottenham*, affirming the decision of Sir *L. Shadwell*, V. C. (7 Sim. 109), held, that C. had a good title in equity to the goods. And see *Smith* v. *Everett*, 4 Bro. C. C. 64; *Ex parte Steward*, 3 M. D. & De G. 265; *Crowfoot* v. *Gurney*, 2 Moo. & Scott, 473; *Diplock* v. *Hammond*, 2 Sm. & Giff. 141; 5 De G. Mac. & G. 320; *L'Estrange* v. *L'Estrange*, 13 Beav. 281; *Riccard* v. *Prichard*, 1 K. & J. 277; *Jones* v. *Farrell*, 1 De G. & Jo. 208; *Ex parte Imbert*, 1 De G. & J. 152; *Farley* v. *Turner*, 26 L. J. Ch., N. S. 710; *Rayner* v. *Harford*, 27 L. J. Ch., N. S. 708; *Chowne* v. *Baylis*, 31 Beav. 351; *Langton* v. *Waring*, 18 C. B., N. S. 315; *Ex parte North Western Bank, In re Slee*, 15 L. R. Eq. 69.

The intention, however, to create a charge must be shown. Thus, a mere letter of instruction to a banker not written with any intent to create a charge on a fund in his hands, will not amount to an equitable assignment: *Hopkinson* v. *Forster*, 19 L. R. Eq. 74. Nor will the opening of a credit for a particular sum constitute an equitable assignment or specific appropriation of that sum, but it is merely an authority to the person in whose favour the credit is opened to draw to the extent of the specified amount. See *Morgan* v. *Larivière*, 7 L. R. (Ho. Lo.) 423; reversing the decision of the Lords Justices, reported 7 L. R. Ch. App. 550.

A valid equitable assignment, if it be clearly proved, may be made verbally. See *Gurnell* v. *Gardner*, 9 Jur. (N. S.), 1220.

There it appeared from the evidence of the plaintiff alone, which was uncontradicted, that Gledhill being indebted to the plaintiff, and having purchased some wool from Bradley, in consideration of the debt due to the plaintiff, and for the purpose of securing the payment, and with the intention of assigning and making over the wool, and vesting it in the plaintiff, in an interview with the plaintiff, said, "There is the wool that has gone to Doncaster, go and sell that wool, pay Bradley the balance due to him on such wool, and keep the remainder yourself." Gledhill died a few hours afterwards, and letters of administration were granted to his brothers, who claimed the wool. The plaintiff removed the wool from the custody of a wharfinger at Doncaster, and sold it, and after paying Bradley, retained the balance in part satisfaction of his debt. It was held by Sir *J. Stuart*, V. C., that what had taken place amounted to a valid equitable assignment of the wool to the plaintiff: see also *Riccard* v. *Prichard*, 1 K. & J. 277, 279; *Field* v. *Megaw*, 4 L. R. (C. P.) 660.

Where a person has a fund belonging to another in his hands a bill of exchange drawn by the latter on the former, although for the exact amount, is not an equitable assignment thereof (*Shand* v. *Du Buisson*, 18 L. R. Eq. 283). Nor is a cheque an equitable assignment of the drawer's balance at the bankers upon whom it is drawn: *Hopkinson* v. *Forster*, 19 L. R. Eq. 74, commenting on *Keene* v. *Beard*, 8 C. B. (N. S.) 372.

A mere mandate from a principal to his agent, not communicated to a third person, will give him no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it: *Scott* v. *Porcher*, 3 Mer. 652, 664. Where, for instance, an order is given by a man to his bankers to pay over a sum to a third person to whom the order is not communicated, and the banker does not make the payment, and the order is afterwards countermanded, the third party cannot insist on the banker paying to him the money: *Morrell* v. *Wooten*, 16 Beav. 197.

When, however, the agent communicates the mandate to the third person, and agrees to exercise it for his benefit, he converts himself into an agent for, and debtor to, the persons in whose favour the mandate was given. Thus in *Fitzgerald* v. *Stewart*, 2 Russ. & My. 457, where consignments had been made from abroad to answer an annuity which the owner of the property consigned was liable to pay, and the consignee

in this country gave notice of the arrangement to the annuitant, and made payments in pursuance of it, it was held by Lord *Brougham*, C., affirming the decision of Sir *L. Shadwell*, V. C., (reported 2 Sim. 333), that the consignee was not afterwards at liberty to discontinue such payments, so long as he had any proceeds of the consignments in his hands. The principle upon which these cases proceed has been well laid down by *Wigram*, V. C., "Courts, both of law and equity," observes his Honor, "have repeatedly decided that, where a creditor on whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and a debtor to, that creditor; and these cases have been decided upon the ground, that the creditor may, on the faith of the notice, have foreborne to sue."

A mere power of attorney or authority to a person to receive money (*not addressed to the debtor*), and directing such person to pay it to a creditor of the party granting the power or authority, will not amount to an equitable assignment. Thus, in *Rodick* v. *Gandell*, 1 De G. Mac. & G. 763, a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors of the company*, authorised them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money on receiving it. It was held by Lord *Truro*, C., affirming the decision of Lord *Langdale*, M. R., (reported 12 Beav. 325), that this did not amount to an equitable assignment of the debt. "The extent of the principle," said his Lordship, "to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, *or* an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. . . . . I think that a decision, that the authority to the solicitors contained in the letter to receive the debt due from the railway company, and to pay what should be received to the bank, operated as an assignment in equity of the railway debts, would be to extend the principle much beyond the warrant of the authorities; and I also think that the effect of such a decision upon the interest of

persons giving orders of the like description, might be very injurious, and would be contrary to the intention of the parties to the transaction. *If an assignment of the debts had been intended, it would have been quite as easy to have directed the order to the railway company* as to the solicitors. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted, and some definite portion been adjusted and realised."

Upon the same principle in *Bell* v. *The London and North-Western Railway Company*, 15 Beav. 548, where a railway contractor gave his bankers a letter directing the railway company to pass the cheques which might become due to him "to his account with the bank" it was held by Sir *John Romilly*, M. R., that this was not an equitable assignment, but that it would have been so if the letter had directed the cheques to be passed *to the bank*. "In *Ex parte South*, 3 Swanst. 392, and in *Lett* v. *Morris*, 4 Sim. 607," said his Honor, "the order was to pay the debt to the third party unconditionally, not to the third party on behalf of the creditor, or to be held by him for the benefit of the creditor as his mere agent to receive the money. An order of that description would always be revocable by the person giving it, but not so an order to pay to the third person absolutely. *Burn* v. *Carvalho*, 4 My. & Cr. 690, was the case of an order to pay to a third person absolutely. This was also the case of *Tibbitts* v. *George*, 5 Ad. & Ell. 107. If a creditor employ a person to collect the debts due to him, and inform the debtor that such person has authority to receive the debt due, this would not be an assignment of the debt to the agent, even though the agent should be a creditor of his principal; but the debtor might, with propriety, and without risk, afterwards pay the debt to the creditor, or to any fresh agent whom he might appoint to receive it. If this were not so, the result would be that, when once any person had authorised an agent to receive a debt, the debtor could never safely pay another agent, or even the creditor himself, without receiving proof that the creditor did not owe any money to the person whom he first had constituted his agent to receive it." See also *Thayer* v. *Lister*, 30 L. J. Ch. (N. S.) 427; *Flint* v. *Walker*, 5 Moore's P. C. C. 179; *In re Foster*, 7 I. R. Eq. 294.

A mere representation, by the drawer, that bills of exchange will be met by the drawee, inasmuch as the drawee has larger funds in his hands belonging to the drawer, will not amount to an equitable assignment or specific appropriation of such funds. See *Citizen's Bank of Louisiana* v. *First National Bank of New Or-*

leans, 6 L. R. Ho. Lo. 352; there in 1867 the Bank of Liverpool had dealings with the First National Bank of New Orleans. The course of business was that the New Orleans Bank remitted to the Liverpool Bank money and good bills, and drew bills against those remittances. The Liverpool Bank accepted the bills thus drawn, and paid them out of the remittances. There was an understanding which had been always acted on, that the Liverpool Bank was never to be under cash advances. The business of the New Orleans Bank consisted largely of the discount and the sale of bills of exchange. On the 29th of April and 2nd of May, 1867, the Citizen's Bank of Louisiana purchased from the New Orleans Bank two bills for 5000*l.* drawn by that bank on the Liverpool Bank, payable at sixty days' sight. These bills were purchased by the Bank of Louisiana, upon the faith of a representation made by the agent of the New Orleans Bank, that the bills would certainly be paid, for that "the bills were drawn expressly or specially against funds to a much larger amount already remitted to the Bank of Liverpool." On the 13th of May, 1867, the New Orleans Bank suspended payment, and the Bank of Liverpool refused to accept or pay the bills, although they had ample funds to meet all the bills drawn by the New Orleans Bank, and they paid the funds to the receiver appointed on behalf of the general creditors. It was held by the House of Lords, affirming the decision of Lord *Romilly*, M. R., that the representation made by the agent of the New Orleans Bank did not amount to an equitable assignment, or a specific appropriation of any part of the funds in the hands of the Bank of Liverpool. "The transaction," said Lord *Selborne*, L. C., "was really of this kind—a person asked to take a bill wants to know distinctly whether the person who has drawn it has made provision for its payment. The statement is, We have sent forward to Liverpool funds of a much larger amount, which we intended to be used in the payment of these and other bills. If that be a specific appropriation, or an equitable assignment, it follows, that every ordinary transaction in commerce, where any inquiry whatever is made, would come into the same category. If any one draws a cheque, and gives a cheque upon a bank, it is a fraud, in one sense (a very intelligible sense), to do that if he has no account there. If he is known to have an account there, it is very likely that no question will be asked. But suppose a question is asked, and he says 'I have a sufficient balance to meet it,' is that an equitable assignment of the balance? If it is not, there is no evidence of assignment here." This decision in sub-

stance affirms the decision of the Court of Appeal in Chancery in *Thomson* v. *Simpson*, 5 L. R. Ch. App. 659, reversing the decision of Sir *J. Stuart*, V. C., reported 9 L. R. Eq. 497.

A promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person. See *Field* v. *Megaw*, 4 L. R. (C. P.) 660, there the plaintiff having a cargo of wheat brought by a vessel called the Maraquita in the hands of a factor for sale, obtained from Wedd a loan of 500*l.*, for which he gave Wedd his acceptance at two months, describing the consideration to be "value received in wheat ex Maraquita," and they verbally agreed that the bill was to be renewed from time to time until the plaintiff should receive from the factor the proceeds of the wheat. The plaintiff compounded with his creditors, and upon an action brought by him on behalf of his creditors to recover back the 500*l.* which had been paid to Wedd, it was held by the Court of Common Pleas, that what had taken place did not amount to a charge of the funds in the hands of the factor, so as to amount to an equitable assignment of, or an equitable charge upon, the fund. See *Malcolm* v. *Scott*, 3 Hare, 39; *Robey & Co.'s Perseverance Ironworks* v. *Ollier*, 7 L. R. Ch. App. 695.

Where an instrument was construed, not as a mere equitable assignment, but as an order for payment of a sum of money *out of a particular fund*, unless it were stamped as required by 55 Geo. 3, c. 184 (Sched. part 1, Tit. Inland Bill), it could not be enforced in equity (*Lord Braybrooke* v. *Meredith*, 13 Sim. 271; *Parsons* v. *Middleton*, 6 Hare, 261; and see *Pott* v. *Lomas*, 6 Hurlst. & N. 529; *Ex parte Shellard, In re Adams*, 17 L. R. Eq. 109): but where an instrument, though in form an order for the payment of money, operated as an equitable assignment, if properly stamped as an assignment, it would be received by the Court: *Diplock* v. *Hammond*, 2 Sm. & G. 141; 5 De G. Mac. & G. 320; *M'Gowan* v. *Smith*, 26 L. J. N. S. (Ch.) 8. See now 33 & 34 Vict. c. 97; Tilsley on Stamp Duties, 131.

There can be no doubt moreover that a covenant to charge, or dispose of, or affect lands hereafter to be acquired, operates in equity upon lands so afterwards acquired: (*Metcalfe* v. *The Archbishop of York*, 1 My. & Cr. 547; *Lyde* v. *Mynn*, 4 Sim. 505; *S. C.*, 1 My. & K. 683; *Wellesley* v. *Wellesley*, 4 My. & Cr. 579;) but no charge will be created except where the covenant refers to particular property, or where property has been acquired with an intention to perform or satisfy the covenant: *Countess of Mornington* v. *Keane*, 2 De G. & Jo. 292;

Roundell v. *Breary*, *Ib.*, 319; and see *Beldring* v. *Read*, 13 W. R. (Exch.) 867.

Upon the same principle, although a mere contract may amount to an actual assignment, it must purport to confer an interest in the future chattels immediately by its own force, and without the necessity of any further act on the part of the assignee upon the future chattels coming into existence, and therefore an assignment of existing chattels, coupled with words which amount to a mere licence to seize after-acquired property, will not be construed as an equitable assignment of the latter: *Reeve* v. *Whitmore*, 4 De G. Jo. & S. 1; 33 L. J. Ch. (N. S.) 63, where Lord *Westbury*, C., affirmed the decision of Sir *R. T. Kindersley*, V. C., reported 32 L. J. Ch. (N. S.) 497. And see *Brown* v. *Bateman*, 2 L. R. C. P. 272, 283, 284.

And where there is a mere licence to seize after-acquired goods for the purpose of selling them and discharging a debt, if the debt is released, as for instance, by virtue of a liquidation under the Bankruptcy Act, 1869, the collateral licence to seize will go with the debt: *Thompson* v. *Cohen*, 7 L. R. Q. B. 527; *Cole* v. *Kernot*, *Ib.*, 534 n.

Where a life policy which was to become void, if the assured should commit suicide, unless the policy should have been "legally assigned," had been deposited to secure a sum of money, it was held to be a sufficient assignment to come within the exception, and that notice of it to the office was unnecessary: *Dufaur* v. *The Professional Life Assurance Office*, 25 Beav. 599; and see *Jones* v. *The Consolidated Investment Assurance Company*, 26 Beav. 256, where a letter charging the policy was held to be sufficient for the same purpose.

III. *How far notice is requisite in order to perfect an assignment of Choses in Action.*]—Notice of an assignment is not necessary to render it perfect as between the assignor and assignee, whether it be for valuable consideration (*Burn* v. *Carvalho*, 4 My. & Cr. 702; *Dufaur* v. *Professional Life Assurance Company*, 25 Beav. 599; *Rodick* v. *Gandell*, 1 De G. Mac. & G. 780) or only voluntary (*Donaldson* v. *Donaldson*, Kay, 711; *Roberts* v. *Lloyd*, 2 Beav. 376; *Re Way's Trusts*, 2 De G. Jo. & Sm. 365).

Nor is notice necessary as against third parties, who simply stand in the same position as the assignor, as, for instance, a person claiming under a subsequent assignment as volunteers: (*Justice* v. *Wynne*, 12 I. Ch. Rep. 289) a creditor under a judgment at common law: (*Beavan* v. *Lord Oxford*, 6 De G. Mac. & G. 492; *Kinderley* v. *Jervis*, 22 Beav. 1; *Eyre* v. *M'Dowell*, 9 Ho. Lo. Ca. 619, 642; *Scott* v. *Hastings*, 4 K. & J.

633;) or under a garnishee order under the Common Law Procedure Act, 1854: *Pickering* v. *The Ilfracombe Railway Company*, 3 L. R. C. P. 235; *Crow* v. *Robinson*, 3 L. R. C. P. 264; overruling *Watts* v. *Porter*, 3 E. & B. 743.

A judgment creditor, therefore, will be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding such creditor has, since the mortgage but before the notice thereof to the trustee of the fund, obtained under 1 & 2 Vict. c. 110, s. 14, an order charging the fund: *Scott* v. *Lord Hastings*, 4 K. & J. 633.

The neglect, however, to give notice may have the effect, 1st, of rendering subsequent payments to the assignor valid; 2nd, of enabling a subsequent purchaser or incumbrancer to gain priority by giving notice; 3rd, of bringing the subject-matter assigned within the operation of the reputed ownership clause of the Bankruptcy Act.

1. *Neglect by assignee to give notice renders subsequent payment to assignor valid.*]—It is clear that where the assignee does not give notice of the assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, he will be obliged to allow the payments which such debtor, trustee, or person subsequently makes to the assignor: *Norrish* v. *Marshall*, 5 Madd. 475; *Stocks* v. *Dobson*, 4 De G. Mac. & G. 11; *Cothay* v. *Sydenham*, 2 Bro. C. C. 391; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91.

2. *Priority, when gained by a subsequent purchaser or incumbrancer giving notice.*]—If the assignee of a chose in action, or a trust estate of personalty, does not perfect his title by giving notice of the assignment to the debtor or trustees, a subsequent purchaser or incumbrancer giving notice of his assignment will thereby acquire priority; and it is of no importance, in the question of priority, whether the interest of the assignor be vested or contingent, present or reversionary. The leading cases upon this subject are *Dearle* v. *Hall*, 3 Russ. 1, and *Loveridge* v. *Cooper*, 3 Russ. 30. In *Dearle* v. *Hall*, 3 Russ. 1, Brown, being entitled for life to the yearly sum of 93*l.*, being the dividend arising from the moiety of a sum of money invested in the names of the executors of his father's will, by an indenture, dated the 19th of December, 1808, assigned it to Dearle, to secure an annuity granted in consideration of 204*l.*; and by another indenture, dated the 26th of September, 1809, he assigned the same yearly sum to Sherring, to secure an annuity granted in consideration of 150*l.* No notice of the assignments was given by either Dearle

or Sherring to the executors. By an indenture, dated the 20th of March, 1812, Brown, in consideration of 711*l.* 3*s.* 6*d.*, assigned the same annual sum absolutely to Hall, who, previous to making the purchase, called for every information respecting the fund and the title from the acting executor, and on the 25th of April, 1812, served the executors with a written notice to pay him, as assignee of Brown, a moiety of the dividends of the fund during Brown's life, and they accordingly paid him a sum of money on account thereof. On the 17th of October following, the executors, for the first time, received notice of the assignments to Dearle and Sherring, and refused to make any more payments until the rights of the different parties should be ascertained. Sir *Thomas Plumer*, M. R., after an elaborate consideration of the authorities, dismissed the bills filed by Dearle and Sherring, holding, that Hall had a better equity to the fund, and that the assignment to him, though posterior in date, was entitled to priority, in consequence of his having given, and of Deale and Sherring having neglected to give, notice to the trustees. "The question," said his Honor, "here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sherring can set up; or rather, the question is, shall these plaintiffs now have equitable relief, to the injury of Hall? What title have they shown to call on a Court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a Court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence, at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is, not as in *Evans* v. *Bicknell* (6 Ves. 174), whether a Court of equity is to deprive the plaintiffs of any right,—whether it is to take from them, for instance, a legal estate, or to impose any charge upon them: it is simply, whether they are entitled to relief against their own negligence. They did not perfect their securities: a third party has innocently advanced his money, and has perfected his security, as far as the nature of the subject permitted him. Is this Court to interfere to postpone him to them?

"They say, that they were not

bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If, therefore, an individual, who, in the way of purchase or mortgage, contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall* v. *Rowles* (1 Ves. 348; 1 Atk. 165), before Lord *Hardwicke* and three of the Judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties, on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised even in Courts of law. In *Twyne's Case* (3 Rep. 80), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences.

"'When a man,' says Lord *Bacon* (Maxims of Law, Max. 16), 'is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued.

"It is true that a chose in action does not admit of tangible actual possession, and that neither Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the 93*l.* a year. But, in *Ryall* v. *Rowles*, the Judges held, that, in the case of a chose in action, you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes,

tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person.

"Is there the least doubt, that, if Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees; but that, according to the doctrine of *Ryall* v. *Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case, it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title,—to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you will allow him to remain, notice is not necessary; for, against him, the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession, must take his chance." See also *Loveridge* v. *Cooper*, 3 Russ. 30. The cases of *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*, were afterwards affirmed by Lord Chancellor *Lyndhurst*, upon appeal (3 Russ. 48), who observed that, in cases like the present, the act of giving the trustee notice, was, in a certain degree, taking possession of the fund; it was going as far towards equitable possession as it was possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. And see *Foster* v. *Blackstone*, 1 My. & K. 297; *S. C.*, *Foster* v. *Cockerell*, 9 Bligh, N. S. 332; 3 C. & F. 456; *Stocks* v. *Dobson*, 5 De G. & Sm. 760; *Dunster* v. *Lord Glengall*, 3 Ir. Ch. Rep. 47.

In *Martin* v. *Sedgwick*, 9 Beav. 333, the defendant held shares in the Rock Life Assurance Office, as a trustee for Dunlop, and executed a declaration of trust, but no notice thereof was given at the office of the Company, the defendant afterwards mortgaged the shares to secure his private debt. Notice of this mortgage was given to the Company, and entered in their books. It was held by Lord *Langdale*, M. R., that the mortgagee had priority over the cestui que trust. "The first question," said his Lordship, "made here is this, whether inasmuch as by the constitution of the Company a shareholder is a partner; and as by the ordinary rule of law, notice to one partner is notice to the others, it must not be assumed that, at the time when the transfer was made to Sedgwick upon trust, the whole Company had such distinct notice of the creation of the trust, that the same effect is to be given to it as if there had been a regular formal notice given in the usual manner. I am of opinion that that is not the case. It would put an end to that important doctrine, by which security is afforded to assignments accompanied with notice to the trustee or holder, and by which a good assignment and security is effected, so as to prevent its being defeated by any subsequent assignment. There was nothing to hinder Dunlop from giving that notice, which would have perfectly secured him against any subsequent dealing with the fund by the defendant. That notice was not given. The result was, that these shares remained standing in his name in the books of the Company unfettered by any such notice; and he was left entirely at liberty without the possibility of any other parties guarding themselves against his improper acts, to dspose of those shares in any manner which the rules of the Company allowed." See also *Ex parte Boulton*, 1 De G. & J. 163; *Pierce* v. *Brady*, 23 Beav. 64.

Where notices of assignments are simultaneous, the assignments will take priority according to their dates. See *Calisher* v. *Forbes*, 7 L. R. Ch. App. 109; there notice was given by one incumbrancer at a banker's and army agent's after the bank was closed, and notice was given by another incumbrancer on the following day as soon as the bank opened, the notices were treated as contemporaneous, and the incumbrances took effect according to their dates. See *In re Barr's Trusts*, 4 K. & J. 219; *In re Atkinson*, 2 De G. Mac. & G. 140; *Lloyd* v. *Banks*, 4 L. R. Eq. 222; *In re Brown's Trusts*, 5 L. R. Eq. 88. See, however, *Re Mary Coombe*, 1 Giff. 91.

Assignments of debts are not governed by the same rules as bills of exchange and promissory notes, so as to make it obligatory upon the assignee of a debt to

give notice to the assignor of non-payment by the debtor. See *Glyn* v. *Hood*, 1 De G. F. & Jo. 334. There Larpent, a partner in the firm of Bell and Co., retired from it, and shortly afterwards borrowed from the plaintiffs, Messrs. Glyn and Co., 20,000*l.* on his promissory note, payable on the 31st of May, 1848, and agreed, by way of collateral security, to give them a lien on his share of the assets of the partnership, which had not yet been ascertained and paid. In furtherance of this, Bell, one of the continuing partners, in July, 1847, at Larpent's request, and with the consent of the other continuing partners, gave the plaintiffs an order on Cockerell and Co., the agents of Bell and Co., directing them to pay to the plaintiffs, out of the funds of Bell and Co. in their hands, the sum of 5000*l.*, and engaged to pay to the plaintiffs the residue of Larpent's share. Cockerell and Co. had not at the time, nor afterwards, nearly so much as 5000*l.* of Bell and Co.'s money in their hands. In August, 1847, the plaintiffs presented the order to Cockerell and Co., *and were informed they had not funds to pay it.* The plaintiffs gave Bell no notice of this. In September, 1847, Cockerell and Co. became insolvent, without having paid any part of the 5000*l.* The promissory note was dishonoured. Bell died in February, 1849. The share of Larpent was finally ascertained in the year 1853, and Larpent died in March, 1855. In November, 1855, the plaintiffs filed this bill to enforce their lien. It was held by the Lords Justices of the Court of Appeal, that the equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange, and that, as the plaintiffs could not have obtained payment of the 5000*l.* from Cockerell and Co., they could not be charged with that sum. It was also held that the plaintiffs were not, under the circumstances, barred from relief by delay, there being no statutory bar, and that the loss occasioned by the failure of Cockerell and Co., having money of Bell and Co. in their hands, was to be treated as a loss of the new firm of Bell and Co., not affecting the share assigned to the plaintiffs.

It seems, however, that the assignee of a debt in such a case is chargeable for wilful default, as every mortgagee must be. Per Lord Justice *Turner*, *Glyn* v. *Hood*, 1 De G. F. & Jo. 309.

A mortgagee of a ship, being under the mortgage entitled to the freight as a chose in action (*Kerswill* v. *Bishop*, 2 C. & J. 529), is, by taking possession, or doing an act equivalent to taking possession, before the freight becomes payable, entitled to receive it as against the mortgagor or his assignees in bankruptcy: (*Rusden* v. *Pope*, 3

L. R. Ex. 269; *Wilson* v. *Wilson*, 14 L. R. Eq. 32), a judgment creditor (*Langton* v. *Horton*, 1 Hare, 549; 3 Beav. 464), or assignees for value. See the case of *Liverpool Marine Credit Company* v. *Wilson*, 7 L. R. Ch. App. 507, where it was held by the Lords Justices of the Court of Appeal that the first registered mortgagee of a ship, by taking possession of her before the freight was completely earned, obtained a legal right to receive the freight, and to retain thereout not only what was due on his first mortgage, but also the amount of any subsequent charge which he might have acquired on the freight, in priority of every equitable charge of which he had no notice; and that it was immaterial that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight.

So a mortgagee of ship and general freight taking possession of the ship before any freight has become payable from the charterers to the owners, has been held to be entitled to freight in priority of a subsequent particular assignee of freight, although he may have given notice of his assignment to the charterers before the mortgagee took possession of the ship: *Brown* v. *Tanner*, 3 L. R. Ch. App. 597, reversing *S. C.*, 2 L. R. Eq. 806. See also *Cato* v. *Irving*, 5 De G. & Sim. 210; *Wilson* v. *Wilson*, 14 L. R. Eq. 32; 20 W. R. (V. C. M) 436.

Where an assignee of a ship and cargo has done all in his power towards taking possession, he will not lose his priority. Thus in *Feltham* v. *Clark*, 1 De G. & Sm. 307, the owner of a vessel made a mortgage of it and of the cargo, in London, to the plaintiffs, whilst the vessel was on a whaling voyage to the South Seas, subject to two prior mortgages thereof, and the third mortgagees forthwith gave notice of their mortgages to the two prior incumbrancers. The master of the vessel afterwards putting into Sydney, transhipped the oil taken on the voyage to another vessel, consigned to consignees in London, who honoured his bill of exchange on them upon having a lien on the consignment. The mortgagor induced Dowers, one of the defendants, to advance him 1000*l.* on a mortgage of the cargo so transhipped, and consigned without notice of any other charge thereon, except the lien of the consignee. Dowers gave notice of his mortgage to the consignee. The plaintiffs, as soon as they knew of the consignment (but subsequent to Dowers' notice), gave notice to the consignee of the mortgage to them; and, after such notice, the consignee, after satisfying his own lien, paid over the balance of the proceeds of the oil to Dowers. It was held, by Sir *James Parker*, V. C., that the plaintiffs having done all they could do towards possession, were entitled to pri-

ority over Dowers. "The plaintiffs," said his Honor, "were not bound to send letters to meet the master wherever the vessel might possibly be; and it has not been shown that the plaintiffs could reasonably have been expected to do any act which they have not done: *Lex neminem cogit ad vana seu inutilia peragenda.* The consequence is, that the plaintiffs have done nothing to forfeit or lose their priority over the defendant Dowers." See also *Langton* v. *Horton*, 1 Hare, 549.

3. *When neglect to give notice brings the subject matter of the assignment within the operation of the reputed ownership clause of the Bankruptcy Act.*]—It was decided, in the principal case of *Ryall* v. *Rowles*, that *debts* are chattels, and are within the meaning of the statute (21 Jac. 1, c. 19, s. 11). The consequence is, that if they remained in the possession, order, and disposition of the bankrupt at the time of the bankruptcy they would pass to the assignees. Therefore, in order completely to divest the bankrupt of such debts, he must have done everything that was equivalent to a delivery of chattels personal; that is, of movable goods; and the Judges, at least one, Sir *Thomas Parker*, says, *that which is equivalent to delivery of movables, is, in the case of a debt, an assignment and delivery of the security* (if any), *and notice to the debtor of the assignment.* It might, perhaps, have been a question whether, after assignment and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition, merely *because there was no notice to the debtor of the assignment.* Probably, that requisite was added, as, otherwise, the debtor might safely pay the money to the person who had, without his knowledge, ceased to be his creditor. The debtor would be *bonâ fide* in making the payment; and it would be impossible to make him pay it again: per Sir *W. Grant*, M. R., in *Jones* v. *Gibbons*, 9 Ves. 410; and see *North* v. *Gurney*, 1 J. & H. 509; *Daniel* v. *Freeman*, 11 I. R. Eq. 233.

Accordingly, upon the same principle, on an assignment of a policy of assurance, it was held to be necessary to give notice to the insurance office, of the assignment, in order to take it out of the order and disposition of the assured; otherwise the assignment would not have been valid as against his assignees. See *Thompson* v. *Speirs*, 13 Sim. 469; *Waldron* v. *Sloper*, 1 Drew. 193.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), has, however, made an important change in the law of reputed ownership, by confining it to traders, and excluding from its operation all choses in action other than debts which have

become due to the bankrupt in the course of his trade. It is as follows. "The property of the bankrupt divisible amongst his creditors, and in this act referred to as the property of the bankrupt, shall (amongst other things), comprise the following particulars: — All goods and chattels being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, *being a trader*, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, *other than debts due to him in the course of his trade or business*, shall not be deemed goods and chattels within the meaning of this clause." (Sect. 15, art. 5.)

It was at one time supposed that a bankrupt's reversionary interest in a chose in action not falling into possession until after his bankruptcy was exempt from the rule as to order and disposition. See *In re Rawbone's Bequest*, 3 K. & J. 300; and see *Ex parte Hulme*, 3 Sm. & Giff. 325. Such interests, however, have been held to be within the rule. See *Bartlett* v. *Bartlett*, 1 De G. & J. 127. But see *Grainge* v. *Warner*, 13 W. R. (V. C. S.) 833.

It has been held that shares in a joint-stock company are not "things in action" within the proviso of sect. 15, subs. 5, of the Bankruptcy Act, 1869: see *Ex parte Union Bank of Manchester, In re Jackson*, 12 L. R. Eq. 354, there a debtor, a trader, deposited with a bank, the certificates of five shares in a gas company incorporated under 7 & 8 Vict. c. 110, to secure the balance of his account current. The bank gave no notice to the company of the deposit thus made. The debtor having become bankrupt, it was held by *Bacon*, C. J., that the shares were in the order and disposition of the bankrupt with the consent of the bank, being the true owner. "If," said his Lordship, "the intention of the framers of the act was to exclude from the operation of this subsection everything incapable of manual delivery, other and clearer terms would have been used. So large a change in the law should not have been made in so small a compass. *No action need be brought in respect of these shares. The owner's title depends upon the register.* He is competent to sell, part with, bequeath or give them away, as part of his estate. They are not things in action at all, but are as much the bankrupt's property as if they had been freehold estate. The 22nd section of the Bankruptcy Act, 1869, is not conclusive, but worthy of observation in the interpretation of the term 'things in action.' I wish it to be understood that I decide nothing

but that the shares in question are not 'things in action' within the meaning of sect. 15, subs. 5, of the Bankruptcy Act, 1869."

Although a debenture of a joint-stock company, by which the company undertake to pay a sum of money, with interest, and charge their undertaking and property with the payment thereof, is a chose in action, nevertheless since even when acquired by a trader who becomes bankrupt, it is not a debt due to him in the course of his trade, it will not come within the reputed ownership clause of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, sect. 15, subs. 5). See *In re Pryce, Ex parte Rensburg*, 4 Ch. D. 685, there a trader handed over as a security for a debt, a debenture of a joint-stock company endorsed in blank to the assignee who neglected to give notice to the company of the assignment until after the commission of the act of bankruptcy upon which the assignee was adjudicated bankrupt. It was held by *Bacon*, C.J., that the assignee of the debenture was entitled to retain it. "There can be no doubt," said his Lordship, "that when this paper was so handed to the creditor, and endorsed, the whole beneficial interest of the debtor in the debenture passed to him. Well, then, is this debenture a *chose in action*? There can be no doubt about it; it is that and nothing else. . . . . As to the argument, that because the bankrupt was a trader, the debenture was a debt due to him in the course of his trade, I am unable to follow it. The result of it would be that every investment made by a man engaged in trade would be a debt due to him in the course of his trade. The debenture has nothing to do with his trade. . . . . The debenture is a chose in action, and I am of opinion that the creditor is entitled to retain it."

It seems, that the Court, as heretofore, will make the order directing the goods and chattels to be sold, as being "in the possession, order or disposition" of the bankrupt; but the trial of the right to the goods and chattels, if disputed, may be before the Court either with or without a jury. Section 72 of the Bankruptcy Act, 1869. See Roche and Hazlitt's Bankruptcy Act, 1869, p. 14, n.

The question has been raised whether when a chose in action has once come within the operation of the order and disposition clause by reason of no notice having been given by the particular assignee of its assignment, the assignees or trustees in bankruptcy will lose their right to claim under that clause by their neglect to give notice, until after the particular assignee has done so—in other words, can a particular assignee of a chose in action take it out of the operation of the reputed ownership clause by giving notice after the bankruptcy

before the assignee or trustee in bankruptcy do so? See *Ex parte Caldwell, In re Currie*, 13 L. R. Eq. 188, there policies of assurance had been assigned to trustees, who did not give notice to the office until after the bankruptcy, but before any notice had been given by the assignee in bankruptcy, Sir *James Bacon*, C. J., was clearly of opinion that the assignee was entitled to the money due on the policy as having been *at the time of the bankruptcy* in the order and disposition of the bankrupt with the consent of the true owners; see also *In re Rawbone's Trusts*, 3 K. & J. 476; *In re Webb's Policy*, 15 W. R. (V. C. M.), 529. Sir *R. Malins*, V. C., however, takes a different view of the law upon this subject in the case of *Stuart* v. *Cockerell*, 8 L. R. Eq. 607; there Stuart, a tenant for life of a fund in Court assigned his interest by way of mortgage, and afterwards became bankrupt. The mortgagee, *after the bankruptcy*, obtained a stop order on the dividends. The assignee in bankruptcy did not obtain a stop order. Sir *R. Malins*, V. C., held that the mortgagee was entitled to priority over the assignee. "Upon the bankruptcy of Stuart," said his Honor, "the petitioners, who are assignees for value of his life interest in the fund in Court, having omitted to perfect their title by obtaining a stop order, that life interest vested in the assignee in bankruptcy. But I am of opinion that assignees in bankruptcy are in no better position than assignees for value, and that it is incumbent on them to perfect their title by giving notice, or obtaining a stop order, which is equivalent to notice, and therefore I held in *In re Brown's Trusts* (5 L. R. Eq. 88), that an assignee in insolvency who had omitted to give notice to the trustees of a fund in which the insolvent had a reversionary interest, must be postponed to a *subsequent* mortgagee who had given notice; here the petitioners, who are assignees prior in date to the bankruptcy, ought certainly to be in at least as good a position as the mortgagees in *In re Brown's Trusts*, who were subsequent to the insolvency, and as they have, and the assignee in bankruptcy has not, obtained a stop order, I must declare that they are entitled to priority over the assignee."

With great deference to the opinion of Sir *R. Malins*, the decision of Sir *James Bacon* seems to be right, inasmuch as the question, whether a fund is in the order and disposition of the bankrupt depends upon the fact whether notice has been given by the particular assignee before the bankruptcy, and cannot be affected afterwards by any omission on the part of the assignees or trustees in bankruptcy to give notice.

There appears to be no analogy

between the case of a particular assignee *antecedent* to bankruptcy giving notice after bankruptcy before the assignee in bankruptcy, and a particular assignee *subsequent* to bankruptcy giving notice before the assignee in bankruptcy. In the former case an Act of Parliament in effect vests the property assigned in the assignee in bankruptcy, because by the neglect of the particular assignee it has been left in the apparent ownership of the assignor. In the latter case the Court very properly gives priority to an assignee for value without notice subsequent to the bankruptcy, who has given notice before the assignee in bankruptcy does so, because the latter has left it in the power of the assignor to commit a fraud upon an innocent party. *In re Barr's Trusts*, 4 K. & J. 219, and cases there cited.

In the case of *In re Russell's Policy Trusts*, 15 L. R. Eq. 26, a policy effected by A. on his life was mortgaged in 1860 without notice to the office. A. became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to B., who had no notice of the bankruptcy. B.'s solicitor after the death of A., gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given to the office. It was held by Sir *R. Malins*, V. C., that this was sufficient to give priority to B. over the creditors in the bankruptcy, observing that the same point occurred in *Stuart* v. *Cockerell*, and that he adhered to that decision.

The case, however, of *In re Russell's Policy Trusts* may, perhaps, be supported upon totally different grounds to those upon which *Stuart* v. *Cockerell* proceeds; viz., that in the former case the assignment for value took place *after* the bankruptcy, and without notice of it, and the assignee or trustee in bankruptcy, by reason of his not having given notice, enabled the bankrupt and his particular assignee to commit a fraud, bringing the case, therefore, within the principle upon which *In re Barr's Trusts*, 4 K. & J. 219, and similar cases were decided.

As to the doctrine of reputed ownership before the Act of 1869, under the 125th Section of 12 & 13 Vict. c. 106, deriving its origin through other Acts from the 10th and 11th Sections of 21 Jac. 1, c. 19, referred to in the principal case of *Ryall* v. *Rowles*, see *Joy* v. *Campbell*, Tudor's L. C., M. L. 2nd ed. 446, and note.

4. *Priorities of equitable interests in land not affected by notice to trustees, when.*]—The doctrine of notice applicable in determining the priority of purchasers, or incumbrancers of choses in action, does not prevail as to equitable es-

tates or interests in land, whether freehold or leasehold: see *Jones* v. *Jones*, 8 Sim. 633; *Wilmot* v. *Pike*, 5 Hare, 14; *Peacock* v. *Burt*, Coote on Mortgages, 693; *Lee* v. *Howlett*, 2 K. & J. 531; *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; and see *Wiltshire* v. *Rabbits*, 14 Sim. 76. There a testator bequeathed a leasehold estate to trustees, upon trust, as therein mentioned; and first, he charged the estate with the payment of an annuity to his daughter during all his interest in the estate. The daughter afterwards mortgaged her annuity, first to A., and afterwards to B., but B. gave the trustees notice of his mortgage before A. did. It was held, by Sir *L. Shadwell*, V. C., that the annuity was not a chose in action, but a chattel interest, and that B. had not gained any priority over A.

Where, however, a person is equitably entitled to moneys secured on (*Daniel* v. *Freeman*, 11 I. R. Eq. 233) or to arise from the sale of (*Lee* v. *Howlett*, 2 K. & J. 531; *Foster* v. *Cockerell*, 3 C. & F. 456) real estate, or to a portion to be raised by trustees out of real estate by sale, mortgage, or otherwise (*Re Hughes' Trust*, 2 Hem. & Mill. 89), such person is not considered to have an interest in land, and the assignees of such moneys, in order to retain priority over subsequent assignees for value, must give notice to the trustees, and previous to the Bankruptcy Act, 1869, they were also required to give such notice to prevent the application of the doctrine of reputed ownership.

The registration of an assignment of a legacy charged upon land in a Register County is unnecessary, and will not postpone a prior unregistered assignment of the same legacy: *Malcolm* v. *Charlesworth*, 1 Kee. 63.

IV. *To whom notice should be given of an Assignment.*]—Notice of an assignment of personalty vested in trustees, or of debts, should as a general rule be given to all the trustees or debtors in writing.

Notice to one of several co-trustees or obligors is, it seems, sufficient notice as long as circumstances remain unaltered, because a subsequent incumbrancer ought to make inquiries from *all* the trustees; but it would not be sufficient on the death of that trustee or obligor, or his otherwise ceasing to continue a trustee: *Smith* v. *Smith*, 2 C. & M. 231; *Timson* v. *Ramsbottom*, 2 Kee. 35; *Meux* v. *Bell*, 1 Hare, 73; *Wise* v. *Wise*, 2 J. & L. 403; *Ex parte Hennessey*, 1 C. & L. 562; *Ex parte Rogers*, 8 De G. Mac. & G. 271; *Willes* v. *Greenhill*, 29 Beav. 387; 4 De G. F. & Jo. 147. And it is immaterial whether the notice be given to an acting or a non-acting trustee: *Smith* v. *Smith*, 2 Cr. & Mees. 233.

New trustees of a settlement

are not affected with notice of an assignment of the funds comprised in the settlement given to their predecessors, nor are they bound to inquire from them whether they have received notice of any incumbrance, and it has never been the practice of the Court of Chancery on appointing new trustees of funds to make such an inquiry: *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80. Hence if notice be given to all the trustees who afterwards die or retire, and new trustees are appointed, such trustees will not incur any liability if they distribute the trust funds before receiving any notice (*Phipps* v. *Lovegrove*, 16 L. R. Eq. 80), and a subsequent incumbrancer who gives notice to them will gain priority over a former incumbrancer who merely gave notice to their predecessors: see *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80; *Meux* v. *Bell*, 1 Hare, 97. Sed vide *Re Durand's Trusts*, 8 W. R. (L. C. & L. L. J.) 33; *Etty* v. *Bridges*, 2 Y. & C. C. C. 492; *Browne* v. *Savage*, 4 Drew. 635.

It follows, therefore, that assignees are not perfectly secure even when they give notice to all the trustees; but if they wish to be so they should obtain a *distringas* upon the funds, or have their deed endorsed on the original deed, or obtain a transfer of the funds into Court. *Phipps* v. *Lovegrove*, 16 L. R. Eq. 90. And see *London Chartered Bank of Australia* v. *Lempriere*, 4 L. R. P. C. C. 572.

Although as a general rule notice to one of several trustees is, with the limitations before mentioned, sufficient, yet where such one of the trustees is also a beneficiary, and assigns his beneficial interest in the trust fund to a stranger, the notice acquired by such trustee *as assignor* will not constitute notice to the trustees so as to prevail over subsequent incumbrances, it being the interest of such trustee *as assignor* to conceal the assignment; but where such trustee assigns his beneficial interest to one of his co-trustees, the notice which that co-trustee acquires as assignee constitutes during his life notice to the trustees, it not being his interest as assignee to conceal the assignment, and therefore it will prevail over subsequent incumbrancers with notice: *Browne* v. *Savage*, 4 Drew. 635; *Willes* v. *Greenhill*, 29 Beav. 376, 391; *Commissioners of Public Works* v. *Harby*, 23 Beav. 508; *Re Selby*, 8 De G. Mac. & G. 271. But see *Ex parte Stewart, In re Shelley*, 34 L. J. (Bk.) N. S. 6.

If the trustee is himself a person who has advanced money to a beneficiary, and has taken an equitable assignment, inasmuch as he could not give notice to himself, he will be entitled to priority over any person taking a subsequent assignment: *Elder* v. *Maclean*, 3 Jur. N. S. 284, *per Kindersley*, V. C.; *Assignees of Dunne* v. *Hibernian Joint Stock*

Co., 2 Ir. R. 821; *Phipps* v. *Lovegrove*, 16 L. R. Eq. 80. Sed vide *The Commissioners of Public Works* v. *Harby*, 23 Beav. 508; 26 L. J. N. S. (Ch.), 472; 3 Jur. N. S. 478.

Although notice should be given as early as possible, it is equally efficacious if it be given before another notice (*Meux* v. *Bell*, 1 Hare, 86; *Stocks* v. *Dobson*, 4 De G. M. & G. 17; *Browne* v. *Savage*, 5 Jur. N. S. 1020). A purchaser, moreover, from an assignee who has given no notice cannot object to the title, unless he can show some intermediate incumbrance, but the vendor ought to point out to him who have been the trustees from time to time, in order to enable the purchaser to ascertain whether there have or not been any intermediate incumbrances: *Hobson* v. *Bell*, 2 Beav. 17. If, however, evidence as to the persons who have been trustees is not produced, the title will be bad (*Ib.* p. 24); but time may be given to produce sufficient evidence, if the vendor thinks he can procure it. *Ib.* 25.

Notice by a subsequent incumbrancer to a person who may possibly become a trustee, before he was actually one, will be ineffectual to displace the priority of a former incumbrancer. Thus, in *Buller* v. *Plunkett*, 1 J. & H. 441, an officer in the army covenanted to assign to the trustees of a settlement any moneys which he might receive from the sale of his commission, and subsequently executed a second covenant to assign the same proceeds to another person who had no notice of the settlement. The second assignee gave the first notice to the army agent of the regiment, but the trustees also gave notice before the fund reached the army agent's hands. It was held by Sir *W. Page Wood*, V. C., that the trustees of the settlement had priority. "It was said," observed his Honor, "that the first notice was given by the mortgagee, but at that time there was no trustee. The army agent was a person who might sell the commission, and into whose hands the money might come, but it was a matter of uncertainty whether that would be so; and it would be carrying the doctrine of notice to trustees too far, to say that an incumbrancer who first gives notice to a person who is likely to become the holder of a fund shall thereby exclude the prior claim of other persons who are guilty of no negligence, and who, in fact, in the present case, themselves gave notice before the army agent had become a trustee of the fund. The earlier covenant, therefore, created a lien in priority to the mortgagee's claim; and, as both claimants had given notice before the fund had reached the hands of the stakeholder, that priority had not been displaced. See also *Webster* v. *Webster*, 31 Beav. 393; *Somer-*

set v. *Cox*, 33 Beav. 634; *Yates* v. *Cox*, 17 W. R. (M. R.) 20.

And where an equitable assignee gives notice before the fund comes into possession of a trustee as, for instance, an army agent, he will be postponed to a subsequent assignee, who has given notice after the fund has come into possession: *Somerset* v. *Cox*, 33 Beav. 634.

These cases arising out of sales of commissions, when they come to be examined, turn upon the fact that the notice was given to a mere possible agent before he was an actual agent—before the time at which he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question. See *Addison* v. *Cox*, 8 L. R. Ch. App. 79.

Where, however, notice is given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable, or is merely charged with the duty of making the payment, such notice will be good. Nor is it material whether the right to receive the money and the consequent obligation to pay it is, at the time when the notice is given, absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation existing at the time when the notice reaches him, to receive and pay over, or to pay over, if he has previously received, the fund out of which the debt is to be satisfied: see *Addison* v. *Cox*, 8 L. R. Ch. App. 76. There Lieutenant Pretor assigned the money to arise from the sale of his commission, first to the plaintiff Addison, and afterwards to the defendant Mountain, to secure sums of money advanced by them respectively. He obtained leave to sell out, and the two assignees gave to Cox & Co., the agents of the regiment, simultaneous notices of their incumbrances; 450*l.*, part of the money which Lieutenant Pretor would receive, came from a particular fund in the hands of Cox & Co., held by them subject to the directions of the Horse Guards. Six days after the notices had been given, a letter was sent from the Horse Guards, the purport of which was communicated by Cox & Co. to Lieutenant Pretor, requesting Cox & Co. to transfer 450*l.* from the fund to the officer. Addison then gave a second notice of his charge. Messrs. Cox & Son afterwards sent a form of receipt to Lieutenant Pretor, which was returned by him signed, before which the 450*l.* was not issuable by Cox & Co. Mountain *then gave a second notice*. Lord *Romilly*, M. R., holding that the 450*l.* was not held in trust for Lieutenant Pretor or his assigns until the receipt for it came into the possession of Cox & Co., held that the claim of Mountain, the second assignee,

ought to be allowed before that of Addison, the first assignee who had given notice before the relation of trustee and *cestui que* trust was established between Cox & Co. and Lieutenant Pretor (see 20 W. R. 853). But Lord *Selborne*, L. C., reversed his Lordship's decision, being of opinion that at the time when Addison gave his second notice, Cox & Co. were the proper persons to receive it. "The Crown," said his Lordship, "when the order was written and communicated to Lieutenant Pretor, had actually made what this Court considers a binding equitable assignment to Lieutenant Pretor of that portion of the reserve fund in Cox & Co.'s hands, which was requisite to pay the 450*l.*, and we have, as it seems to me, everything necessary to make Cox & Co., from that time forth, at all events, stakeholders of the agreed and appropriated fund for Lieutenant Pretor's payment. If that be so, there is an end of the case, because the notice was promptly given after that date, and was given first by the present plaintiff. I feel it, therefore, my duty to vary the order under appeal, and to make a decree in the appellant's favour, giving him the first charge, and he will add to his charge the costs of the appeal."

Notice of an assignment to the solicitor of trustees has been held sufficient: *Rickards* v. *Gledstanes*, 3 Giff. 298; *Willes* v. *Greenhill*, 29 Beav. 392; but see *Re Durand's Trusts*, 8 W. R. (L. C. & L. J.) 33.

The assignee in the case of the assignment of such things as shares in a public company, or of a policy of assurance, should give actual notice to the office of the company, for notice to a shareholder will not be held constructive notice to the company: *Thompson* v. *Speirs* (13 Sim. 469); *Re Thomas and William Styan*, 1 Ph. 105; *Thompson* v. *Tomkins*, 2 Drew. & Sm. 8; *Re Carew's Estate Act*, 31 Beav. 39; *Edwards* v. *Martin*, 1 L. R. Eq. 121.

Notice, however, of the assignment of shares when given to the secretary (*Ex parte Stright*, *In the matter of Eyles*, 1 Mont. 502; *Gale* v. *Lewis*, 9 Q. B. 730; 16 L. J. (Q. B.), 119; to a director and actuary (*Ex parte Watkins*, 1 Mont. & Ayr. 689; 4 D. & C. 87; sed vide *Ex parte Hennessey*, 1 C. & L. 559), or to a director and auditor (*Ex parte Waithman*, 4 D. & C. 412, sed vide *Ex parte Hennessey*, 1 C. & L. 559), has been held good.

But a mere casual mention thereof to a clerk in the office of the company has been held not to be constructive notice to the company in whose employ he is: *Ex parte Carbis*, 4 D. & C. 354; 1 Mont. & Ayr. 693, n.

As to the notice required to be given under the Policies Assurance Act, 1867, see post, pp. 806, 807.

Where funds assigned are affected by successive trusts, the

assignee ought to give notice of the assignment to the trustees having the control of the funds: see *Bridge* v. *Beadon*, 3 L. R. Eq. 664; there it was held that the priority of assignments of the equitable interest in personal estate settled upon such trusts as a person should appoint, and appointed by such person to trustees in trust for the assignor, depended upon priority of notice to the trustees of the original settlement, so long as the trust estate was under their control; consequently that a mortgagee of such interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees under the original settlement, was postponed to a subsequent mortgagee without notice of the prior mortgage, who gave notice to both sets of trustees.

Where stock standing in the names of trustees has been given as a specific legacy, and no assent has been given to it by the executor, notice to one of the trustees, not being an executor, is not sufficient to vest in the parties claiming by assignment from the legatee, that equitable possession of the fund which is required in order to postpone a subsequent incumbrancer, who has taken the precaution of giving such notice to the executor: *Holt* v. *Dewell*, 4 Hare, 447.

Where, by reason of the death of the person in whose name stock was standing, without legal representatives, there was no trustee to whom notice could be given, it was held, by Sir *J. L. Knight Bruce*, V. C., that a second incumbrancer, without notice of the first, by serving a note of *distringas* on the Bank of England, thereby obtained priority: *Etty* v. *Bridges*, 2 Y. & C. C. C. 486.

Where a fund is not in the hands of trustees but in Court, then a person taking an assignment of it should obtain a stop order, otherwise a subsequent assignee will gain priority by obtaining the first stop order (*Greening* v. *Beckford*, 5 Sim. 195; *Swayne* v. *Swayne*, 11 Beav. 463); although the person taking the first assignment be a trustee of the fund (*Elder* v. *Maclean*, 5 W. R. 447, 3 Jur. N. S. 283), but the order should be left at the Paymaster-General's office (*Waller* v. *Wildridge*, 3 Ir. Ch. Rep. 155).

A mere notice to the Paymaster-General of an assignment of funds in his hands is of no avail against a stop order afterwards obtained by a subsequent purchaser without notice: *Warburton* v. *Hill*, Kay, 470. See remarks on this case in *Haly* v. *Barry*, 3 L. R. Ch. App. 456, 457.

Where the mortgagee of a share of a fund in Court obtains a stop order, which in effect prevents the division of the fund without notice to him, and an order is subsequently made for the distribution of the fund, and the share of the mortgagor is

carried over to the account of him and his incumbrancers, a subsequent incumbrancer will not gain priority by obtaining a stop order on the share so carried over, because the Court would hold the fund as a trustee for the persons entitled thereto in the order of their priorities: *Lister* v. *Tidd*, 4 L. R. Eq. 462, 463.

Where, however, notice of an assignment has been given to trustees of a fund which is afterwards paid into Court, a subsequent assignee will not by obtaining a stop order gain priority over the first. Thus in *Livesey* v. *Harding*, 23 Beav. 141, a first incumbrancer on a reversionary legacy gave due notice to the trustees. A fund was afterwards brought into Court to provide for the legacy, and a second incumbrancer obtained the first stop order. It was held by Sir *John Romilly*, M. R., that he did not thereby obtain priority over the first incumbrancer. "It has been contended," said his Honor, "that when a fund is paid into Court, the first person who obtained a stop order obtained a priority. Without disputing this, as a general proposition, it does not apply to the case. Due notice was given to the trustees before the suit was instituted, and *Brearcliff* v. *Dorrington* (4 De G. & Sm. 122) proves, that in such a case the order in which the stop orders are obtained does not affect the prior incumbrancer, who had given due notice of his security." See also *In re Atkinson*, 2 De G. Mac. & G. 140.

Although in general where a fund is in Court, a stop order should be obtained by the assignee to take it out of the order and disposition of the assignor (*Bartlett* v. *Bartlett*, 1 De G. & J. 127), notice to an executor of an assignment of a fund, part of his testator's estate, paid into Court in a suit for the administration of the estate, or under the "Trustee Relief Act," will be sufficient for that purpose without a stop order: *Thompson* v. *Tomkins*, 2 Drew. & Sm. 8; *Day* v. *Day*, 1 De G. & Jo. 144. If indeed any subsequent incumbrancer gets a stop order before such notice is given, such stop order takes priority: *Per Kindersley*, V. C., in *Thompson* v. *Tomkins*, 2 Drew. & Sm. 20.

But the notice given to the executor is good for all portions of the testator's estate, as against all persons becoming incumbrancers after such notice was given. *Ib.*

The only proper effect of a stop order, whether general or particular, is confined to the amount on which the order is founded, and does not extend further. Thus, in *Macleod* v. *Buchanan*, 33 Beav. 234, A. purchased of X. one-seventh part of a fund in Court, and obtained a general stop order on the whole fund. A. afterwards purchased another one-seventh of Y., but obtained no further stop order. Y. subsequently mortgaged to B. for a

pre-existing debt the one-seventh which he had already sold and assigned, and two years afterwards B. obtained a stop order on Y.'s share. It was held by Sir *John Romilly*, M. R., whose order was on appeal affirmed by the Lords Justices (4 De G. Jo. & Sm. 265) that B. had priority over A. in respect of Y.'s share.

Although it is obviously better to give a written notice, parol notice is sufficient (*Smith* v. *Smith*, 2 Cr. & M. 231; *Ex parte Carbis*, 4 D. & C. 357; *Browne* v. *Savage*, 4 Drew. 640; *Re Tichener*, 35 Beav. 317); but a statement made in a mere casual conversation is not so: *Re Tichener*, 35 Beav. 317; *In re Brown's Trusts*, 5 L. R. Eq. 88.

It seems, however, that although a general notice of a charge without specifying the amount will be sufficient (21 Beav. 434), and that a mere mistake in the description of the fund, if there is no doubt as to its being intended, will not render the notice void as against a subsequent purchaser, the Court will not allow the former assignment to stand as a security against him beyond the sum mentioned in the notice: *Woodburn* v. *Grant*, 22 Beav. 483; and see *Re Bright's Trust*, 21 Beav. 430, in which case it was held that where two charges on a chose in action were contained in one deed, and a notice was given to the trustees which specified one only; the trustees had not constructive notice of the contents of the deed, so that notice of both the charges was to be imputed to them.

It may be here mentioned that a purchaser or incumbrancer who has notice of a former assignment for value cannot gain priority either by giving notice to trustees or by obtaining a stop order: *Warburton* v. *Hill*, Kay, 470.

V. *Rights and remedies of an assignee under an equitable assignment.*] — Where the assignment is of a *chose in action in equity*, the assignee could sue for it in his own name in the Court of Chancery.

Where the assignment was of *legal choses in action*, the Courts of Law have for a long time allowed the assignee to sue in the name of the assignor: *Winch* v. *Keeley*, 1 T. R. 619; *De Pothonier* v. *De Mattos*, Ell. Bl. & Ell. 467. See *Master* v. *Buller*, 4 T. R. 340. It is true that if the debtor assented to the transfer of a debt, an action might be brought at law against him by the assignee, on the implied promise to pay (*Israel* v. *Douglas*, 1 H. Black. 239; *Baron* v. *Husband*, 4 B. & Ad. 611; and see Addison on Contracts, 821, 6th ed.); but if he did not, it could only be brought in the name of the assignor, though in equity, as has been before shown, the assent of the debtor, in the case of the assignment of an equitable chose

in action, was not required, and proceedings might be there taken by the assignee in his own name. *Ib.*

The Court of Equity, however, would interfere with its assistance if the assignor refused to allow the assignee to use his name or obstructed him when doing so. *Hammond* v. *Messenger*, 9 Sim. 327—332.

But it was decided in equity that, if a bill were filed in a simple case, where the plaintiff had obtained from a person to whom a debt was due, a right to sue in his name for the debt, a demurrer would be allowed, unless it was alleged that the assignor refused his name to be used, or obstructed proceedings against the debtor. And in *Hammond* v. *Messenger*, 9 Sim. 327, where there was no such allegation, Sir *L. Shadwell*, V. C., observed that it was quite new to him that, in such a simple case as that, the Court allowed, in the first instance, a bill to be filed against a debtor, by the person who had become the assignee of the debt. But his Honor added, "I admit that, *if special circumstances are stated*, and it is represented that, notwithstanding the right which the assignee has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, a Court of equity will interfere, for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, the Court has jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor." See also *Keys* v. *Williams*, 3 Y. & C. Exch. Ca. 466; *Rose* v. *Clarke*, 1 Y. & C. C. C. 534.

When a debtor had received notice of an equitable assignment of the debt, he was bound to pay the debt to the assignee, although the assignor might have commenced proceedings against him at law to recover it, and although the equitable assignee refused to indemnify him on receiving payment: *Jones* v. *Farrell*, 1 De G. & Jo. 208; and see *Hutchinson* v. *Heyworth*, 9 Ad. & Ell. 375. Secus, where an equitable assignment relating to real property was invalid by the law of the country where the property was situated: *Sichel* v. *Raphael*, 34 L. J. (N. S.) Ch. 106; 10 Jur. N. S. 1165.

VI. *Liabilities of assignee of a chose in action in taking it subject to equities.*]—The assignee of a chose in action, whether it be a debt or an obligation, or a trust fund, although without notice, in general takes it subject to all the equities which subsist against it. Thus, in the case of *Turton* v. *Benson*, 1 P. Wms. 496, where a son on his marriage was to have 3000*l.* portion with his wife, and

privately, without notice to his parents, who treated for the marriage, gave a bond to the wife's father to pay back 1000*l.* of the portion seven years after; the bond was afterwards assigned for the benefit of creditors, it was held, by Sir *Joseph Jekyll*, M. R., and on appeal, by Lord *Macclesfield*, that the bond, being void in equity, it would not be made better by the assignment. See *S. C.*, 2 Vern. 764; *Coles* v. *Jones*, 2 Vern. 692; *Davies* v. *Austen*, 1 Ves. jun. 247; *Hamil* v. *Stokes*, 4 Price, 161; *Priddy* v. *Rose*, 3 Mer. 86; *Molloy* v. *French*, 13 Ir. Eq. Rep. 261; *Dibbs* v. *Goren*, 11 Beav. 483; *Houlditch* v. *Wallace*, 5 C. & F. 629; *Ward* v. *Ward*, 4 Ir. Ch. Rep. 215, 220; *Cockell* v. *Taylor*, 15 Beav. 103; *Smith* v. *Parkes*, 16 Beav. 115; *Rolt* v. *White*, 31 Beav. 520; *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294; *Graham* v. *Johnson*, 8 L. R. Eq. 36.

So, an assignee of a company's debenture takes subject to all equities subsisting between the assignor and the company at the date of the assignment. Thus, a shareholder of a company, after it has commenced to be wound up, can only assign a debenture of the company subject to a right of set-off by the company of all calls which may be made subsequently to the assignment and previously to the payment of the debt due on the debenture: *In re China Steamship Company*, *Ex parte Mackenzie*, 7 L. R. Eq. 240; *In re Natal Investment Company*, 3 L. R. Ch. App. 355; *Dickson* v. *Swansea Vale Railway Company*, 4 L. R. Q. B. 44.

So, if a man assigns over a satisfied bond as a security for a just debt, the assignee could not set up the bond in equity, which, being satisfied before, could receive no new force from the assignment: *Turton* v. *Benson*, 1 P. Wms. 497.

Upon the same principle an assignee of money to arise under a contract will only be entitled to it subject to the conditions of the contract: see *Tooth* v. *Hallett*, 4 L. R. Ch. App. 242, there a builder assigned to Tooth 200*l.* of what should be coming to him under a building contract with Hallett and Abbey. The contract provided that the building should be finished by a certain day, and if not, that Hallett and Abbey might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterwards the builder executed a creditors' deed. The trustee of this deed, Mr. Woolett, completed the building with his own money, and was repaid by Hallett and Abbey. Allowing this repayment as proper, nothing remained due on the contract. Tooth then filed his bill to enforce payment of the 200*l.* It was held by the Lords Justices, affirming the decision of Sir *R. Malins*, V. C., that the

payments by Woolett, the trustee, were proper, and that the bill ought to be dismissed with costs. "Under the circumstances which existed," said Lord Justice *Gifford*, "nothing at all could be coming to the assignor from the contract. It is not, I think, carrying the principle of the cases of *Myers* v. *United Guarantee and Light Assurance Company* (7 D. M. & G. 112), and *Bristow* v. *Whitmore* (9 Ho. Lo. Ca. 391), too far to apply it to the present case."

And if a creditor assigns over a debt which has been partially satisfied, the assignee, although without notice, will take subject to the state of accounts at the date of the assignment (*Ord* v. *White*, 3 Beav. 357; *Smith* v. *Parkes*, 16 Beav. 115; *Rolt* v. *White*, 31 Beav. 520), and if the assignee does not give notice of the assignment to the debtor, he will be obliged to allow the payments which the debtor subsequently makes to the creditor: *Norrish* v. *Marshall*, 5 Madd. 475; *Stocks* v. *Dobson*, 4 De G. M. & G. 11.

Upon the same principle the assignees for value without notice of a residuary estate in Court in a suit in which it has been certified that all debts have been paid, will take subject to the claims of other creditors, coming in and establishing their right to prove. See *Hooper* v. *Smart*, 1 Ch. D. 90, there in an administration suit all the certified debts were paid, and the residuary legatees were declared entitled to the estate of the testator subject to an annuity, to provide for which a fund was retained in Court to the credit of the cause. The fund in Court was assigned for value by the residuary legatees, and stop orders were obtained by the assignees. Afterwards other creditors of the testator established their claims in another suit, to which the executor of the testator and the residuary legatees were parties. It was held by Sir *Charles Hall*, V. C., that these creditors were entitled to payment out of the fund in Court in priority to the assignees of the residuary legatees. "The persons," said his Lordship, "taking for value, as purchasers, under residuary legatees, must be held to take the interests so acquired by purchase, subject to the rights and interests of those creditors who may come in according to the general rule of the Court and establish the right to payment of their debts, so long as any fund remains available for that purpose. . . . . This fund remains in Court and the purchasers took subject to the risk that other claims might be brought in and established. They took only as purchasers and transferees of *choses in action*, and such purchasers and transferees are always exposed to great risk. They have been held to take subject to making good a breach of trust by a trustee, the vendor, al-

though the breach of trust was subsequent to the purchase. So long as a fund remains in Court, it is available for payment of the creditors' debt, and that being so, the contention in this case on behalf of the purchasers fails."

So, if a trustee or executor assign a beneficial interest he may have taken under the will or trust, the assignee takes it subject to the equities which attached to the assignor; and therefore, if the latter, whether previously or subsequently to the assignment, commits a breach of trust whereby a debt becomes due to the estate, the assignee cannot claim the beneficial interest till he has satisfied the debt: *Morris* v. *Livie*, 1 Y. & C. C. C. 380; *Barnett* v. *Sheffield*, 1 De G. Mac. & G. 371; *Wilkins* v. *Sibley*, 4 Giff. 442.

The result is otherwise where the assignor became executor or trustee after the assignment took place, for in such case no equity arises in respect of a debt subsequently incurred: *Irby* v. *Irby*, 25 Beav. 632, or where the doctrine relative to a purchaser for value without notice is applicable. Thus where a person seised in trust for himself and another person as tenants in common in fee, retains the entire rents, the debt arising in favour of the co-tenant, will not be charged on the trustee's beneficial interest as against a purchaser without notice from him: *British Mutual Investment Company* v. *Smart*, 10 L. R. Ch. App. 567.

When a trustee or executor receives notice that a legatee has charged his legacy in favour of a stranger, the trustee is bound to withhold all further payments to that legatee, unless made with the consent of the mortgagee of the legacy: *Stephens* v. *Venables*, 30 Beav. 627.

Where a cestui que trust is indebted to the estate by reason of his having profited by a breach of trust, an assignee for value of his beneficial interests will take it, subject to the equity of making good the breach of trust by which the assignor has profited: *Priddy* v. *Rose*, 3 Mer. 86; *Willes* v. *Greenhill* (No. 1), 29 Beav. 376; *Stephens* v. *Venables* (No. 1), 30 Beav. 625. The assignee, moreover, of a chose in action as a bond, will take it subject to any right of set-off which the obligor had against the assignor. See *Cavendish* v. *Geaves*, 24 Beav. 163, 173. But after the assignee has given notice of the assignment the trustee or obligee can, as against the assignee, create no new charge or right of set-off: *Stephens* v. *Venables*, 30 Beav. 625, 627; *Willes* v. *Greenhill*, 29 Beav. 376; *Cavendish* v. *Geaves*, 24 Beav. 163, 173; *Moore* v. *Jervis*, 2 Coll. 60.

Where a trustee of a fund has himself a charge upon it, he is, it seems, in the absence of inquiry, under no obligation to communicate that charge to a person who gives him notice of a subsequent

charge, nor will he by omitting to do so lose his priority: *In re Lewer*, 4 Ch. D. 101, 104.

Although the rule generally holds good, that whoever takes an assignment of a chose in action, takes it subject to all its equities; it has been held that the rule must yield where a contrary intention appears from the nature or in the terms of the contract: *In re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *In re Blakely Ordnance Company*, 3 L. R. Ch. App. 154.

Moreover, any person may release those equities who is entitled to the benefit of them, and he may do so, either positively by words, in writing, or by the whole course of his conduct: *In re Northern Assam Tea Company*, 10 L. R. Eq. 458, 463; *In re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *Higgs* v. *The Northern Assam Tea Company*, 4 L. R. Ex. 387; *In re General Estates Company, Ex parte City Bank*, 3 L. R. Ch. App. 758; *In re Blakely Ordnance Company*, 3 L. R. Ch. App. 154; *In re Hercules Insurance Co.*, 19 L. R. Eq. 303.

And parties entitled to equities may lose their right to enforce them against the assignee, by neglecting to give him timely notice of any fact to which they have been accessory, tending to mislead him as to the real interest of the assignor: see *Mangles* v. *Dixon*, 1 Mac. & G. 437; 1 Hall & T. 542, which case however was reversed by the House of Lords, 3 H. L. Cas. 702.

An exception to the rule also occurs in the case of negotiable instruments, as promissory notes (*In re General Estates Company, Ex parte City Bank*, 3 L. R. Ch. App. 758), an endorsed bill of lading (*Rodger* v. *The Comptoir d'Escompte de Paris*, 2 L. R. P. C. 405; *The Chartered Bank of India, Australia, and China* v. *Henderson*, 5 L. R. P. C. 501), or bills of exchange. Thus, in an anonymous case, Com. Rep. 43; 2 Eq. Ca. Abr. 85, pl. 3, it was held by Lord Keeper *Somers*, that a drawer of a bill of exchange, though given without consideration, was not entitled to relief against a third person, to whom it was assigned for an honest debt; the Lord Keeper observing, that he would not give relief, "because it would tend to destroy trade, which is carried on everywhere by means of bills of exchange, and he would not lessen an honest creditor's security."

And it has moreover been held that the title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bonâ fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security be payable at a future time or on demand: *Currie* v. *Misa*, 10 L. R. Ex. 153.

Although a bond may be given with the intention that it is to

be used as a negotiable instrument, an assignee, for value of such bond, will take it subject to all its equities, if such intention do not appear upon the face of the bond: *Graham* v. *Johnson*, 8 L. R. Eq. 36; *Crouch* v. *Credit Foncier of England*, 8 L. R. Q. B. 374.

The indorsee of an overdue bill of exchange or note takes it subject to all equities attaching to the bill or note itself: see *Holmes* v. *Kidd*, 3 H. & N. 891, there the acceptor had accepted a bill of 300*l*., depositing with the drawer certain canvas, which he was to be at liberty to sell as the means of providing for the bill. The bill was indorsed when overdue to the plaintiff, and afterwards the canvas was sold by the drawer, but did not wholly pay the bill. The question was whether the indorsee could recover. Mr. Justice *Erle* said: "The question is, whether the receipt of the money by the drawer is a bar to this action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency."

So, in *Cook* v. *Lister*, 13 C. B. (N. S.), 543, it was decided that the actual payment of an accommodation bill was an equity attaching to the bill itself, and therefore a good defence to an action against the acceptor. See also the recent case of *In re European Bank*, 5 L. R. Ch. App. 358. There, D. Pappa, the manager of the Oriental Commercial Bank, abstracted monies of the bank, and bought with them, on the 21st March, 1867, certain overdue bills of exchange. On the 4th of April, 1867, the Eastern Commercial Bank, promoted by D. Pappa, was registered, of which, till July in that year, D. Pappa, was the sole director. On the 6th of April, 1867, D. Pappa sold these bills to the Eastern Commercial Bank, and paid himself for them out of their funds. The Eastern Commercial Bank were still the holders. The bills having been proved against the European Bank, on which they were drawn, it was held by Lord Justice *Giffard*, first, that the Eastern Commercial Company were not affected with notice of the title of the Oriental Commercial Bank through the knowledge of D. Pappa, inasmuch as he could not be taken to have disclosed to that bank his own fraud; secondly, that the claim of the Oriental Commercial Bank to the bills, as having been purchased with their money, was an equity attaching to the bills; that the Eastern Commercial Bank, having purchased them when overdue, took subject to this equity, and that the Oriental Commercial Bank was entitled to the benefit of the proof. "The want of

notice," said his Lordship, "is not conclusive in this case. The bills were overdue when the Eastern Commercial Bank took them, there were equities affecting the bills, and the Eastern Commercial Bank has no better title, either legal or equitable, than D. Pappa had. The law on this subject cannot be better stated than is done by Vice-Chancellor *Malins* in his judgment in *Ex parte Swan*, 6 L. R. Eq. 359, 360."

But equities to affect an indorsee of an overdue bill must be such as attach to the bill itself, and not claims arising out of collateral matters such as the statutory right of set-off: *Sturtevant* v. *Ford*, 4 Man. & G. 101; *Oulds* v. *Harrison*, 10 Ex. 572; *Burrough* v. *Moss*, 10 B. & C. 558; and the important decision of Sir *R. Malins*, V. C., *In re Overend, Gurney, & Co., Ex parte Swan*, 6 L. R. Eq. 344.

Where a person receives a bill of exchange unindorsed (though for value) he acquires no better title under it than the person from whom he receives it himself has. Thus where A. had fraudulently obtained a bill or cheque, *payable to order*, from B., and handed it to C. in satisfaction of a bonâ fide debt, but without indorsing it, it was held by the Court of Common Pleas that C. could not acquire a legal title to sue upon the instrument by obtaining A.'s indorsement after he had notice of the fraud: *Whistler* v. *Forster*, 14 C. B. (N. S.) 248.

It seems that as bonds are within the equity of the statute 5 & 6 Will. 4, c. 41 (partially repealed by 37 & 38 Vict. c. 35), which makes securities valid in the hands of bonâ fide holders without notice of a gambling debt, the obligor will not be able to object to a bond assigned for valuable consideration without notice, that it was given to secure money lost by a wager on a horse race: *Hawker* v. *Hallewell*, 3 Sm. & Giff. 194.

In equity, the transfer of goods for valuable consideration, by a consignee, for a limited purpose, does not destroy the consignor's right of stoppage in transitu, ultra the particular lien of the transferree. Thus, in *Spalding* v. *Ruding*, 6 Beav. 376, A. consigned goods to the value of 1800*l.* to B., who transferred the bill of lading to C. to secure 1000*l.* B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title, to stop in transitu, a right to retain the whole, in satisfaction of a general balance due to him from B. It was held by Lord *Langdale*, M. R., first, that he was not entitled beyond the 1000*l.*; and, secondly, that A.'s remedy against C. for the surplus was in equity. See *S. C.* affirmed by Lord *Lyndhurst*, 15 L. J. Ch. 374; *Berndtstone* v. *Strang*, 4 L. R. Eq. 481; and *Meyerstein* v. *Barber*, 2 L. R. C. P. 38, 53; 2 L. R. C. P. (Ex.

C.) 661; *Latham* v. *Chartered Bank of India*, 17 L. R. Eq. 205.

And the lien of a solicitor for his costs on a fund recovered by his exertions, cannot be affected by an assignment of the fund made by the client, nor by a stop order obtained by the assignee: *Haynes* v. *Cooper*, 33 Beav. 431.

VII. *Choses in action how far made by statute assignable.*]—It has been before stated generally what choses in action have been made assignable at law. The earlier statutes it is unnecessary again further to refer. It may, however, be useful to state more fully the recent legislation upon the subject.

By the Policies Assurance Act, 1867 (30 & 31 Vict. c. 144), it is enacted that "any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for monies thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such monies" (sect. 1).

"No assignment made after the passing of this Act shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England, Scotland, or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment bonâ fide made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed" (sect. 3).

"Every assurance company shall on every policy issued by them after the 30th of September, 1867, specify their principal place or principal places of business at which notices of assignment may be given in pursuance of this Act" (sect. 4).

"Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case

of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and every such written acknowledgment, if signed by a person being de jure or de facto the manager, secretary, treasurer, or other principal officer of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurance company of their having duly received the notice to which such acknowledgment relates" (sect. 6).

And it is provided "that this Act shall not apply to any policy of assurance granted or to be granted or to any contract for a payment on death entered into or to be entered into in pursuance of the provisions of 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, or either of those Acts, or to any engagement for payment on death by any friendly society" (sect. 8). See *The Scottish Amicable Life Assurance Society* v. *Fuller*, 2 I. R. Eq. 53.

By the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), it is enacted that "whenever a policy of assurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name" . . . (sect. 1).

It has been recently decided that under this Act a policy of marine assurance can be assigned, after loss, so as to entitle the assignee to sue upon it in his own name: *Lloyd* v. *Fleming*, *Lloyd* v. *Spence*, 7 L. R. Q. B. 299.

But it cannot be assigned after the interest of the assignor has ceased by a delivery of the cargo to the purchaser (*North of England Oil Cake Company* v. *Archangel Insurance Company*, 10 L. R. Q. B. 249, 253), unless there had been an agreement to assign the policy before such interest ceased: *Ib.* 254, per *Lush*, J.

And by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), it has been enacted that, "Where any portion of the property of the bankrupt consists of stocks, shares in ships, shares or any other property transferable in the books of any company, office, or person, the right to transfer such property shall be absolutely vested in the trustee to the same extent as the bankrupt might have exercised the same if he had not become bankrupt. . . . . Where any portion of the property of the bankrupt consists of things in action, any action, suit, or other proceeding for the recovery of such things instituted by the trustee shall be instituted in his official name, as in this Act

provided; and such things shall for the purpose of such action, suit, or other proceeding, be deemed to be assignable in law, and to have been duly assigned to the trustee in his official capacity" (sect. 22).

It may be here mentioned that under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, the equitable assignee of a debt can present a petition against the debtor without joining the assignor as a co-petitioner: *Ex parte Cooper, In re Baillie,* 20 L. R. Eq. 762.

By "The Supreme Court of Judicature Act, 1873," 36 & 37 Vict c. 66, sect. 25, subsect. 6, it is enacted that "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other *legal* chose in action, of which *express notice* in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities, which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

It will be observed that in order to constitute a legal assignment under the 25th section, subsect. 6, it must, 1st, be an *absolute* assignment not purporting to be by way of charge only. 2ndly, the subject matter of the assignment must be of any debt or other legal chose in action. 3rdly, express notice *in writing* of the assignment must have been given by the assignor.

Now, unless these three requisites concur, it seems that the assignment will remain as before purely equitable.

The mode of determining any conflicting claims to the debt or legal chose in action assigned, is pointed out by a proviso of subsection 6, by which it is enacted "that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees" (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74).

The Trustees' Relief Acts, until extended by the 6th subsection of section 25 of the Judicature Act, 1873, did not enable an assurance society having notice of conflicting claims to pay policy monies into Court, unless the monies were the subject of a trust (*In re Haycock's Policy*, 1 Ch. D. 611), but that objection could not be entertained on a petition praying payment out of Court of monies so paid in. (*Ib*).

VIII. *What Assignments are contrary to Public Policy, and herein of Champerty and Maintenance.*] —As in the case of agreements, a Court of equity upon the ground of public policy, will not give effect to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of its duties. Thus the half-pay or full-pay of an officer in the army (*Stone* v. *Lidderdale*, 9 Anst. 533; *M'Carthy* v. *Goold*, 1 Ball & B. 389; *Collyer* v. *Falton*, T. & R. 459, 474; *Priddy* v. *Rose*, 3 Mer. 102); the salary of an assistant parliamentary counsel for the Treasury (*Cooper* v. *Reilly*, 2 Sim. 560); and of a clerk of the peace (*Palmer* v. *Bate*, 6 Moore, 28; 2 Brod. & Bing. 673), have been held not assignable. See also *Hill* v. *Paul*, 8 C. & F. 295. And the assignment by a retired military officer of his pension, though for valuable consideration, is void, under 47 Geo. 3, c. 25 (*Lloyd* v. *Cheetham*, 3 Giff. 171); but that Act does not apply to a pension granted by the late East India Company: *Heald* v. *Hay*, 3 Giff. 467; *Carew* v. *Cooper*, 4 Giff. 619; 12 W. R. 586, where the Lords Justices differed in opinion. So the pension of a retired officer of the Indian navy for past services has been held liable to sequestration: *Dent* v. *Dent*, 1 L. R. P. & D. 366. And a pension of a retired officer of the army in consideration of wounds seems to have been held to be assignable: *Knight* v. *Bulkeley*, 27 L. J. N. S., Ch. 592.

Upon the same principle, the salary of a judge, given to him for the support of the dignity of his office, would not be assignable. This seems to have been taken for granted in the case of *Arbuthnot* v. *Norton*, 5 Moore, P. C. C. 219, which case, however, was held not to fall within the principles before laid down. There Sir John Norton, a puisne judge of the Supreme Court at Madras, assigned a sum "equal to the amount of six months' salary," directed by 6 Geo. 4, c. 85, to be paid to the "legal personal representatives" of such judge, in case he shall die in and after six months' possession of office. It was held by the Judicial Committee of the Privy Council, that the assignment was valid, not being within the 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126. "In

giving this opinion," said Dr. *Lushington*, P. C., "we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public offices; on the contrary, we acknowledge the soundness of the principles which govern those cases, but we think that this case does not fall within any of those principles; and we think so, because this is not a sum of money which, *at any time during the lifetime* of Sir John Norton could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with decorum and propriety the high rank of life in which he was placed in India. We do not see any of the evils, which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this sum, inasmuch as during his lifetime his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were."

In *Davis* v. *Duke of Marlborough*, 1 Swanst. 74, it was held by Lord *Eldon*, that the pension granted by 5 Ann. c. 4, "for the more honourable support of the dignities" of the Duke of Marlborough and his posterity, payable out of the revenues of the Post-office, was inalienable. "In that case," observes Lord *Langdale*, M. R., in *Grenfell* v. *The Dean and Canons of Windsor*, 2 Beav. 550, "the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely for having a perpetual memorial of national gratitude for public services, would be entirely lost; and so, in the course of that case, Lord *Eldon* said, in allusion to the pension of a great public officer, that it could not be aliened because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office."

In the principal case of *Row* v. *Dawson*, Lord *Hardwicke* entertained jurisdiction on the ground that the officer admitted the money to be in his hands for the use of the person under whom the litigating parties made their claim: *Priddy* v. *Rose*, 3 Mer. 103.

But, where no particular services are to be rendered to the public, an assignment of an interest or pension, though derived from the Crown or the public, will be supported. Thus, in *Alexander* v. *The Duke of Wellington*, 2 Russ. & My. 35, it was held, that prize-money was assignable in equity before any interest had vested by grant from the Crown. And in *Tunstall* v. *Boothby*, 10 Sim. 542, a pension granted by Government in compensation for the loss of a place in the Customs, was held

assignable. In *Feistel* v. *King's College, Cambridge,* 10 Beav. 491, Lord *Langdale* held, that an assignment of the emoluments of a fellow of a college in the university was valid, and gave effect to the security thereon, out of the dividends apportioned to such fellow, from time to time in respect of his fellowship. Sir *L. Shadwell,* V. C., seems, however, to have come to a different conclusion in *Berkeley* v. *King's College,* cited 10 Beav. 499. In *Grenfell* v. *The Dean and Canons of Windsor,* 2 Beav. 544, a canon of Windsor granted the canonry profits and emoluments thereof to secure a sum of money. There was no cure of souls, and the only duties were residence within the Castle, and attendance in the chapel, twenty-one days in the year. Lord *Langdale,* M. R., held that the security was valid, and appointed a receiver of the profits. "If," said his Lordship, "in this case the residence in Windsor Castle, and the attendance on divine service had been stated in the answer, or in any way shown to be for the benefit of the public, or for the maintenance of the dignity of the sovereign, I should have thought the case worthy of a very different consideration... But from all which is stated in this answer, that is not the case: it is a service to be performed for the benefit of the party himself; and, therefore, upon the case as it now stands upon this answer, and without saying that there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiff is valid." It appears that, in *Butcher* v. *Musgrove,* 2 Beav. 550, n., being an action by another mortgagee, the Court of Common Pleas, on the 23rd June, 1840, decided that an action of ejectment would not lie for the canonry in question, it being a mere office of which the sheriff could not give possession; and that ejectment did not lie for the residentiary house in which the canon resided, as it appeared to be vested in the Corporation, and not in the canon.

It may be here mentioned that under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 134, a portion of the pay, half-pay, salary or pension, of a bankrupt was applicable for his creditors. This Act has been repealed by 32 & 33 Vict. c. 83; and somewhat similar provisions have been re-enacted in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, ss. 89, 90). See Robson on Bankruptcy, 332, 333, 334, 335.

An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor might thereafter acquire of a like nature to the patent sold, is not contrary to public policy: *Printing and Numerical Registering Company* v. *Sampson,* 19 L. R. Eq. 462.

Courts of equity will not give

effect to assignments which partake of the nature of champerty or maintenance. Thus, in *Stevens* v. *Bagwell*, 15 Ves. 139, one-fifth part of the share of prize-money, the subject of a suit *then depending* in the Admiralty Court, was assigned by the executrix of one of the captors, and her husband, to Navy agents, in consideration of their indemnifying them from all costs on account of any suit touching the said prize-money, and paying to them the remaining four-fifths, if it should be recovered; it was held by Sir *W. Grant*, M. R., that the assignment was void, as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it; and see *Skapholme* v. *Hart*, Ca. t. Finch, 477; *Strachan* v. *Brander*, 1 Eden, 303; *Wood* v. *Downes*, 18 Ves. 120, 123; *Stone* v. *Yea*, Jac. 426; *Bayly* v. *Tyrrell*, 2 Ball & B. 362; *Conry* v. *Caulfield*, 2 Ball & B. 268; and see *Earle* v. *Hopwood*, 9 C. B. (N. S.) 566; *Hutley* v. *Hutley*, 8 L. R. Q. B. 112.

And the purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity: *De Hoghton* v. *Money*, 2 L. R. Ch. App. 164; 1 L. R. Eq. 154.

So, the assignment of a *bare right* to file a bill in equity for a fraud committed upon the assignor, will be held void, as contrary to public policy, and as savouring of maintenance; see *Prosser* v. *Edmonds*, 1 Y. & C. Exch. Ca. 481, and the elaborate judgment of Lord *Abinger*, C. B., in which he fully examines the doctrine and its policy. "What," said his Lordship, "is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but that of all countries (see Voet. Comm. ad Pandect. lib. 41, tit. 1, s. 38), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a Court of equity will discourage the practice;" and see *Powell* v. *Knowler*, 2 Atk. 226; *Kenney* v. *Browne*, 3 Ridg. P. C. 462, 498, 501; *Bayly* v. *Tyrrell*, 2 Ball & B. 363; *Stanley* v. *Jones*, 7 Bing. 369; *Sprye* v. *Porter*, 7 Ell. & B. 58; *Twiss* v. *Noblett*, 4 I. R. Eq. 64. And it

has been decided in the United States, that a mere right of action for a tort is not, for the like reason, assignable: *Garder* v. *Adams*, 12 Wend. R. 297. So a mere assignment of a right to sue a trustee for the chance of recovering from him interest or profits of part of the trust funds which were for a certain period in his hands, has been held invalid: *Hill* v. *Boyle*, 4 L. R. Eq. 260, 263.

But the purchase of an interest pendente lite (*Williams* v. *Protheroe*, 5 Bing. 309; 3 Y. & J. 129; *Wood* v. *Griffith*, 1 Swanst. 56; *Knight* v. *Bowyer*, 2 De G. & Jo. 421, 445); or a mortgage pendente lite (*Cockell* v. *Taylor*, 15 Beav. 103, 117); or the advance of money for carrying on a suit, even though there be a covenant to indemnify the assignor against past and future costs of a suit and proceedings, if the parties have a common interest (*Hunter* v. *Daniel*, 4 Hare, 420, and the remarks of Sir *J. Wigram*, V. C., disapproving of *Harrington* v. *Long*, 2 My. & K. 590; and see *Wallis* v. *The Duke of Portland*, 3 Ves. 503); or if there exists between the parties the relationship of father and son, or heir-apparent (*Burke* v. *Greene*, 2 Ball & B. 521; and see *Moore* v. *Fisher*, 7 Sim. 384), or master and servant (*Wallis* v. *The Duke of Portland*, 3 Ves. 503), at any rate where the advance is made from wages in the hands of the master, or the master is in fear of losing the services of the servant through attachment or otherwise (Viner's Ab. Maintenance, K., Master for Servant), or it seems where the cause of action arose out of some ministerial act done in the character of a servant (*Elborough* v. *Ayres*, 10 L. R. Eq. 367, 371, 375); will not be considered as maintenance or champerty. See also *Wilson* v. *Short*, 6 Hare, 366; *Dickinson* v. *Burrell*, 35 Beav. 257; 14 W. R. (M. R.) 412.

A purchase by an attorney pendente lite of the subject-matter of the suit is invalid: *Simpson* v. *Lamb*, 7 Ell. & Bl. 84; and see *Hall* v. *Hallett*, 1 Cox, 134; *Wood* v. *Downes*, 18 Ves. 120.

An assignment, however, of the subject-matter of a suit pendente lite to an attorney by way of *security*, as for instance for payment of his costs, will be valid, although according to the authorities before cited a sale to him would have been void: *Anderson* v. *Radcliffe*, 6 Jur. N. S. 578; 28 L. J. (Q. B.) N. S. 32.

An assignment of a debt even to an attorney, *after* a judge's order for payment, but before the order is made a rule of Court, if there be no other objection to the transaction, *will* be valid as not being within the mischief of the rule which prevents parties assigning property in a suit to an attorney while the proceedings are pending: *Smith* v. *Selwyn*, 5 W. R. 682 (Q. B).

Where a creditor who had instituted proceedings at law and in equity against his debtor, entered into an agreement with the debtor to abandon those proceedings, and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor, and agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, and in recovering his securities, it was held by Sir *J. Leach*, V. C., that the agreement did not amount to champerty, but would have done so, if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit: *Hartley* v. *Russell*, 2 S. & S. 244.

An agreement, however, by a shareholder in a company which is being compulsorily wound up, that, in consideration of a pecuniary equivalent, he would endeavour to postpone the making of a call, or would support the claim of a creditor, was held, by the Court of Common Pleas to be illegal, as being contrary to the policy of the Winding-up Acts: *Elliott* v. *Richardson*, 5 L. R. C. P. 744; and *semble* per *Willes*, J., that such agreement was also void as being within the spirit of the law against maintenance: Ib. 748.

Although the suit of a person claiming under a title founded of champerty and maintenance will fail, a person who has originally a good title to sue will not lose it by having entered into a bargain savouring of champerty and maintenance with the solicitor he employs in the suit. See *Hilton* v. *Woods*, 4 L. R. Eq. 432. There the plaintiff agreed with Mr. Wright, a solicitor, to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings. It was held by Sir *R. Malins*, V. C., that although the contract amounted to champerty and maintenance, the plaintiff was not disqualified from suing the person in possession of the mines, because his title was anterior to the illegal contract, but that if the solicitor had been, the party suing his bill would have been dismissed, inasmuch as he would have claimed through such contract. "I have," said his Honor, "carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that where

a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff, suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill. This would have followed from the decisions in *Harrington* v. *Long*, 2 My. & K. 590; *Stanley* v. *Jones*, 7 Bing. 369; *Reynell* v. *Sprye*, 8 Hare, 222; 1 D. M. G. 660; *Sprye* v. *Porter*, 7 E. & B. 58; *Simpson* v. *Lamb*, Ib. 84; *Earle* v. *Hopwood*, 9 C. B. (N. S.) 566. I do not refer in detail to those cases, but some of them are cases in which the plaintiff sues by virtue of a title under a contract, which amounts to maintenance, and others, as in *Reynell* v. *Sprye*, are bills to set aside the contracts on the ground that they are tainted with that objection. In this case the plaintiff comes forward to assert his title to property which was vested in him long before he entered into the improper bargain with Mr. Wright, and I cannot, therefore, hold him to be disqualified to sustain the suit. But as any decree I may make for the defendant to pay costs would in effect go to exonerate Mr. Wright from the consequences of the improper contract he has entered into with the plaintiff, and would to that extent be for his benefit, the decree I shall give the plaintiff will be without costs."

Although by 33 & 34 Vict. c. 28 (The Attorneys' and Solicitors' Act, 1870), attorneys and solicitors may, under certain restrictions, make agreements with their clients as to remuneration in lieu of costs; the law as regards contracts void as between attorney and client for champerty or maintenance appears to be unaffected thereby. See section 12, which enacts that, "Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding." See *In re Attorneys' and Solicitors' Act*, 1870, 1 Ch. D. 573.

An agreement by an heir-at-law and devisee out of possession, where it is doubtful in which of them the right is vested, to recover the estate and divide it between them, is contrary to the policy of the law, as well as the

statute of 32 Hen. 8, c. 9 (repealed as to sect. 5, by the Statute Law Revision Act, 1863, 26 & 27 Vict. c. 125), against pretended titles. See *Lord Cholmondeley* v. *Clinton*, 4 Bligh, 1, 42, 45, 90, 123, where Lord *Redesdale* observed, that such persons are incompetent to make a bargain upon the subject affecting any person except the person in possession, that they are both competent to make a composition with him if he thought fit, but competent to deal with no other person by the statute, which is only an affirmance of the common law upon the subject of pretended titles by adding penalties: Sugd. Prop. 74.

Where a legatee too poor to sue assigned the legacy for less than it was worth to the plaintiff, who bought it for the purpose of enforcing payment by suit, it was held that this did not amount to champerty or maintenance: *Tyson* v. *Jackson*, 30 Beav. 384.

The English laws of maintenance and champerty are not of force as specific laws in India, and a fair agreement there to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded *per se* as opposed to public policy: *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, 2 App. Ca. 186, 208. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid: Ib. 186, 209.

HORNSBY *v.* LEE.

August 17, 1816.

[REPORTED 2 MADD. 16.]

ASSIGNMENT OF WIFE'S CHOSES IN ACTION.—REDUCTION INTO POSSESSION.]—*Husband and wife assign a reversionary interest of the wife in certain trust stock, as security for the payment of an annuity granted by the husband, the husband afterwards takes the benefit of the Insolvent Debtors' Act, and a general assignment is made of his property. The person on whose death the wife was to take dies, and then the husband dies without having done any other act to reduce the stock into possession. Held, that his wife was entitled by survivorship to the stock against both the particular and the general assignee.*

BY indenture, 1st January, 1774, between Deacon and Collier, assignees of Baptist Darwin, a bankrupt (the father of the plaintiff), of the first part; the said Baptist Darwin and S. Darwin, his wife (the mother of the plaintiff), of the second part; and Mary Petty, R. Petty, J. Elliott, and G. Hooper, of the third part. Deacon and Collier granted, &c., unto the said M. Petty, R. Petty, J. Elliott, and G. Hooper, 422*l.* 6*s.* 3*d.* four per cents., together with the dividends, to hold the same upon trust, to apply the dividends for the separate use of S. Darwin during her life, and after her death, to apply the principal and dividends among all and every such child and children of the said B. Darwin by the said S. Darwin, as should be then living, in equal shares, payable at twenty-one; but if either of the children should die before his or

their shares should become payable, the shares of him, her, or them so dying, to be paid to the survivors; and if only one child who should live to attain twenty-one, then the principal sum and the dividends to be paid to such only child. By the same indenture, Deacon and Collier granted, &c., to the said M. Petty, R. Petty, J. Elliott, and G. Hooper, certain shares in a messuage, and all the assignee's right, title, and interest in, and to the real estate late of Richard Petty (the father of the said S. Darwin), and the moiety, or half-part of the share and proportion of them, the said assignees, of, in, and to a certain sum of 2,762*l.* 11*s.* 3*d.* upon the same trusts as were declared respecting the 422*l.* 6*s.* 3*d.* Four per cents.

The plaintiff and Anne Mary Darwin were the only issue of Baptist and Sarah Darwin. Baptist Darwin died in 1782. In 1787, the plaintiff married Nathaniel Hornsby, without a settlement, and in February, 1799, the plaintiff and her husband assigned over a moiety of their interest in the said trust funds, upon the contingency of the plaintiff surviving her mother, unto the defendant, John Parker, as a collateral security for the due payment of an annuity of 30*l.* granted by the plaintiff's husband, Hornsby, to Parker during his life, in consideration of 200*l.* paid to Hornsby.

In 1790, Anne Mary Darwin married John Patten.

In 1801, Thomas Ralph and the defendant George Lee, were appointed trustees, and the trust monies, which then consisted of 1,453*l.* 15*s.* 6*d.*, 3*l.* per cents. were transferred to them.

Anne Mary Patten died in 1807, and Sarah Darwin (the mother) died early in February, 1814 (*a*).

(*a*) The particular day of her death does not appear on the pleadings.

The plaintiff's husband, Hornsby, was confined in the King's Bench Prison for debt, and in January, 1814, was discharged under the Insolvent Act, and his estate and effects vested in a clerk of the peace, and the same were by him assigned to the defendant, John Seton.

Hornsby afterwards, 16th February, 1814, died without having instituted any proceedings, or done any act to reduce the trust fund into possession, in the short

interval—a few days only—between the widow's death and his own.

Thomas Ralph died 24th March, 1814.

The bill stating these facts prayed, that the trust funds, with the dividends, might be transferred to the plaintiff; or if the Court should be of opinion that the defendants, Parker and Seton, or either of them, were entitled to them, then that the plaintiff might be decreed to have a settlement out of the same.

The defendant Parker, by his answer, insisted that the dividends and interest of the moiety of the trust monies assigned to him, ought to be applied pursuant to the trusts declared as to the same, in and by the indenture of the 26th of February, 1799, and stated, that 314*l.* 3*s.* 6*d.* was due to him for ten years and a half arrears of the annuity, and claimed to be paid the same out of the trust monies.

The defendant Seton, by his answer, submitted, that the trust funds ought to be transferred to him as the assignee of the estate and effects of Hornsby, for the benefit of himself and the rest of the creditors.

The defendant Lee, the trustee, submitted to act as the Court should direct.

Mr. *Cooke* and Mr. *Richards* for the plaintiff.

The plaintiff claims the whole of this property, as having survived to her. This being a reversionary interest, the husband could not reduce it into possession, or part with it before the death of Sarah Darwin, the mother; and after her death, a few days before his own, he did no act to reduce the property into possession. Neither the particular assignment to Parker, nor the general assignment under the Insolvent Act to Seton, operated as a reduction into possession. In *Mitford* v. *Mitford* (9 Ves. 87) it was determined, that the general assignment in bankruptcy had not the effect of reducing into possession a legacy of stock left in trust for the benefit of the bankrupt's wife, and her right by survivorship was established against the assignees. The same principle must apply to all assignments, whether under the Insolvent Debtors'

Act, or to a particular assignee. They cited also *Wildman* v. *Wildman* (9 Ves. 174), and *Woolands* v. *Crowcher* (12 Ves. 174).

The plaintiff, by joining in the assignment to Parker, has not affected her claim; for being a married woman, the deed was inoperative as to her.

Mr. *Leach* and Mr. *Dowdeswell* for the defendant Parker.

The assignment to Parker of this reversionary interest, as a security for the payment of the annuity granted to him, was valid. In *Wright* v. *Morley* (12 Ves. 174) an assignment by the husband of his interest, and right of his wife, was held good, subject to the wife's equity to a settlement. That, it is true, was a present interest; but whether the interest to which the husband is entitled in right of his wife be present or reversionary, makes no difference. In both cases his assignment is effectual, subject to the wife's equity to a settlement.

Mr. *Trower* for the defendant Seton.

After the determination in *Mitford* v. *Mitford* (9 Ves. 87), I cannot contend that this interest passed by the assignment under the Insolvent Debtors' Act; but this defendant, not having asserted any right to this property, and being made a party against his desire, ought to have his costs.

Mr. *Shadwell*, for the trustee, asked for his costs.

Sir Thomas Plumer, V. C. E.—[After stating the facts of the case.] Independently of authority, let us consider, upon principle, whether the husband's assignment of his wife's contingent interest is good. The husband has a right to his wife's choses in action, provided he reduces them into possession. Is a deed assigning a reversionary interest, a reduction into possession? It is impossible actually to reduce a reversionary interest into possession. Is it then a constructive reduction into possession? *The assignment puts the assignee of the husband in the same situation as the husband*, and if the husband survives the wife, the assignee is entitled to the property; but here

the husband died before the wife, and the assignee therefore is not entitled to the property. This is the manner in which the case strikes me upon principle.

According to *Mitford* v. *Mitford* (9 Ves. 87) it is clear, that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the Insolvent Debtors' Act. Nor do I see what answer can be given to the observation of Mr. *Cooke*, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woolands* v. *Crowcher* (12 Ves. 174) is strong to show the insufficiency of the assignment to bar the wife's claim in case she survives her husband. On principle and authority the plaintiff is entitled to this money.

The decree was as follows: Declare the plaintiff is entitled to 1453*l.* 15*s.* 6*d.*, 3*l.* per cent. Reduced annuities in the pleadings mentioned, standing in the names of Thomas Ralph, in the pleadings named, and the defendant, George Lee, in the books of the Governor and Company of the Bank of England. And it is ordered that the defendant George Lee, do transfer the said 1453*l.* 15*s.* 6*d.*, 3*l.* per cent. Reduced annuities, unto the plaintiff, with interest and dividends which have accrued due thereon. And it is ordered, that the plaintiff do pay unto the defendants George Lee and John Seton, their costs of this suit, to be taxed by Mr. Campbell, one of the Masters of this Court, as between solicitor and client; and as between the plaintiff and defendant John Parker, no costs on either side; and any of the parties are to be at liberty to apply to this Court, as they shall be advised.

Nothing is clearer than that a husband only becomes entitled upon marriage to a qualified interest in the choses in action and reversionary personal property of his wife; and *if he does not, during his lifetime, reduce them into possession, they will belong to*

his wife surviving him. Co. Litt. 351; *Scawin* v. *Blunt*, 7 Ves. 294; *Langham* v. *Nenny*, 3 Ves. 467; 1 Bright, Husb. & W. 36.

1. *What amounts to a reduction into possession of a Wife's choses in action*].—In order to reduce a wife's choses in action into possession, acts must be done which will have the effect of *changing* the property therein. Neither the mere intention of an executor to pay a chose in action to which the wife is entitled to the husband; nor an appropriation of a particular fund for that purpose (*Blunt* v. *Bestland*, 5 Ves. 515); nor the husband's receipt of the interest thereof (*Howman* v. *Corie*, 2 Vern. 190; *Blunt* v. *Bestland*, 5 Ves. 515; *Hart* v. *Stephens*, 6 Q. B. (N. S.) 937; 14 L. J. (N. S.) Q. B. 148; 9 Jur. 225), even although, where the chose in action was a promissory note, it has been handed to him (*Nash* v. *Nash*, 2 Madd. 133; and see *Day* v. *Pargrave*, 3 Man. & Selw. 395, cited), amount to a reduction into possession; and a receipt of part of the fund by the husband will only amount to a reduction into possession pro tanto: *Nash* v. *Nash*, 2 Madd. 133, 139; *Scrutton* v. *Pattello*, 19 L. R. Eq. 369, 373. A transfer of stock by trustees or executors into the name of the married woman (*Wildman* v. *Wildman*, 9 Ves. 174); or into the names of the husband and wife (*Prole* v. *Soady*, 3 L. R. Ch. App. 220; and see *Scrutton* v. *Pattillo*, 19 L. R. Eq. 369); à fortiori where trustees of a fund belonging to the wife simply retain it in their own hands (*Twisden* v. *Wise*, 1 Vern. 161), or invest or pay it in the names of trustees for her (*Aitchison* v. *Dixon*, 10 L. R. Eq. 589), will not amount to a reduction into possession. A mere agreement to sell a fund (*Harwood* v. *Fisher*, 1 Y. & C. Exch. Ca. 110), or a set-off of a debt of the husband's due to a testator against a legacy he has left to the wife, will not bar the wife's right to the legacy in case she survives her husband: *Harrison* v. *Andrews*, 13 Sim. 595; *Carr* v. *Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 249; *Ex parte O'Ferrall*, 1 G. & J. 347; *Elibank* v. *Montolieu*, 5 Ves. 737; *Reeve* v. *Richer*, 11 Jur. 960; *In re Batchelor*, 16 L. R. Eq. 481; *M'Mahon* v. *Burchell*, 3 Hare, 99. It is laid down, however, in a subsequent report of the last cited case, that where a debt to the estate of the testator may be set off by the executors against a legacy bequeathed by the testator to the debtor, such debt may also be set off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) to a settlement: *M'Mahon* v. *Burchell*, 5 Hare, 325; and see *Hall* v. *Hill*, 1 Conn. & Law. 135; 1 Dru. & War. 109.

The mere proof by a husband against the estate of a bankrupt in-

debted to his wife, will not amount to reduction into possession by the husband, if he die before a dividend be made. See *Anon.*, 2 Vern. 706; there J. S., indebted by bond to the wife of A., became a bankrupt. The husband proved the debt, and paid contribution money, but died before any dividend was made. The wife survived, and died also before any distribution. Lord *Cowper*, L. C., held that the payment of contribution money by the husband did not alter the property of the debt, but that it remained a chose in action, and survived to the wife.

The receipt by the husband of his wife's chose in action, as, for instance, of a sum due to her on a mortgage in fee, will be a reduction thereof into possession (*Rees* v. *Keith*, 11 Sim. 388, 390), unless such receipt by the husband be in the character of trustee, when it will not have that effect: *Baker* v. *Hull*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413. A transfer of the wife's stock into her husband's sole name would be a reduction into possession: (1 Bright's Husb. & W. 54,) and it has even been held where the husband was a lunatic, that the payment by order of the Court of stock belonging to the wife to the credit of the lunacy, was as much a reduction into possession as a payment to the lunatic or his committee: *In the matter of Jenkins*, 5 Russ. 183, 187.

And as a husband may, by transferring his wife's stock into his own name, reduce it into possession, so he may do so by transferring it into the names of trustees upon trusts inconsistent with his wife's title by survivorship: *Hansen* v. *Miller*, 14 Sim. 22; *Burnham* v. *Bennett*, 2 Coll. 254.

Where, however, a husband directs or consents to an investment of stock belonging to his wife, in a manner consistent with her equities, he will not be considered by such an act as destroying such equities, by its being a reduction into possession. Thus, in *Ryland* v. *Smith*, 1 My. & Cr. 53, the wife being under a will entitled to stock and to cash part of a residue, the executors, at the request of the husband, transferred the stock into the names of trustees for the wife's separate use, and paid the cash to the husband. The husband employed part of the cash in increasing the amount of the stock. He afterwards became bankrupt, and died. It was held by Sir *C. C. Pepys*, M. R., that the stock transferred by the executors was not reduced into possession by the husband, and, therefore, belonged to the wife by survivorship, but that the assignees under the bankruptcy were entitled to the increase made by the husband.

Where the wife is possessed of choses in action even such as promissory notes, or bills of exchange

given to her *before marriage*, unless the contracts thereon be altered as by taking a new security (*Yard* v. *Ellard*, 1 Salk. 117, pl. 8), the husband must bring an action upon them in the names of himself and his wife, and if he obtains judgment and sues out execution, he will thereby reduce such choses in action into possession (*Hardy* v. *Robinson*, 1 Keb. 440; *Tirell* v. *Bennet*, 2 Keb. 89; *Milner* v. *Milnes*, 3 T. R. 627; *Rumsey* v. *George*, 1 Mau. & Selw. 176; *Sherrington* v. *Yates*, 12 M. & W. 855); but if he die after judgment and before execution sued out, the judgment will survive to the wife, and she will be entitled to a scire facias thereon: *Bond* v. *Simmons*, 3 Atk. 21.

Where, however, the choses in action accrue to the wife *during the marriage*, and the husband elects to disagree to his wife's interest by commencing an action in his own name only, if he dies after judgment, his representatives, and not his wife, will be entitled to the benefit thereof: *Oglander* v. *Baston*, 1 Vern. 396.

If, however, before the marriage the wife obtained a judgment, and she and her husband sued out a scire facias, and obtained an award of execution, and the wife died before the writ was executed, the property will be changed by the award, and belong to the husband: Bright's H. & W. p. 61.

Where an award was made by which a sum of money was ordered to be paid to the husband in respect of the personal estate to which his wife was entitled as residuary legatee, and the husband having died before anything further was done, it was held by Lord *Jeffries*, L. C., that the executor of the husband was entitled to such sum, and that it did not survive to the wife. "The award," said his Lordship, "is a sort of judgment, and the arbitrator having awarded that the money should be paid to the husband, that has changed the property, and vested it in the husband:" *Oglander* v. *Baston*, 1 Vern. 396. It is doubtful, however, whether this decision can be upheld, inasmuch as an award alone has not the effect of changing the property in personal chattels: *Hunter* v. *Rice*, 15 East, 100; *Thorpe* v. *Eyre*, 1 Ad. & Ell. 926; 3 Nev. & M. 214.

Where there is a decree in a joint suit by husband and wife, for money claimed in her right, if the husband die before any other proceedings, the benefit of the decree will survive to the wife (*Nanney* v. *Martin*, 1 Eq. Ca. Ab. 68); nor will her right by survivorship be prejudiced if nothing has been done in the suit to change the property: *Adams* v. *Lavender*, M'Clell. & Y. 41; *Bond* v. *Simmons*, 3 Atk. 20; *Macaulay* v. *Philips*, 4 Ves. 15; 10 Ves. 91, cited.

If, however, the property were changed, as, for instance, by the

approval by the Court of a settlement to be made on the wife (*Macaulay* v. *Philips*, 4 Ves. 19); or by an order for payment to the husband, the wife's right to take by survivorship will be gone: *Heygate* v. *Annesley*, 3 Bro. C. C. 362; sed vide *Fleet* v. *Perrins*, 3 L.R. Q. B. 536; 4 L.R. Q. B. 500.

A sale by a husband for a sum of money of his wife's chattels, which the purchaser takes possession of, will amount to a reduction into possession by the husband, and in the event of the sale being voidable, as for instance, by reason of its having been made to a person in a fiduciary relation towards the husband, the husband or his representatives will be the proper parties to set aside such sale: *Widgery* v. *Tepper*, 5 Ch. D. 516.

If a husband fail to reduce his wife's choses in action into possession during her lifetime, he will, upon her death before him, if he has not made a valid assignment thereof, be entitled to them on taking out letters of administration to her: (Bright's Husb. & Wife, 41.) And if he die without doing so, his personal representative, upon taking out letters of administration to the wife, will become entitled to such choses in action: *In the goods of M. A. Harding*, 2 L. R. P. & D. 394; *In the goods of J. Risden*, 1 L. R. P. & D. 637.

2. *Chose in action of a married woman—how far assignable.*]—It is now well established, upon the principle that a husband can give no better right to another than he has himself; that all assignments made by the husband of the wife's choses in action or reversionary personal property, whether vested or contingent, which are not, or cannot be, then reduced into possession, whether the assignment be in bankruptcy, or under the Insolvent Act, or to trustees for payment of debts, or to a purchaser for valuable consideration, even although the wife joins therein, pass only the interest which the husband himself has, subject to the wife's legal right by survivorship.

The principal case was the first in which this subject was thoroughly discussed, and Sir *Thomas Plumer* lays down the rule, ever since adopted in equity, that *the assignment puts the assignee of the husband in the same situation as the husband; and if the husband survives the wife, the assignee is entitled to the property; but that if the husband died before the wife, the assignee is not entitled thereto.* See the important cases of *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65, where the reversionary interest of the wife was vested; and *Watson* v. *Dennis*, 3 Russ. 90; *Stamper* v. *Barker*, 5 Madd. 157; *Box* v. *Box*, 2 C. & L. 605; *Box* v. *Jackson*, 1 Dru. 55; *Prole* v. *Soady*, 3 L. R. Ch. App. 220; *Wilkinson*

v. *Gibson*, 4 L. R. Eq. 162. In *Le Vasseur* v. *Scratton*, 14 Sim. 116, a female infant being entitled to the reversion of a chose in action, expectant on the decease of the survivor of A. and B., she and her husband covenanted, in contemplation of their marriage, to assign it to trustees, in trust, as to one moiety for the husband absolutely, and as to the other moiety, for the wife and the issue of the marriage. The husband died first, and afterwards A. and B. died. It was held by Sir *L. Shadwell*, V. C., that the chose in action survived to the wife, and that she was entitled to have it transferred to her.

But a woman may, by her acts, after the death of her husband, have shown such an intention to acquiesce in and adopt a settlement of her reversionary interest, made during her first coverture for the benefit of herself and children, as to render it binding upon any subsequently taken husband: *Ashton* v. *M'Dougall*, 5 Beav. 56; *Kingston* v. *Booth*, 4 I. R. Eq. 589, 605; *White* v. *Cox*, 2 Ch. D. 387; and in *Davies* v. *Davies*, 9 L. R. Eq. 468, it was held that a widow who had directed part of the funds which had fallen into possession to be paid to the trustees, and had afterwards become lunatic, must be taken, in absence of any evidence to the contrary, to have confirmed the whole settlement. See also *Milner* v. *Lord Harewood*, 18 Ves. 259, 277.

It must be remembered that under the Infants' Settlement Act (18 & 19 Vict. c. 43), an infant may now, with the approbation of the Court of Chancery, make a valid settlement of property, though it be in reversion, remainder, or expectancy. See Morgan's and Chute's Chancery Statutes and Orders, p. 233, 4th ed.

It has been said by an eminent Judge, that where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. *Per* Lord *Lyndhurst* in *Honner* v. *Morton*, 3 Russ. 69.

However, it seems now to be clearly established that, whether the husband after an assignment of his wife's choses in action dies in the lifetime of the person having a prior interest, whereby the chose in action *cannot*, as against the wife, be reduced into possession, or whether he survives and dies before it *is* reduced into possession, the same result follows,—the chose in action will survive to the wife. Thus, in *Ellison* v. *Elwin*, 13 Sim. 309, by articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate, to which she was entitled under the trusts of his will, to trustees, in trust for

themselves and their children. After the lady had attained twenty-one a settlement was made, for the purpose of carrying the articles into effect, to which the husband and wife and the trustees were the only parties; but before the settled property was transferred to the trustees, the husband died. It was held, by Sir *L. Shadwell*, V. C., that the wife's right to the property by survivorship was not barred.

The principle of this decision was followed by the Vice-Chancellor *Knight Bruce* in *Ashby* v. *Ashby*, 1 Coll. 553. In that case, a husband, for a valuable consideration, assigned a legacy, to the payment of which his wife was entitled twelve months after the decease of the testator's widow. The husband survived the testator's widow more than twelve months, but took no steps to reduce the property into possession. His Honor, upon the authority of *Elwin* v. *Williams* (7 Jur. 337), held the assignment void as against the surviving wife: observing, however, that he did not say what would have been the effect upon the wife's rights or claims if the husband had, bonâ fide for valuable consideration, executed a deed of *release* of the legacy. See also *Hastings* v. *Orde*, 11 Sim. 205; *Ashton* v. *M'Dougall*, 5 Beav. 56; *Wilkinson* v. *Charlesworth*, 10 Beav. 324, 328; *Rowland* v. *M'Donnel*, 13 Ir. Ch. Rep. 365, 381; *Borton* v. *Borton*, 16 Sim. 552; *Michelmore* v. *Mudge*, 2 Giff. 183.

It has, however, been since decided that a release by a husband of a reversionary chose in action of his wife is as inoperative to bind his wife by survivorship as his assignment would be: *Rogers* v. *Acaster*, 14 Beav. 445.

Where an annuity or life interest in a fund is given to a married woman, and is not settled to her separate use, the husband is not, with her concurrence, capable of effectually disposing of her life estate, except during his own life; for, if she outlive her husband, such part of it as would be enjoyed by her after the coverture determined, would be reversionary only, and consequently the husband cannot, consistently with the cases of *Purdew* v. *Jackson* and *Honner* v. *Morton*, make a title to such portion of the annuity or dividends of the fund as may accrue after his own death, and during the life of his wife surviving him. See *Stiff* v. *Everitt*, 1 My. & Cr. 37; *Harley* v. *Harley*, 10 Hare, 325; *In re Godfrey's Trusts*, 1 I. R. Eq. 531; but see *Hore* v. *Becher*, 12 Sim. 465.

Where personalty, a reversionary interest in which is given to a married woman, is brought into existence for the purpose of securing a loan to her husband, the assignment by the husband and wife with the object of effecting such security will, *pro tanto*, defeat the wife's right by survivorship.

Thus, in *Winter* v. *Easum*, 2 De G. Jo. & Sm. 272, a married woman entitled to income for her separate use, agreed to assist her husband in obtaining a loan from an insurance company. A policy was accordingly effected with the company, by which a sum was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage deed of the same date, reciting an agreement for a loan by the office at the request of the husband and wife, the wife assigned her separate income, and the husband the policy, by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose of binding her separate estate, covenanted that the husband would pay the premiums on the policy; and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of income; and a declaration by all parties that if the policy moneys became payable before the mortgage was paid, the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy as being a chose in action not settled to her separate use, and therefore incapable of being effectually assigned during the husband's life. It was held by the Lords Justices of the Court of Appeal, that, although the policy if taken alone created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of the mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security. See also *Stamford, Spalding, and Boston Banking Company* v. *Ball*, 31 L. J. (N. S.) Ch. 143.

Where, however, a single woman insures her life, and afterwards marries, inasmuch as her contract with the insurance society is for a reversionary payment to herself, if the society with which she has insured assigns over its business to another society, it seems that the married woman cannot effectually adopt the liability of the latter society in lieu of that of the former: *Conquest's Case*, 1 Ch. D. 334, 342.

Although a woman having a reversionary interest in personalty, obtain an assignment of the interest of every other person therein, she will not thereby convert her reversionary interest into an interest in possession, or enable her husband to do indirectly, what he could not do directly,—assign her original interest, so as to bar her right by survivorship; and if the reversionary fund is in Court, it will not be paid out, although the consent of all other persons

interested in it be obtained. After some conflicting decisions, this was finally determined in the important case of *Whittle* v. *Henning*, 2 Ph. 731. There, a fund in Court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son by deed surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. Upon a petition being presented by the husband, wife, and son, for payment of the fund to the son, it was held by Lord *Cottenham*, C., affirming the decision of Lord *Langdale*, M. R. (reported 11 Beav. 222), that the payment could not be made, and accordingly dismissed the petition. "It is true," observed his Lordship, "that the wife in this case has not only a present life interest from her husband, but the ultimate interest in the fund from her son, and therefore, it is said, has a present absolute title to the whole. This proposition assumes that the reversionary life interest no longer exists, that it is in fact merged in the other interests so conferred upon her by her husband and son. But this can only prevail if the Court should, by analogy to law, establish an equitable merger for the sole purpose of depriving the wife of this protection to her reversionary interest, which it has hitherto afforded, which would be to permit a supposed analogy to the rules of law to defeat the rules and practice of this Court in the protection it affords to married women, although in all other cases it disregards the rules of law, and the rights of husbands when they interfere with such rules and practice. What this Court protects is, the reversionary life interest of the wife; and for that purpose it will consider it still as reversionary, notwithstanding other parties interested in the fund may, for the purpose of depriving her of such reversionary interest, by enabling her to dispose of it, endeavour to unite in her person all the other interests in it. I observe that the Vice-Chancellor of England, in *Hall* v. *Hugonin* (14 Sim. 595), says, that he does not put the case as one of merger; but the conveyancer who prepared the assignment in this case seems to have been aware that in no other way could the object of the parties be advanced; for it recites that the object was, that the life interest of the husband should be merged and extinguished in the interest of the wife. If there be no merger, the life interest of the wife remains reversionary, and would therefore be clearly within *Purdew* v. *Jackson* (1 Russ. 1), *Honner* v. *Morton* (3 Russ. 65), and the many other cases which have established the rule for the protection of the reversionary interests of wives. Is

there, then, a merger which defeats this rule? Legal merger there cannot be; but if there had been, equity would not permit a merger at law to defeat equitable estates and interests. Such has been the rule at least since the time of Charles II., as is proved by *Thorn* v. *Newman* (3 Swanst. 603), *Nurse* v. *Yerworth* (3 Swanst. 618). Will it, then, when there is no legal merger, introduce the doctrine of merger into trusts, solely for the purpose of defeating equities, and destroying its own jurisdiction in the protection of the interests of married women? I cannot, also, but refer, upon this part of the case, to the able argument of Mr. *Rendall* in *Hall* v. *Hugonin* (14 Sim. 595), showing how impossible it was to prejudice the wife in her own reversionary interest by others bestowing upon her gifts which she might afterwards disclaim, and thereby revive her reversionary interest, after this Court, if it should make the order prayed, had destroyed it by treating it as an interest in possession." And see *Richards* v. *Chambers*, 10 Ves. 580; *Story* v. *Tonge*, 7 Beav. 91; *Brandon* v. *Woodthorpe*, 10 Beav. 463; *Cresswell* v. *Dewell*, 4 Giff. 460; *In re Butler's Trusts*, 3 Ir. R. Eq. 138. The cases, therefore, of *Hall* v. *Hugonin*, 14 Sim. 595, *Creed* v. *Perry*, 14 Sim. 592, and *Bishop* v. *Colebrook*, 16 Sim. 39, may be considered as overruled.

But although the Court of equity will not give effect to an assignment by the husband, of his wife's reversionary chose in action, so as to defeat her legal right by survivorship, it will be good against him if he survive his wife (*Hornsby* v. *Lee*, 2 Madd. 20), and when it becomes an interest in possession it will be subject to the wife's equity to a settlement. See *Greedy* v. *Lavender*, 13 Beav. 62, and note to *Lady Elibank* v. *Montolieu*, Vol. 1, p. 485; and see *Clarke* v. *Woodward*, 25 Beav. 455.

A married woman who has obtained a decree for a judicial separation from her husband, is entitled absolutely, under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8, to her *choses in action* not reduced into possession, although she may have previously joined her husband in a mortgage thereof. (*In re Insole*, 1 L. R. Eq. 470; 35 Beav. 92); and if the husband appears to oppose the application of his wife, he will be refused costs: *Johnson* v. *Lander*, 7 L. R. Eq. 228.

The same result follows when there has been a decree for the dissolution of marriage: *Wells* v. *Malbon*, 31 Beav. 48; *Prole* v. *Soady*, 3 L. R. Ch. App. 220; and as the decree for dissolution of marriage takes effect from the date of the decree *nisi*, anything done in the interval by the husband or his assignee will not have the effect of reducing the wife's *choses in action* into possession: *Prole* v. *Soady*, 3 L. R. Ch. App. 220; and although the wife, after a

decree for the dissolution of the marriage does not obtain possession of her "choses in action," her executors will be entitled thereto, and not the husband, inasmuch as the same consequences as to property must follow the declaration of dissolution by the Divorce Court, as if the marriage contract had been annihilated, and the marriage tie broken at that date, and that the rights of the divorced husband, which depended upon the contract, then ceased: *Wilkinson* v. *Gibson*, 4 L. R. Eq. 162.

So likewise a married woman who has obtained a protection order under 20 & 21 Vict. c. 85, s. 21, in consequence of her husband's desertion, will become absolutely entitled to her choses in action not reduced into possession: *In re Coward and Adams' Purchase*, 20 L. R. Eq. 179.

But where they consisted of funds in court, it was held that evidence ought to be produced that the separation was a continuing one. The affidavit, however, of the married woman herself as to that fact, and also as to no settlement or agreement for a settlement having been made, was held to be sufficient: *Ewart* v. *Chubb*, 20 L. R. Eq. 454.

It may, however, be here mentioned that, although the Court which deals with divorce causes has power under the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), when it pronounces a sentence of divorce or judicial separation for *adultery of the wife*, to order a settlement of any property of the wife for the benefit of the innocent party and the children of the marriage (sect. 45), it has no power on a dissolution of a marriage on account of the ill-conduct of the husband to make an order whereby any of his rights under a marriage settlement shall be forfeited: *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; *Burton* v. *Sturgeon*, 2 Ch. D. 318, overruling *Jessop* v. *Blake*, 3 Giff. 639; *Swift* v. *Wenman*, 10 L. R. Eq. 15; *Fussell* v. *Dowding*, 14 L. R. Eq. 421. See also *Evans* v. *Carrington*, 2 De G. F. & Jo. 481.

If the chose in action either is originally, or becomes, an interest presently attainable, it may be reduced into possession by actual payment to the husband or his assignees: and the wife's right by survivorship and her equity to a settlement may be thereby defeated: *Cunningham* v. *Antrobus*, 16 Sim. 436; *Allday* v. *Fletcher*, 1 De G. & J. 82. See ante, Vol. 1, p. 512.

Where a married woman is a joint tenant of a reversionary interest, if she die during the life of her husband, before the reversion becomes an interest in possession, the other joint tenants and not her husband will take by survivorship. Thus, in *In re Trusts of Barton's Will*, 10 Hare, 12, a woman, joint tenant of a rever-

sionary interest in a legacy of 2000*l.* stock, married, and after the marriage, the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving; it was held by Sir *G. Turner*, V. C., that by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife, and that upon the death of the tenant for life, the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund.

A recent Act, 20 & 21 Vict. c. 57, Malins' Act (which does not extend to Scotland), enables married women in certain cases, to dispose of reversionary interests in personal estate, in the same manner as they can now dispose of their real estates.

It enacts that, "After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: *Provided always*, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be *restrained from alienating or affecting the same.*" Sect. 1.

It is then enacted that, "Every deed *to be executed in England* or *Wales* by a married woman for any of the purposes of this Act shall be acknowledged by her, in the manner prescribed by 3 & 4 Will. 4, c. 74 (the Fines and Recoveries Act); and every deed *to be executed in Ireland* by a married woman for any of the purposes of this Act shall be acknowledged by her in the manner prescribed by 4 & 5 Will. 4, c. 92 (the Irish Fines and Recoveries Act); and all and singular the clauses and provisions in the said Acts concerning the disposition of

lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released, or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land." Sect. 2.

It is then provided, "That the powers of disposition given to a married woman by this Act shall not interfere with any power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition." Sect. 3.

And also, "That the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage." Sect. 4. See *Clarke* v. *Green*, 2 Hem. & Mill. 474.

It will be observed that the operation of this Act is of a very limited character. In the first place, it only applies to reversionary interests in personalty to which married women may become entitled after the 31st of December, 1857. And with regard to this, it has been decided, that where a married woman takes a reversionary interest under an appointment executed after the 31st day of December, 1857, and made in pursuance of a power contained in an instrument dated before that day, she will not under Malins' Act, be able to dispose of such reversionary interest as if she had become entitled to it under an instrument made after the 31st day of December, 1857: *In re Butler's Trusts*, 3 Ir. R. Eq. 138.

In the next place, reversionary interests in personal estate comprised in any settlement, or agreement for a settlement, on marriage are excepted from the operation of the Act.

And lastly, all persons conferring reversionary interests in personalty on married women "by any deed, will, or instrument," may restrain them from alienating or affecting the same.

An assignment, when duly made under this statute (20 & 21 Vict. c. 57) passes and transfers personal property to which a married woman is entitled in reversion, discharged from the right of her husband, or any one claiming under him, as effectually as if she were a feme sole. See *In re Batchelor*, 16 L. R. Eq. 481. There a married woman, whose husband was indebted to a testator, having be-

come entitled under his will to a legacy in reversion, not limited to her separate use, joined with her husband in assigning it for value by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57. On the reversion falling in, the executors claimed to be entitled to retain the amount of the debt out of the legacy. It was held by Lord Chancellor *Selborne* (sitting as Master of the Rolls) that there was no right of retainer, and that the assignee for value was entitled to be paid in full. "I am of opinion," said his Lordship, "that the executor's future and contingent right of retainer, as against the husband, if he should eventually have become entitled to reduce this legacy into possession, did not estop the husband in equity from concurring with his wife in such a deed executed by her under this statute. It would doubtless have been otherwise, if he had himself previously dealt with his jus mariti in this legacy by any deed or contract for value; but the right claimed by the executors exists, if at all, by operation of law only, and not by any manner of contract.

"It was however said that the words of the statute enabling a married woman to dispose of the future or reversionary interest 'of such married woman, or her husband in her right,' must be understood, as to the husband's interest in her right, under the deduction of all claims which, as against the husband, would have operated to reduce the *quantum* of his interest. This suggestion struck me at the time as very ingenious; but it is, in my opinion, unsound. It is not accurate to say, that claims which follow and attach themselves upon the husband's interest in wife's right, operate by way of deduction from it. They are derivative from, or they may be adverse to it, but the existence and the quantum of the jus mariti itself are prior to, and in fact constitute the foundation of, all such claims. The construction suggested cannot, in my opinion, be reconciled either with the express declaration that the wife's disposition is to operate 'as fully and effectually as if she were a feme sole,' or with the absolute and unqualified extinguishment of her equity to a settlement.

"If, before the statute, a testator had given such a reversionary legacy to a married woman whose husband was indebted to him, with a power to her to dispose of it while reversionary in the very words of this statute, and under the same condition so far as relates to the husband's concurrence, it cannot, I think, be doubtful that he would have created a power paramount to, and, in case of its exercise, exclusive of, any right of his executors to retain the husband's debt out of the wife's legacy. The effect of the statute is, in my opinion, the same."

As to the form of the stop order on the assignment of the wife's reversionary chose in action, see *Moreau* v. *Polley*, 1 De G. & Sm. 143.

Where a married woman, domiciled abroad, is entitled to reversionary interests in personalty, her rights or powers over such interests, or those of her husband, will be regulated by the law of their domicil. See *Guepratte* v. *Young*, 4 De G. & Sm. 217; *Duncan* v. *Cannan*, 18 Beav. 128, and the cases there cited.

A husband may make a valid assignment of his wife's reversionary interest in leaseholds (*Donne* v. *Hart*, 2 Russ. & My. 360), unless the interest be of such a nature that it cannot by possibility vest in the wife in possession during the coverture: *Duberley* v. *Day*, 16 Beav. 33.

STAPILTON *v.* STAPILTON.

August 2, 1739.

[REPORTED 1 ATK. 2.]

COMPROMISE — FAMILY ARRANGEMENT.]—*An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement.*

Where agreements are entered into to save the honour of a family, and are reasonable ones, a Court of equity will, if possible, decree a performance of them.

BY a deed, dated on the 21st of August, 1661, Philip Stapilton was tenant of the premises in question, for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they, by deeds of lease and release, the 9th and 10th of September, 1724, reciting, that, for settling and perpetuating all manors, &c., in the name and blood of the Stapiltons, and for making provision for his two sons, &c., for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates thereinafter mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum

of 5*s*., release and confirm to Thomson and Fairfax all those manors, &c.: To have and to hold to them, their heirs and assigns, to the use (as to part) of Philip the father, his heirs and assigns for ever, and as to another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father. And as to the remaining part, to the use of Philip the father for life, with like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within twelve months, and likewise for farther assurances. N.B. To this deed, the heir of the surviving trustee in the deed in 1661 was not a party.

But, by deeds of lease and release, dated the 28th and 29th of September, 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons make Thomson and Fairfax tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September, 1724.

Before any recovery suffered, Henry died, leaving issue the plaintiff.

Afterwards, by lease and release, the 12th and 13th of April, 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, Philip the father and Philip the son covenant to suffer a recovery, in which Thomson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity Term, 1725, a recovery was suffered, in

which were the same tenant to the præcipe, the same demandant, and the same vouchees (except Henry, who was dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

The father Philip Stapilton, being dead, the plaintiff, as son and heir of Henry, brought this bill to establish his title to the premises in question, and for the whole estate as tenant in tail under the old settlement, and to be let into possession, and for an account of rents received by Philip Stapilton the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant Philip the son, by his answer confesses the several deeds before mentioned, but says, Henry was a bastard, and that, by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

Upon an issue directed, Henry was found illegitimate, and the cause was now heard upon the equity reserved, when the counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points:—

Argument for the plaintiff.

1st. That the recovery suffered in Trinity Term, 1725, should enure to the use of the deeds of the 9th and 10th of September, 1724, and not to the uses of the deed in 1725.

2ndly. Supposing it did not, yet that the deed of 1724 was such an agreement as this Court will carry into execution.

As to the first point, it was said that the uses, when once declared, cannot be altered, unless all the parties entitled to the uses join in the new declaration; and Henry did not join in the deed of 1725. Tenant in tail may part with his estate, and it shall be good against him, though not against his issue. For tenant in tail is not aided by the Statute of Westminster the 2nd, but only his issue; therefore, by the deed of 1724, the uses

being executed by the Statute of Uses (27 Hen. 8, c. 10), Henry gained a base fee, which is not avoidable by Philip during his life; and, as his issue are barred by the subsequent recovery, they will not be able to avoid it, and consequently Henry's estate, which was before defeasible, is made indefeasible by the recovery.

If tenant in tail confesses a judgment, or mortgages the lands, and afterwards suffers a recovery to a collateral purpose, that recovery shall enure to make good all his precedent acts and incumbrances: 1 Ch. Cas. 119 (*a*). [Lord Chancellor mentioned a case in Lord King's time, where father, tenant in tail, remainder to himself in fee, contracting debts on specialty, his son after his death levying a fine, let in his father's creditors.] And if a recovery suffered for another purpose will substantiate any prior act of the tenant in tail, much more in this case, this recovery will substantiate the first deed, where there are all the parties who covenanted by that deed.

(*a*) *Goddard* v. *Complin.*

As to the second point: this cannot be considered as a voluntary agreement, for Henry's legitimacy was then doubtful, and, if he had proved legitimate, Philip would have come into this Court to have the agreement executed, and Henry would have been bound by it. This Court has decreed the performance of agreements like this, founded upon mistakes; as in the cases of *Frank* v. *Frank*, 1 Ch. Cas. 84, and *Cann* v. *Cann*, 1 P. Wms. 723.

Argument for the defendant.

For the defendant it was argued, as to the first point, that Henry being dead before the recovery was suffered, the intent of the parties in the first deed could not be pursued; for the plaintiff (supposing him legitimate) claims paramount his father, and the deed 1661; therefore, as the recovery could not substantiate the first deed, supposing him legitimate, it shall not substantiate it, now he is found illegitimate.

The plaintiff, upon the death of his father, had not any use vested in him; for the intent of the parties was, that the uses should arise out of the recovery: the ends recited could not be come at without a recovery; and where the

intent of the parties is, that the uses should pass by fine or recovery, nothing will pass by the deed that is intended only to declare the uses. The fine and recovery all make but one conveyance: Cro. Jac. 643, 2 Ro. Rep. 68, 2 Lev. 306, 1 Vent. 279, 2 Lev. 54; *Cromwell's Case*, 2 Co. 69; Cro. Jac. 320.

As to the second point: take it as an agreement, this Court will not decree a performance of it; for, supposing Henry had been found legitimate, this Court would not have decreed a performance of it against the plaintiff; so that, in regard to the defendant, it must be considered as a voluntary agreement, into which he was drawn without any valuable consideration; and the covenant for further assurance will be void, as the deed itself to which it is annexed is void: and so it was determined in the case of *Fursaker* v. *Robinson*, Prec. Ch. 475.

Lord Chancellor Hardwicke.—The plaintiff in this case is entitled to have a decree. There was a sufficient foundation for Philip the father, and Henry and Philip, his two sons, to execute the lease and release of the 9th and 10th of September, 1724. It was *to save the honour of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done.*

It would be very hard for the defendant, on his side, to endeavour to set aside this agreement, and the effect of this deed. Consider the state and situation of the family at the time of making the agreement; Philip had these children grown up, had a very considerable real estate, both his sons then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so; there was a foresight in the father and mother, that such a dispute between their two sons might hereafter arise, to their dishonour, and likewise that of the family.

The foundation of this agreement, the illegitimacy of the eldest son Henry, has now been determined by a trial, and it is found that Henry was a bastard; yet both the

sons are of the same blood of the father equally, though not so in the notion of the law.

If the elder son should be found illegitimate (as he now is), the father knew he would be left without any provision, if no such agreement was made; and, on the other hand, if his legitimacy should be established, then Philip, the younger son, would have nothing. To prevent these disputes and ill consequences, the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving trustee in the settlement of 1661, at the time of the lease and release of the 9th and 10th of September, 1724; because they covenant a writ of entry should be sued out within twelve months, which is a very unusual time to limit to suffer a recovery, and done in order to give time to find out the heir of the surviving trustee, if they could find him out; but he was afterwards found, and made a party to the deeds of the 28th and 29th of September, 1724.

The bill is brought by the eldest son and heir of Henry, to have the benefit and possession of the whole estate, and to have an account of the rents and profits, and to be quieted in the possession, and for general relief. Upon the first hearing, an issue was directed to try whether Henry the father was legitimate, and it was found he was not; and now the plaintiff insists upon having the benefit of this agreement, whereby he is only entitled to a part; this being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; but it might be otherwise in the case of an adult person.

Upon this case there arise two general questions:—

First, Whether the plaintiff has any estate at law by virtue of any of the conveyances, or by the recovery?

Secondly, If he has no estate at law, or only a defeasible one, whether he is entitled to have the benefit of this agreement, and to have it carried into execution here?

The first question consists of two branches:—

First, Whether the lease and release of the 9th and 10th of September, 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725?

Secondly, If not, whether the recovery of Trinity Term, 1725, having barred the estate tail, will make good any estate which passed by the lease and release of the 9th and 10th of September, 1724?

As to the first: whether the lease and release is a good declaration of the uses of the recovery, I am strongly inclined to think it will amount to a good declaration: this question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer a recovery, and uses are declared, if the recovery is after suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will enure to the uses so declared.

And, before the Statute of Frauds, if the deed declaring the uses had not been pursued, a parol declaration of uses would have been let in; but if there is a deed declaring the uses, and the common recovery is suffered accordingly, that would, before the statute, exclude a parol declaration of new uses.

But, even now, there may be a subsequent declaration of uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore, though it is said at the bar, that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law, for such subsequent declaration must be by all the parties concerned in interest; and in *The case of the Countess of Rutland* (5 Co. 25), it is not laid down there that the tenant in tail might declare new uses, but it is said, whilst it is directory only, new uses may be declared; and the meaning of that is, that, as the uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual

consent of all the parties concerned in interest; and in that case it was a mutual agreement of all parties.

And in the case of *Jones* v. *Morley* (2 Salk. 677), there was a variance as to the time of suffering the recovery, from the deed declaring the uses, and it was there held, that a declaration of uses was equally good, whether by deed or not, if in writing.

But, in the present case, the second agreement not being between all the parties concerned in interest, ought not to control the first declaration, and especially as this recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

The consideration for suffering the recovery was good, both in law and equity; and there is no case to warrant me to say, the first agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uses.

But if it was doubtful whether the recovery suffered in 1725 should enure to the uses declared by the deed of 1724, I am of opinion the recovery will operate to make good those estates which passed by the deed of 1724.

But to this, two objections have been made:—

First, That the uses must be governed by and operate according to the intention of the parties; therefore, the subsequent recovery being suffered to other uses, those uses will take place.

Secondly, If any uses did pass by the deed in 1724, yet this recovery will not make those uses good; because the subsequent recovery was suffered to particular uses declared by the deed of 1725.

As to the first objection, I am of opinion that a use did pass by the deed of 1724, and according to the intention of the parties. It is certainly true, that, according to the Statute of Uses (27 Hen. 8, c. 10), the general doctrine is, that the uses shall be executed according to the intention of the parties; but both the Courts of law and equity consider what was the general and final intent of the parties. In this case, their intention was, that the estate

should pass; and wherever a Court of law or equity find that the general and substantial intent of the parties was that the estate should pass, they will construe deeds in support of that intention different from the formal nature of those deeds themselves; as a feoffment to serve the intention of the parties, shall operate as a covenant to stand seised. The intent here was, that the estate in point of law should pass by the deed of 1724, and that the uses declared by that deed should vest in the mean time till the recovery suffered. This is an answer to the objection arising from the Statute of Uses; but there is another question, What estate passed by the deed of 1724?

It was a defeasible estate to serve the uses of that deed, and so is the resolution in *Machill* v. *Clarke*, in Farresl. 18 (*a*), 2 Salk. 619, that tenant in tail may convey a base fee and estate defeasible, by the entry of the issue.

(*a*) 4 Mod. 1.

The next question is, whether the recovery suffered in 1725 did enure to make good and render indefeasible those base estates created by the deed of 1724? And I am of opinion they are made good.

The objection to this is, that the recovery was suffered in pursuance of the deed of 1725, wherein there were new uses limited; but the only uses which make any difference in that deed, are to Philip the son and his heirs; so there is nobody concerned in the question but Philip and his heirs.

It has been argued by defendant's counsel, that, if the first declaration of uses is in general to prevail, purchasers of estates, though they have a recovery for strengthening their title, with a declaration of the uses of the recovery to themselves and their heirs, cannot be safe; for the vendor may defeat such declaration by a precedent one to different uses; but in such cases I think a recovery would not enure to make good such former declaration of uses, but only the uses of the purchase.

It is admitted, that, if tenant in tail confesses a judgment or a statute, or enters into a bond and afterwards suffers a recovery to bar the estate tail, it lets in the

precedent judgment, &c. And it is as clear, if a tenant in tail makes a lease not warranted by the statute of the 32 Hen. 8, c. 28, if he suffers a recovery, that lets in the lease and makes it good. There are so many cases of this kind, that it is not necessary for me to mention them.

This case is different from those that turn only upon the point of the effect of a mere declaration of uses; for a mere declaration of uses subsists only upon the agreement of the parties; and in such cases, where the agreement has been changed by mutual assent of all parties, there a recovery shall enure to make good such last agreement or declaration.

But if the estate was vested, notwithstanding such declaration of uses, yet the recovery has always been held to make good such defeasible estate; for the prior lease, charge, or estate made by tenant in tail, is only defeasible by the issue, by virtue of the statute De Donis (13 Edw. 1) which was made to protect the issue against the alienation of the tenant in tail; therefore the issue would avoid such lease, &c., but not the tenant in tail himself; but when by the recovery he has gained to himself a fee, all the reasoning for avoiding an estate made by tenant in tail is gone, for the issue is barred by the recovery. The reason why the issue may avoid a charge made by tenant in tail is, upon account of the protection of the issue and his estate, under the statute *De Donis* (13 Edw. 1), and of the privity of the estate tail; but when the privity is gone, the reason ceases; and to this purpose is the case of *Croker* v. *Kelsey*, Sir W. Jones, 60.

In *Lord Derwentwater's Case* (9 Mod. 172), the question was, whether a Papist, tenant in tail, suffering a recovery and declaring the uses to himself in fee, gained a new estate within the 11th and 12th of Will. 3, c. 4, or was in of the old use? And it was held, the 5th of Geo. 1, by four judges out of five, appointed delegates to determine appeals from the Commissioners of Forfeited Estates that he was in of the old use; and I take it for law, that a tenant in tail suffering a recovery is in of the old use, and that the estate is discharged of the statute

De Donis; and therefore, I am of opinion that the recovery has made good this defeasible estate, created by the deed of 1724.

It has been objected, that, if the plaintiff has any title, his remedy is at law; but I think it is more properly here. He is an infant, and has come recently into this Court. Nor do I think this case depends entirely upon the point of law; for I am of opinion that the plaintiff is entitled to have an execution of the agreement, as a good and binding agreement in this Court.

The question is, whether there was *any valuable consideration* on all sides for entering into this agreement? If so, then there is a sufficient ground for coming here; but a mere volunteer is not entitled to come here for an execution of an agreement. But here is a proper consideration, as appears in the recital of the deed of 1724. Neither is it the common case of a bastard; for the law of England does allow of some privileges to a bastard eigne, and their parents are not punishable by the canon law for antenuptial fornication.

In the case of *Cann* v. *Cann* (*a*), it was laid down by Lord *Macclesfield*, that an agreement, entered into upon a supposition of a right (*b*), or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

(*a*) 1 P. Wms. 723, 727.

(*b*) Lord *Eldon* in *Stockley* v. *Stockley*, 1 V. & B. 31, observes that the words of Lord *Macclesfield*, instead of "a supposition of right," might have been "a doubtful right."

Another objection has been made to this agreement, that the benefit on Henry and Philip's side was not mutual and equal. During both their lives, the benefit and obligation was mutual, and Henry would have been equally compellable to suffer a recovery with Philip. But it is said, that an alteration as to their mutual benefit has happened by the death of Henry; and it is said, that if Henry had been legitimate, the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of

his ancestor, the tenant in tail. But here, the chance was at first equal; and it is hard to say, that the act of God should hinder the agreement from being carried into execution; the chance was equal, who died first, Henry or Philip? If Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion Philip's son would have been entitled to have come against Henry for an execution of the agreement; and, therefore, the chance was at first equal on both sides, and we are not to consider how the event has happened.

Another objection has been taken, that the father made use of his coercive power over Philip, to force him into this agreement; and it is said equity does not favour agreements made by compulsion. But *this Court always considers the reasonableness of the agreement;* besides, here is no proof of compulsion by the father: if there was any compulsion, it seems rather to have been made use of against Henry, who was then esteemed his eldest son; and, considering the consequence of setting aside this agreement, *a Court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.*

His Lordship, therefore, declared, that the plaintiff is entitled to the lands and premises limited in remainder, to the first son of Henry Stapilton, his father, by the deeds of the 9th and 10th of September, 1724, according to the uses therein, and to the benefit of the covenants in those deeds, and decreed the defendant Philip to come to an account for the rents of the said premises; and declared that Philip was entitled to hold the lands, limited by the deeds of the 9th and 10th of September, 1724, to Philip the elder for life, with remainder to the defendant for life, against the plaintiff and his heirs; and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, and no costs on either side.

"From the Case of *Stapilton* v. *Stapilton*," observes Lord Chancellor *Sugden*, "down to the present day, the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family (and especially, I may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers. . . . . Generally, if there be a legitimate and an illegitimate son, it cannot admit of any doubt, that, under the state of circumstances involving the honour and credit of a family, there may be a compromise binding upon the legitimate son, by which he agrees to give up a particular part of the property to his illegitimate brother; and that, not, of course, upon any title in the illegitimate son, but simply upon the ground that such an arrangement was for the honour of the family, and the settlement of family differences, and to avoid any question of legitimacy:" *Westby* v. *Westby*, 2 D. & War. 503. In that case, which proceeded on precisely the same principles as *Stapilton* v. *Stapilton*, A. was entitled to an estate in remainder, in Blackacre, expectant upon the decease of his uncle B. without male issue, and had also a remote interest in Whiteacre, expectant upon the same event. B. was twice married; by his first wife he had issue only two daughters; by his second, *who was sister of his first wife*, he had issue both sons and daughters. Under these circumstances, in 1817 A. threatened and attempted to institute proceedings of a civil character in the Ecclesiastical Court against B. and his second wife, for the purpose of annulling their marriage, and rendering their issue illegitimate. A compromise was proposed, and after much deliberation carried into effect by articles of agreement. By these articles, B. agreed to secure certain provisions for the female issue of A.; and in consideration thereof, A. covenanted not to impeach B.'s second marriage. The articles also contained a proviso, that, in the event of the successful impeachment of B.'s marriage by any person, all the agreements of the articles should be void. In 1838 B. died, and his marriage was never disturbed. On a bill filed by his executor and his eldest son, to set aside the compromise of 1817, it was held, by Lord Chancellor *Sugden*, that the transaction was a fair family arrangement, neither inconsistent with public policy nor the principles of the

Court, and the bill was dismissed with costs. And see *Stockley* v. *Stockley* (1 V. & B. 30), where Lord *Eldon*, after noticing *Pullen* v. *Ready* (2 Atk. 587), and *Cory* v. *Cory* (1 Ves. 19), said, that those cases and *Stapilton* v. *Stapilton*, which, with all the able reasoning in it, was also an extremely strong case, led him to the opinion, that, in family arrangements, the Court did not quite go the length of denying relief upon the principle that prevailed between strangers. And see *Cood* v. *Cood*, 33 Beav. 314; *Williams* v. *Williams*, 2 Dr. & Sm. 378; 2 L. R. Ch. App. 294.

A family arrangement may be implied without any express written contract from a long course of dealings between the parties, and the Court will enforce it, in the same mode as it does ordinary family arrangements. See *Williams* v. *Williams*, 2 Dr. & Sm. 378; 2 L. R. Ch. App. 294.

It is proposed in this note to examine the cases in which Courts of equity will give effect to transactions based upon the compromise of conflicting claims, and to point out how much more readily, and to how much greater an extent, such transactions will be supported, when they either are, or partake of the nature of, family arrangements.

The compromise of doubtful claims, whatever may be the actual rights of the parties, has, from the policy of preventing litigation, been generally upheld in all enlightened systems of jurisprudence. The authorities of the civil law upon the subject, are collected in Burge's Comm. vol. 3, 742. So, in the law of Scotland, compromises, under the name of *transactions*, are equally favoured. Thus, Lord *Stair*, in treating on Restitution, lays it down, "that positive law, for utility and quietness' sake, excepteth *transactions* which are properly such, and which are of two sorts, the one extrajudical, when, in any matter doubtful and debateable, either party to shun the hazard and trouble of a legal decision, is willing to *transact* and agree, so as thereby they quit or abate part of what they claim as their right, and so they tacitly renounce all future question upon any appearing of right, either judicially or extrajudicially; and therefore, what either quitteth to other of their rights is done for the same cause, and hath in it, either expressly or implicitly, that such *transaction* shall not be *retracted* upon anything that shall accidentally appear thereafter, fraud and force only (as the common exception in all human actions) being excepted:" Stair's Inst. tit. 7, s. 9; *Hotchkin* v. *Dickson*, 2 Bligh. 348; *Stewart* v. *Stewart*, 6 C. & F. 911; and see *Trigge* v. *Lavallee*, 11 W. R. (P. C.) 404, as to the old French law.

With regard to our law, it is

clear that if a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made bonâ fide, to which he believed himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a Court of equity, without inquiring whether he was in truth liable to the claim, will compel a specific performance: *Attwood* v. ———, 1 Russ. 353; *Pickering* v. *Pickering*, 2 Beav. 56; *Partridge* v. *Smith*, 11 W. R. (V. C. K.) 714. And see *Callisher* v. *Bischoffsheim*, 5 L. R. Q. B. 449, where it was decided at law, that a compromise of a disputed claim made bonâ fide, is a good consideration for a promise, even although it ultimately turn out that the claim was wholly unfounded.

Nor can the Court inquire into the supposed adequacy or inadequacy of the consideration. "Where," asks Sir *John Leach*, V. C., "is it to find a scale for determining the true measure of adequacy? If a Court is in such a case to be governed by its judicial opinion upon the rights of the parties, then to him who by that opinion is held to be entitled to the whole property, no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant. It is for this reason, and because I consider it to be wholly immaterial for the purpose of deciding upon the validity of the deed of compromise, that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim to the perpetual annuity. It is enough to support this deed, that there was a doubtful question and a compromise fairly and deliberately made upon consideration; and the actual rights of the parties, whatever they might be, cannot affect the question." Per Sir *J. Leach*, V. C., in *Naylor* v. *Winch*, 1 S. & S. 565; see also *Lucy's case*, 4 De G. Mac. & G. 356, and *Cook* v. *Wright*, 1 B. & S. 559, 570.

A distinction has been taken between an error of law and an error of fact. "It is a maxim of equity," says an eminent Judge, "that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in law, they cannot afterwards be heard to say, that the contract shall on that account be set aside:" *Marshall* v. *Collett*, 1 Y. & C. Exch. Ca. 238; and see *Broughton* v. *Hutt*, 3 De G. & Jo. 501; *The Midland Great Western Railway of Ireland Company* v. *Kinder*, 6 W. R. (Ho. L.) 511; *The Directors, &c. of the Midland Great Western Railway of Ireland* v. *Johnson*, 6 Ho. Lo. 798, 811.

It is not intended here to examine with any minuteness the

nice distinctions which undoubtedly exist as to the effect of a mistake of law or fact in ordinary dealings or agreements (see *Cooper* v. *Phibbs*, 2 L. R. Ho. Lo. 149). It seems, however, that ignorance, whether of fact or law, if the fact or law be doubtful, and the ignorance of it is common to all parties, especially in cases of family arrangements, will not vitiate a compromise. For instance, the question, whether a person is heir or not, is a *fact*, or, at any rate, often depends upon a doubtful fact, whether a marriage has or has not been celebrated; nevertheless, it is clear, that if, as in the principal case, that fact be doubtful, two claimants, although one of them is afterwards clearly proved to be heir, may settle all disputes, especially to save the honour of the family, by dividing the property. Another case may be mentioned, in which the parties entering into a compromise appear to have been ignorant of a fact, namely, of the existence of a deed; nevertheless, the compromise was sustained. In *Neale* v. *Neale* (1 Keen, 672), James Neale and Joseph Neale, having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, James, the elder brother, taking somewhat the larger share, a doubt being then entertained, whether their father had a right to devise the lands. James was, in fact, at the time of this agreement, tenant in tail under the limitations of a surrender made by his grandfather; and, after James's death without issue, Joseph, having discovered his own title as tenant in tail, repudiated the agreement, and brought an action to recover the whole estate. On a bill being filed by the devisee of James, it was argued for Joseph, that he had never agreed to abandon any right which he might thereafter acquire, and which was neither in his own contemplation nor in that of the party with whom the agreement was made; and that, in most of the cases which were cited, the parties had a full knowledge of all the circumstances enabling them to enter into a compromise. However, Lord *Langdale*, M. R., decreed Joseph to do all necessary acts to bar the entail, and vest the parts of the lands allotted under the agreement to James, upon the trusts of James's will. "It does not," said his Lordship, "appear to me that the agreement merely related to the mode of enjoying the estate, or had reference only to a partition. Joseph did not so consider it; he knew that James thought himself entitled to the whole estate, and he himself, influenced, as he says, by the assertions of James, and desirous to avoid litigation, consented to accept less than half. This, then, is not a simple agreement for

equality of partition—it is an agreement for partition, with compensation for abandoning a supposed right and a claim. Upon what that supposed right depended does not appear; but that there was a supposed right of James, to some extent yielded to by Joseph, is clear; and, if it be considered that the right which to the parties themselves at that time was only supposed, had a real foundation, which might have been verified either by production of the document then in the possession of Joseph, or by searching the Court rolls of the manor, that, if Joseph had not made the concession which he did, James, instead of consenting to the agreement, might have investigated the title, and proved that the whole estate was his own, it will appear that the concession, however trifling in itself, placed the parties in a situation very different from that in which they might otherwise have stood; and looking at this case with reference to those principles, deducible from the several cases cited at the bar, I am of opinion that the agreement, though *parol*, yet being in the nature of a family arrangement, and followed by the uninterrupted several enjoyment of the portions allotted to the two brothers respectively, is an agreement which this Court will enforce." This decision was, on appeal, affirmed by Lord *Cottenham*. See also *Heap* v. *Tonge*, 9 Hare, 90; *Manby* v. *Bewicke*, 3 K. & J. 342; *Fowler* v. *Fowler*, 4 De G. & Jo. 250.

That a mistake of *law* which is common to all the parties, will not vitiate an arrangement, is clear. Thus, in *Pullen* v. *Ready*, 2 Atk. 587, legacies were given, to be forfeited upon marriage without consent; one of the legatees did marry without consent, and a family arrangement, without the advice of counsel, took place, and articles were executed, giving that legatee the benefit of the legacy. It was insisted afterwards, that the arrangement was made under a mistake of law that the condition was only in terrorem, which under the circumstances, it was not; but Lord *Hardwicke* decreed specific performance of the articles, saying, that, at the time of the execution of the articles, the marriage without consent could not but be known, and that the parties to it could not possibly be supposed to be ignorant of that *fact* which happened some years before. That it was said, they might know the *fact*, and yet not know the *consequence in law:* but if parties were entering into an agreement, and the very will out of which the forfeiture arose was lying before them and their counsel while the drafts were preparing, the parties should be supposed to be acquainted with the consequences of law as to that point, and should not be relieved under a pretence of being surprised, with such strong circumstances

attending it; so that, with the knowledge of the will, and all the clauses in it, the condition annexed, and the forfeiture, the parties, with their eyes open, executed the deed; that it had been insisted by counsel, that they had executed the articles under a *mistake*. But his Lordship said, that there was nothing more mischievous than for the Court to decree a forfeiture after an agreement, in which, *if there was any mistake, it was the mistake of all the parties to the articles, and no one of them was more under an imposition than the other*. The Court was so far from assisting to set up the forfeiture again, that it would rather rejoice at the agreement, because it had absolutely tied up the hands of the Court from meddling in the question; and if it were to decree the forfeiture then, it would be making all agreements vain and nugatory: the case that came nearest to the present was *Cann* v. *Cann* (1 P. Wms. 723), before Lord *Macclesfield*.

Where, therefore, a doubtful question arises, such as a question of construction upon a will, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportion which may be agreed upon. Per Sir *J. Leach*, V. C., in *Naylor* v. *Winch*, 1 S. & S. 564.

So where payments were made under a mistaken construction of a doubtful clause in a settlement, the Court refused to direct them to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially as subsequent family arrangements had proceeded on the footing of that construction: *Clifton* v. *Cockburn*, 3 My. & K. 76; and see *Great Western Railway Co.* v. *Cripps*, 5 Hare, 91; *Rogers* v. *Ingham*, 3 Ch. D. 351.

And where a deed of family arrangement has been acted upon for many years, and no fraud is imputed, the Court will not set aside or alter such deed upon the mere allegation by some of the parties to it, that its provisions did not carry out their intentions: *Bentley* v. *Mackay*, 31 Beav. 143, 10 W. R. (L. J.) 873.

The principle of these cases seems to have been departed from in *Lansdown* v. *Lansdown*, Mos. 364. In that case there were four brothers; the second died, and the eldest brother entered upon his lands; the youngest brother claimed a title; upon which they applied to Hughes, a schoolmaster, their neighbour, in the country (who often acted as an attorney), for his opinion, who, upon consulting a book called "The Clerk's Remembrancer," gave it in favour of the youngest brother, because land could not ascend; upon which the eldest brother agreed to divide the estate with the youngest, and declared he would rather do so

than go to law, though he had the right; upon which Mr. Hughes prepared deeds of lease and release of the moiety, which were executed by the eldest brother, and bonds in the penalty of 300*l.*, which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares. The youngest brother died, and the moiety descended on the infant defendant, his son and heir. And Lord Chancellor *King* decreed, that the bond and deeds of lease and release should be delivered up to the plaintiff, the eldest brother, being obtained by mistake and *misrepresentation*, and that the defendant, the infant, when he came of age should convey nisi, &c.; and his Lordship said, that the maxim of law, *Ignorantia juris non excusat*, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases.

An extract of this case, from the Registrar's Book, is given, 2 J. & W. 205, where the ground for the decision is stated to be "mistake and misrepresentation of the law." A mere mistake, however, or misrepresentation of the law by the person the brothers consulted, would not be sufficient reason for refusing to carry into effect such an agreement; and it is clear that the observation of Lord *King*, that the maxim, *Ignorantia juris non excusat*, did not hold in civil cases, has not been recognised in modern times. See *Stewart* v. *Stewart*, 6 C. & F. 966; *Hirschfield* v. *The London Brighton and South Coast Railway Co.*, 2 Q. B. D. 1.

Moreover, where parties come to the Court of Chancery to be relieved against the consequences of mistakes in law, it is the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told in what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice they have received be well or ill founded) they will give up the question in favour of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, and particularly when they arise between parent and child. Per Sir *G. Turner*, V. C.; *Stone* v. *Godfrey*, 5 De G. Mac. & G. 90.

Any transaction between father, tenant for life, and son, tenant in tail of property, entered into upon barring the entail, is looked upon in the nature of a family arrangement; and in such a case, apparent inadequacy of consideration, and the circumstance, that the property is reversionary, will have but little weight. In *Cory* v. *Cory*, 1 Ves. 19, on the fact appearing, that one of the parties was drunk at the time an agreement was entered

into to settle disputes in a family, Lord *Hardwicke* thought that it was not sufficient to set the agreement aside, as it was reasonable, and it did not appear that any unfair advantage was taken. And he observed, that, "if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not set it aside." And see *Wycherley* v. *Wycherley*, 2 Eden, 175; *Persse* v. *Persse*, 7 C. & F. 318.

In *Bellamy* v. *Sabine*, 2 Ph. 425, upon an agreement between father and son, for disentailing an estate, and for a conveyance to the son in fee, the main consideration moving from the son was an undertaking to pay the father's debts, even the circumstance of several of the most important items being left in blank was held insufficient to set the transaction aside as against the father, though the son was only just come of age, as a family arrangement of such a description could not be supposed to have depended upon a very exact calculation of the amount of debts. See also *Hoghton* v. *Hoghton*, 15 Beav. 305, where the law upon the subject is very elaborately laid down by Sir *John Romilly*, M. R. *Dimsdale* v. *Dimsdale*, 3 Drew. 556; *Baker* v. *Bradley*, 7 De G. Mac. & G. 597; *Hartopp* v. *Hartopp*, 21 Beav. 259; *Head* v. *Godlee*, Johns. 536; *Jenner* v. *Jenner*, 2 Giff. 232; 2 De G., F. & Jo. 359.

As to undue influence on the part of a parent, see ante, p. 573.

A *bonâ fide* family arrangement (previous to the abolition of the usury laws) would not have been deemed usurious merely because it secured a loan with legal interest, and the borrower, by way of settlement, made other provisions for the lender: *Arkwright* v. *Lord Huntley*, Printed Cases, D. P., 1825, cited Sugd. Prop. 86.

If an arrangement between two parties is, on moral principles, fair, or is such as is sustainable, as between them, on the ground of its being a family transaction, it will not be rendered invalid because it may have been concocted and brought about by a third party, with a fraudulent intention of benefiting himself. Thus, in *Bellamy* v. *Sabine*, 2 Ph. 425, an agreement between a father, tenant for life, and an eldest son, tenant in tail, for certain considerations, to bar the entail and convey the estate to the son, was followed, within a fortnight, by the sale of the estate by the son to the solicitor who had acted for both parties in the agreement. In a suit, after the death of the son without issue, by the next remainderman in tail, who was also heir-at-law of the son, to set aside both transactions, and to have the estates resettled to the former

uses, Lord *Cottenham* was of opinion, upon the evidence, that both transactions were but parts of one scheme, contrived by the solicitor for his own benefit; but, being also of opinion, that, on the principle of family arrangements, the agreement between the father and son was not necessarily an unfair one in itself, the second transaction only was set aside, the bill being dismissed as to the first, and the solicitor was decreed to convey the estate to the plaintiff in fee.

Although it is clear that when parties enter into a compromise or family arrangement, in order to avoid litigating the question as to whether one of the parties is entitled to certain property or not, such compromise will not be set aside although it should eventually turn out that the party taking something under the compromise was in reality legally entitled to nothing; nevertheless, the rather refined distinction has been taken that if the parties assuming something to be due, by the compromise merely settle the amount, without reference to the question whether anything be due or not, if it turns out that nothing really was due, the compromise will not be binding, and a deed for carrying it into effect will be set aside. This distinction was taken in the case of *Lawton* v. *Campion*, 18 Beav. 87, there the children of John Lawton, a deceased remainderman, insisted as against their uncle Charles (a prior tenant for life in possession) that they were entitled, under the terms of a settlement, to have their portions raised from the death of their father in 1831. Some discussion took place, and a bill was filed by them. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of the arrears of interest, and settled the amount of the future interest, which Charles thereby engaged to pay. It having been afterwards determined in another suit, that on the true construction of the settlement the claim of the children was unfounded, Charles instituted a suit to set aside the deed, and Sir *John Romilly*, M. R., made a decree in his favour. "In my opinion," said his Honor, "the thing compromised was not the right to have the portions immediately raised, but something collateral to it, and arising and flowing out of it. The liability of the plaintiff to pay was not, in fact, compromised; but the amount which he would have to pay, under a liability, assumed and admitted on both sides, was the thing compromised, and the only subject of the compromise. That is the view which I take of this case from the correspondence, and which the deed appears to me to confirm. It appears to me to have been entered into for the purpose of settling the question of the amount which the plaintiff was liable to pay to these ladies,

and not to settle any question as to his liability to pay anything at all." And after referring to *Harvey* v. *Cooke*, 4 Russ. 57, as being exactly in point, his Honor added, "Undoubtedly a family arrangement was entered into in this case; but the question is, what it included. In my opinion, the liability of the plaintiff to pay anything, or in other words, the fact that the money was raisable on the death of John Lawton, was not an ingredient in that arrangement, and did not form a term of it. That question was not present to the mind of either party at the time when they entered into this arrangement, as one which could be contested; the arrangement was limited to matters in difference, flowing out of and proceeding from that which was considered to be an undoubted liability."

Upon a principle somewhat similar it has been determined that a compromise under the Court, will not exclude a point of construction not then under consideration: *Bennett* v. *Merriman*, 6 Beav. 360.

But an agreement cannot be sustained, even as a family arrangement, if by design, or even by accident, there has not been a full disclosure of all material circumstances in the knowledge of one of the parties, and it is immaterial whether information be asked for by the other parties or not. See *Gordon* v. *Gordon*, 3 Swanst. 400, there an agreement was entered into between two brothers, the younger of whom disputed the legitimacy of the elder, for the division of the family estates. At the time of the agreement the younger brother was apprised of a private ceremony of marriage which had passed between their parents, but did not communicate that fact to the elder. The legitimacy of the elder brother being established on the trial of an issue directed, Lord *Eldon*, after the lapse of nineteen years, rescinded the agreement.

In giving judgment, his Lordship said, "My view of this case, (and I have not arrived at it without reluctance, is, that the younger son knew that there had been some ceremony, which is called a private marriage. I cannot doubt that fact without imputing to several witnesses the most infamous perjury. I find no evidence that at the time when the plaintiff entered into the agreement of 1790, he was apprised of that ceremony; and I say, that if the youngest son, knowing that fact, of which the plaintiff was ignorant, dealt with him without disclosing it, *whether the omission of disclosure originated in design, or in an honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication*, the agreement cannot be sanctioned by the Court.

"If the younger son had in-

formed the plaintiff of the fact of the private ceremony, and afforded him the opportunity of deciding, by his own judgment, whether that ceremony constituted a marriage, and the plaintiff had consented to impute to himself the character of illegitimacy, when, by the verdict, it appears that the character of legitimacy belonged to him, I think, omitting at present the question of consideration, that the Court could not have interfered with the agreement." And see *Pusey* v. *Desbouverie*, 3 P. Wms. 315, 321; *M'Carthy* v. *Decaix*, 2 Russ. & My. 614; *Harvey* v. *Cooke*, 4 Russ. 58; *Groves* v. *Perkins*, 6 Sim. 576; *Leonard* v. *Leonard*, 2 Ball & B. 171; *Smith* v. *Pincombe*, 3 Mac. & G. 653; *Cooke* v. *Greves*, 30 Beav. 378; *Greenwood* v. *Greenwood*, 2 De G. Jo. & Sm. 28; *Tennent* v. *Tennents*, 2 L. R. Ho. Lo., *Sco.*, 6, 9, 10; *Fane* v. *Fane*, 20 L. R. Eq. 698.

And especially if parties are not on equal terms, and one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties: *Pickering* v. *Pickering*, 2 Beav. 31, 56; *Pusey* v. *Desbouverie*, 3 P. Wms. 315, 320, 321; *Sturge* v. *Sturge*, 12 Beav. 229.

A concealment, however, of truth, or a suggestion of what is false, will not affect the validity of a compromise, unless it be relevant to the matter to be compromised. See *Maynard* v. *Eaton*, 9 L. R. Ch. App. 414. There the defendant, through his broker, purchased from the plaintiff's broker, through a jobber in the ordinary way, shares in a joint-stock company, which were afterwards registered in the name of the defendant's son, who at that time was an infant—a fact then unknown to the plaintiff. Soon afterwards the company was wound up voluntarily, when the infant transferree brought an action by his father, as next friend, against the plaintiff, who was auditor of the company, charging him with fraud in selling the shares, knowing the company to be in an insolvent condition. The action was compromised upon the terms that all charges of fraud should be withdrawn, and that the purchase-money should be repaid to the infant. The liquidators, on discovering that the transferree was an infant, substituted the name of the plaintiff for his as a contributory to the company. The plaintiff then filed a bill against the defendant, charging that he was the real purchaser of the shares, and that the plaintiff was not aware of the fact when he entered into the compromise, and claimed to be indemnified by the defendant against all

loss in respect of the transaction. It was held by the Court of Appeal in Chancery, reversing the decision of Sir *R. Malins*, V. C., that the compromise was an effectual bar to the plaintiff's claim to relief, and that the fact of his ignorance that the defendant was the real owner of the shares was immaterial. "It was argued," said Lord *Cairns*, L. C., "and it was the only way in which the compromise could be got rid of, that the plaintiff at that time was ignorant of the fact that the father was the real owner of the shares. Supposing it to have been so, how could that have been in any way relevant to the validity of the compromise? Suppose the plaintiff had been told in Court, when the compromise was about to be concluded, that the real owner of the shares was the father, I cannot imagine in what respect it would have been relevant, either in trying the action before a jury, or as to the terms of a compromise, whether the beneficial owner was the son or the father. The only person who could have brought the action was the infant whose name was on the register, and he was capable of maintaining it. The action having resulted in the recision of the contract, the vendor had a right to be reinstated as the owner of the shares, and by being so reinstated, he lost any right which he might have had against the father for any indemnity in respect of them."

A transaction will not be supported as a family arrangement, which appears to have been entered into by parties simply misunderstanding their interests, about which there could be no reasonable doubt, especially where the party surrendering his rights, was a person liable to imposition and without professional advice. See *Dunnage* v. *White*, 1 Swanst. 137, a deed was executed by the members of a family, to determine their interests under the will and partial intestacy of an ancestor; but it appeared on the face of the deed, that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration; and evidence being given of his gross ignorance and habitual intoxication, liability to imposition, and want of professional advice. After an acquiescence of five years, and in the absence of direct proof of fraud or undue influence, Sir *Thomas Plumer*, M. R., considering the state of mind of the heir, his circumstances, and the nature of the transaction, was of opinion it was not such a deed as the Court ought to execute, and that it could not be supported as a family arrangement, upon the doctrine of *Stapilton* v. *Stapilton*, and *Cann* v. *Cann;* but he said, that, undoubtedly, parties entitled in different events, might, while the uncertainty existed, each taking his chance, effect a valid compro-

mise; that, in *Stapilton* v. *Stapilton*, the legitimacy of the eldest son was *doubtful:* that was a question proper to be so settled, and the settlement was a consideration which gave effect to the deed." See also *Stockley* v. *Stockley*, 1 V. & B. 31.

Where a person under the influence of threats, and under apprehension of arrest, and without adequate consideration or advice, has given securities as a compromise of doubtful rights, they will be set aside in equity: *Scott* v. *Scott*, 11 Ir. Eq. Rep. 74.

Upon the same principle where a deed in the nature of a family arrangement has been executed by a cestui que trust, under pressure from the trustees in violation of their duties, it will be set aside in equity: *Ellis* v. *Barker*, 7 L. R. Ch. App. 104.

Where a deed was made for the purpose of carrying into effect a family arrangement, and it contained a declaration of trust inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to, or contemplated by, the parties or their solicitors, or that their actual rights were intended to be altered, it was held by Sir *James Wigram*, V. C., that the declaration ought to be varied: *Ashurst* v. *Mill*, 7 Hare, 502.

It has been decided by the highest authority, that a compromise of a family dispute is not rendered invalid, in consequence of one of the parties not distinctly understanding his rights, if they were understood by his agents, by whose acts and knowledge in the absence of fraud, the principal is bound. *Stewart* v. *Stewart*, 6 C. & F. 911, where Lord *Cottenham*, after an elaborate examination of the authorities, shows that the principle is the same in the law of Scotland as in the law of England and in the civil law.

Where a family arrangement is entered into upon the assumption that all the parties named in a deed will execute it, and one of them does not do so, it will not be binding upon the others although they execute it: *Peto* v. *Peto*, 16 Sim. 590.

The result is the same where one of the parties, from any incapacity, as for instance, coverture, cannot execute the deed in a valid or binding form: *Bolitho* v. *Hillyar*, 13 W. R. (M. R.) 600; 34 Beav. 180; and see *Taylor* v. *Cartwright*, 14 L. R. Eq. 167.

Where a bill alleges a judgment obtained by fraud and a subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud or to have the compromise carried out, and in the opinion of the Court the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed: *Cawley* v. *Poole*, 1 Hem. & Mill. 50.

A compromise made after a bill

is filed may be relied on by the answer, if it completely disposes of the rights in question; but if its validity be doubtful, or it requires something further to carry it into effect, proceedings must be taken either to execute or set it aside. Therefore when a bill claimed a share of property, and an agreement was made to dispose of it, and divide the proceeds in a certain manner, which was never carried out, and the agreement was impeached by amendments in the bill, the cause was allowed to stand over: *Bristow* v. *Bristow*, 12 Ir. Eq. Rep. 329.

Letters written, after a dispute has arisen, with a view to a compromise and "without prejudice," cannot be used in evidence against the party by or on behalf of whom they were written. See *Hoghton* v. *Hoghton*, 15 Beav. 321, where Sir *J. Romilly*, M. R., said, "that such communications made with a view to an amicable arrangement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences." And see *Jones* v. *Foxall*, 15 Beav. 388, 396.

In a recent case in Ireland, a correspondence had been carried on with a view to a compromise, and without prejudice to the rights of the parties. It was held by the Court of Appeal in Chancery that it could not be given in evidence to take a claim out of the operation of the Statute of Limitations, even though there had never been any controversy as to the existence and the validity of the claim. "There are grounds of public policy," said Lord Justice of Appeal, "which apply with great force to this case, for when a party makes concessions in order to effect a compromise, and guards himself against their use for any other purpose, it would be unconscientious and unjust to deprive him of the protection for which he has expressly stipulated." *In re Monsell*, 6 Ir. Ch. Rep. 245, 254.

Neither counsel (*Swinfen* v. *Swinfen*, 18 C. B. 485; 1 C. B. N. S. 364; 27 L. J. (Ch.) 35, 491) nor an attorney (*Fray* v. *Vowles*, 1 Ell. & Ell. 839, 846, 847, 848) can compromise a case against the express wishes of their client. An action for so doing will lie against the attorney (*Fray* v. *Vowles*, 1 Ell. & Ell. 839), but not against counsel: *Swinfen* v. *Lord Chelmsford*, 5 Hurlst. & Norm. 890. But it seems that both counsel (*Strauss* v. *Francis*, 1 L. J. Q. B. 379), and attorneys in ordinary cases entrusted with the general management of a cause, have power to compromise it, unless expressly forbidden so to do (*Prestwich* v. *Poley*, 18 C. B. (N. S.) 806; *Berry* v. *Mullen*, 5 Ir. Eq. 368), and an attorney is not guilty of actual negligence, provided he acts *bonâ fide* and with reasonable care

and skill, and the compromise is for the benefit of his client, and is not made in defiance of his express prohibition: *Chown* v. *Parrott*, 14 C. B. (N. S) 74; and it seems that a compromise being within the apparent authority of counsel or an attorney is binding on the client, notwithstanding he dissented, unless this dissent was brought to the knowledge of the opposite party at the time: *Strauss* v. *Francis*, 1 L. R. Q. B. 379; *Brady* v. *Curran*, 2 Ir. Rep. C. L. 314; *Berry* v. *Mullen*, 5 Ir. R. Eq. 368.

As to the power of an avocat and avoué in Lower Canada, apart from a special mandate, to bind his client, see *King* v. *Pinsoncault*, 6 L. R. P. C. C. 245.

If the Court, having all the necessary facts before it, sanctions a compromise on behalf of infants, and it afterwards turns out that the Court was mistaken, the infants have no redress, it being an error of judgment for which there is no remedy. But if by suppression or misstatement of facts the Court has been led to an erroneous conclusion, the persons who have done this are amenable to justice, and the Court will, if possible, set aside the transaction as against the innocent party: *Brooke* v. *Lord Mostyn*, 33 Beav. 457; 2 De G. Jo. & S. 373, reversed Dom. Proc. nom. *Mostyn* v. *Brooke*, 4 L. R. Ho. Lo. 304; but the reversal did not affect the law as laid down in the Courts below, but proceeded upon the opinion of the House that, in fact, there had not been any concealment of documents or any misrepresentations when the arrangements, which the suit sought to set aside, had been agreed upon. See also *Stainton* v. *The Carron Company*, 6 Jur. N. S. 360.

The Court has jurisdiction to sanction, on behalf of a married woman, a compromise of a suit, to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest: *Wall* v. *Rogers*, 9 L. R. Eq. 58.

Contracts upon the Separation of Husband and Wife.]—In this place a class of contracts, viewed now with more favour than heretofore by Courts of equity, may be noticed, viz., contracts upon the separation of husband and wife, which partake somewhat of the nature of family arrangements. It may be admitted, indeed, that, a *mere* agreement for husband and wife to live separate and apart from each other is against the policy of the law, and will not be executed by the Court (*Westmeath* v. *Westmeath*, Jac. 126); nevertheless, it will be seen that a contract *founded on that motive* will clearly be enforced.

"It is in vain," observed Lord *Langdale*, M. R., "to regret the perplexities in which Courts have found themselves involved, by enforcing the minor and auxiliary

darts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it. It does, as Sir *W. Grant* expresses it (*Worrall* v. *Jacob*, 3 Mer. 268), seem rather strange, but it has been settled, that, in certain cases, they must do so:" *Frampton* v. *Frampton*, 4 Beav. 293.

It is necessary to distinguish between a deed of separation actually executed and a mere agreement for a separation.

Where a deed of separation between husband and wife has been actually executed, although it is not founded upon valuable consideration, the trusts thereof will, if complete, be carried into effect by the Court. See *Frampton* v. *Frampton*, 4 Beav. 287. There, on a separation between a husband and wife, the former by deed made between himself, his wife, and trustees, assigned the dividends of some funds standing in the names of trustees to other trustees for the benefit of the wife, and he covenanted that she might live apart from him, and the wife agreed to accept the provision in lieu of dower, and to exonerate her husband from all her debts and to forfeit her right under the deed if she violated the agreement. The deed contained no covenant on the part of the trustees, and was supported by no further consideration. It was held by Lord *Langdale*, M. R., that although the assignment was purely voluntary, it was binding upon the husband. "It would," said his Lordship, "scarcely be just to say, that although a voluntary trust may be binding in other cases, it shall not be so in the case where a husband has by creating such a trust, prevailed upon his wife to live apart from him, and waive the enforcement of her conjugal rights."

Courts of equity will moreover decree specific performance of agreements to *execute a deed of separation* where the stipulations are not contrary to law or in contravention of public policy: *Vansittart* v. *Vansittart*, 2 De G. & Jo. 255.

But the agreement must be founded on sufficient consideration (see Cases collected, vol. 1, pp. 312, 313), for if it be merely voluntary it will not be enforced in equity: *Walrond* v. *Walrond*, Johns. 18.

An agreement by a wife (who has property settled to her separate use without power of anticipation) on a separation to indemnify her husband against debts, will not amount to valuable consideration, as a married woman has no power to contract so as to bind property of that description: *Walrond* v. *Walrond*, Johns. 18.

Where there are any stipulations in an agreement for separation contrary to law or public policy, a Court of equity will not, even if it be made on sufficient

consideration, separate one portion of it from the other, and decree specific performance of part, but will refuse to decree specific performance altogether. Thus, in *Vansittart* v. *Vansittart*, 2 De G. & Jo. 249, by a memorandum of agreement made between a husband and his wife who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife, and that none of the children should be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child, and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education. It was held by the full Court of Appeal (affirming the decision of Sir *W. Page Wood*, V. C., 4 K. & J. 62) that the provisions as to the children were contrary to public policy, as interfering with the due discharge of the father's duties with respect to them; and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made. "It has been said," observed *Turner*, L. J., "that there are cases of this Court's enforcing the execution of separation deeds, and I believe that there are such cases, although the point was not perhaps entirely set at rest until the decision of the House of Lords in *Wilson* v. *Wilson* (1 Ho. Lo. Ca. 538); since that case, however, I agree that we must take it to be the settled rule that the Court will enforce specific performance of agreements for separation, and of course the deed to be executed must contain covenants for that separation which are necessary incidents. Then it is said, why not decree the execution of a deed which shall contain not only those provisions but other provisions which the Courts will not enforce? The answer is, we are bound by the authority to the extent of the case of *Wilson* v. *Wilson:* the House of Lords has so determined; but we are now called upon to carry that authority further, and to enforce an agreement which contains other provisions repugnant to the policy of the law in other respects. I am not prepared to go that length; I am of opinion that it would be inexpedient so to do." See also *Walrond* v. *Walrond*, Johns. 18; *Hope* v. *Hope*, 8 De G. Mac. & G. 731; *Gibbs* v. *Harding*, 8 L. R. Eq. 490; 5 L. R. Ch. App. 336. Such an agreement, however, as in *Vansittart* v. *Vansittart* was held to be void as contrary to public policy, has been rendered valid by 36 Vict. c. 12. See note of *Eyre* v. *Countess of Shaftsbury*, ante, p. 660.

So an agreement by a husband petitioner in a suit for the dissolution of marriage on account of the adultery of his wife, to withdraw from the suit in consideration of a sum of money paid and to be secured by the co-respondent, has been held to be a fraud upon the Divorce Act (20 & 21 Vict. c. 85), and void as against public policy: *Gipps* v. *Hume*, 2 J. & H. 517. See also and consider *Browne* v. *Brine*, 1 Exch. D. 5.

Where, however, a separation deed is actually executed, the Court of Chancery will enforce any of its stipulations which are in accordance with the law, although it may also contain others which are contrary to the law or public policy: *Vansittart* v. *Vansittart*, 2 De G. & Jo. 255; *Walrond* v. *Walrond*, 1 Johns. 18; *Re Matthews*, 26 Beav. 463; *Swift* v. *Swift*, 13 W. R. (M. R.) 378; *S. C. Ib.* (L. J.) 731; 34 L. J. N. S. (Ch.) 209, and see ante, . 659.

But where a wife induces her husband to execute a deed of separation, in contemplation by her of her renewal of an illicit intercourse (*Evans* v. *Carrington*, 2 De G. F. & Jo. 481, reversing the decision of Sir *W. Page Wood*, V. C., reported 1 J. & H. 598); or upon the false assurance that she has not committed adultery (*Brown* v. *Brown*, 7 L. R. Eq. 185), the deed will be void.

A deed of separation is a good answer to a husband seeking by habeas corpus to obtain the person of his wife: *King* v. *Mead*, 1 Burr. 542; *King* v. *Winton*, 5 T. R. 91.

The Ecclesiastical Courts considered a separation by private arrangement as an illegal contract, implying a dereliction of stipulated duties, which the parties were not at liberty to desert, and, consequently, would entirely disregard it as a bar to a suit for the restitution of conjugal rights: *Mortimer* v. *Mortimer*, 2 Hagg. Con. Rep. 318; *Westmeath* v. *Westmeath*, 2 Hagg. Eccles. Rep. App. 115; *King* v. *Samson*, 3 Adams, 277.

But a Court of equity would, it appears, where a valid contract for separation had been entered into between husband and wife, stay proceedings of either party for such purpose in the Ecclesiastical Court (*Wilson* v. *Wilson*, 1 H. L. Ca. 538, 556, 575; *Hunt* v. *Hunt*, 4 De G. F. & J. 221; 10 W. R. (L. C.) 215, reversing the decision of Sir *John Romilly*, M. R., 31 Beav. 89) and would restrain a husband from molesting his wife (*Sanders* v. *Rodway*, 16 Beav. 207), and a wife from molesting her husband (*Flower* v. *Flower*, 20 W. R. (V. C. W.) 231), contrary to covenants contained in deeds of separation. See also *Williams* v. *Baily*, 2 L. R. Eq. 734; *Kitchin* v. *Kitchin*, 19 L. T. (N. S.) 674.

But although the trustees of a

separation deed may be immediately upon its execution answerable for any breach of contract on the part of the wife, it seems that she will not be placed in the same position until she has compromised herself by some acceptance of the deed. Thus, in *Williams* v. *Baily*, 2 L. R. Eq. 731, in a separation deed the husband covenanted with trustees to allow his wife 50*l.* a year for her support; he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her or to allow her "any further or greater or other support, maintenance, or alimony" than the annuity of 50*l.* It was held by Sir *W. Page Wood*, V. C., that in the absence of any act showing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the Court would not, upon an interlocutory motion, restrain her from proceeding in the Divorce Court to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the Court put her under an undertaking to deal with alimony as the Court should direct.

Although, after a separation by private arrangement of the parties, a husband and wife may be relieved from the necessity of cohabitation, they still retain their relative positions which formerly could only be dissolved by parliament (*Marshall* v. *Rutter*, 8 T. R. 545): and now by proceedings under the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85); the husband will, consequently, be liable to his wife's debts, unless he provides for her maintenance by an adequate allowance, and it is regularly paid; in which case, he will have a good defence to an action brought against him for goods supplied to his wife: *Hodkinson* v. *Fletcher*, 4 Camp. 70; *Hindley* v. *Westmeath*, 6 B. & C. 200; *Mizen* v. *Pick*, 3 M. & W. 481; *Reeve* v. *Marquis of Conyngham*, 2 C. & K. 444.

Upon the same principle, a deed of separation is no bar to an action for damages by the husband for the seduction of his wife (*Chambers* v. *Caulfield*, 6 East, 244); nor will it, in the absence of express stipulation to that effect, prevent a wife from claiming her share of her husband's personal estate under the Statute of Distributions: *Slatter* v. *Slatter*, 1 Y. & C. Exch. Ca. 28.

A mere voluntary separation between husband and wife, not founded on valuable consideration, will not, however, although binding upon the husband, be valid against his creditors (*Fitzer* v. *Fitzer*, 2 Atk. 511; *Clough* v. *Lambert*, 10 Sim. 174); or against subsequent purchasers or mort-

gagees (*Cowx* v. *Foster*, 1 J. & H. 30); but an indemnity against the wife's debts (*Stephens* v. *Olive*, 2 Bro. C. C. 90; *Worrall* v. *Jacob*, 3 Mer. 256), or a relinquishment of her claim to alimony (*Hobbs* v. *Hull*, 1 Cox, 445), and, perhaps, the compromise of a suit (*Jodrell* v. *Jodrell*, 9 Beav. 45; *Wilson* v. *Wilson*, 1 H. L. Ca. 538), would constitute a valuable consideration as against the husband's creditors.

There is an important distinction, however, between contracts for *immediate* separation, which have just been discussed, and contracts as to *future* separation; for although the latter do not appear at one time to have been disapproved of (*Moore* v. *Moore*, 1 Atk. 727; *Hoare* v. *Hoare*, 2 Ridg. P. C. 268; *Rodney* v. *Chambers*, 2 East, 297), it has since been determined by the highest authority,—the House of Lords,—that a deed providing for a future separation is void, as contrary to public policy: *Westmeath* v. *Westmeath*, 1 Dow & C. 519; and see *Durant* v. *Titley*, 7 Price, 577; *Vandergucht* v. *De Blaquiere*, 5 My. & Cr. 229; and see and consider *Cocksedge* v. *Cocksedge*, 5 Hare, 397; 14 Sim. 244; *Cartwright* v. *Cartwright*, 10 Hare, 630; 3 De G. Mac. & G. 982; *Byrne* v. *Lord Carew*, 13 Ir. Eq. Rep. 1; *H.* v. *W.*, 3 K. & J. 382; *Merryweather* v. *Jones*, 4 Giff. 499; *Procter* v. *Robinson*, 14 W. R. (M. R.) 381. However, in *Rodney* v. *Chambers*, 2 East, 297, a covenant to allow maintenance in case the separation took place with the *approbation of trustees*, was held valid; and see *Gawden* v. *Draper*, 2 Vent. 217; *Chambers* v. *Caulfield*, 6 East, 244; *Soilleux* v. *Herbst*, 2 Bos. & P. 444; *Bateman* v. *Ross*, 1 Dow, 235.

Where a separation deed points to the separation as the consideration upon which it is based, and no separation ever takes place, the consideration having failed, the deed is wholly void, and the Court of Chancery will direct it to be cancelled: *Bindley* v. *Moloney*, 7 L. R. Eq. 343; see also *Westmeath* v. *Salisbury*, 5 Bli. N. S. 339.

So likewise, a reconciliation by renewal of cohabitation, although there be no stipulation to that effect, will of itself avoid a mere deed of separation (*Westmeath* v. *Westmeath*, 1 Dow & C. 519; *Jee* v. *Thurlow*, 2 B. & C. 547; *Webster* v. *Webster*, 1 Sm. & Giff. 489; 4 De G. Mac. & G. 437). But mere reconciliation, such as communication by letters, without cohabitation (*Slatter* v. *Slatter*, 1 Y. & C. Exch. Ca. 28; *Frampton* v. *Frampton*, 4 Beav. 287), or merely living together under the same roof, without reconciliation, as where it is shown that the parties conducted themselves with the greatest animosity towards each other will not have that effect (*Bateman* v. *Ross*, 1 Dow, 245). But where there are trusts

in a deed of separation going beyond the provisions of a deed of separation, it will not be avoided by a subsequent reconciliation, as, for instance, where they provide for the husband and a child of the marriage out of the wife's property: *Ruffles* v. *Alston*, 19 L. R. Eq. 539, 545.

There is nothing moreover illegal in continuing trusts for payment of money to the wife in the event of reconciliation: *Nicholls* v. *Danvers*, 2 Vern. 671; *Wilson* v. *Muschell*, 3 B. & Ad. 743; *Bateman* v. *Ross*, 1 Dow, 245; *Byrne* v. *Lord Carew*, 13 Ir. Eq. Rep. 1; *Crouch* v. *Waller*, 4 De G. & Jo. 302; *Randle* v. *Gould*, 8 Ell. & Bl. 457.

And if a husband after a separation contracts to continue the payment of an annuity to his wife to which she was entitled under a separation deed, in case she would return to and cohabit with him, he will be bound to pay it, even where the contract was merely by parol, when the wife by part performance on her side takes the contract out of the statute: *Webster* v. *Webster*, 3 Jur. N. S. 655; 1 Sm. & Giff. 489.

The adultery of the wife will not prevent her taking proceedings under the deed or contract for separation (*Seagrave* v. *Seagrave*, 13 Ves. 443). And a plea of the wife's adultery (*Baynon* v. *Batley*, 8 Bing. 256) of a divorce a mensâ et thoro (*Jee* v. *Thurlow*, 2 B. & C. 547), or a dissolution of marriage (*Goslin* v. *Clark*, 1 C. B. (N. S.) 681; 31 L. J. (C. P.) 330), on account of adultery, will be held no defence to an action by trustees for arrears of separate maintenance under a covenant in a separation deed (and see *Charlesworth* v. *Holt*, 9 L. R. Exch. 38), unless the covenant by unmistakeable words limits his liability to the period during which the marriage relation continues: Ib. 41, per *Bramwell*, B.

In *Jodrell* v. *Jodrell*, 9 Beav. 45, a singular deed between husband and wife was upheld as a family arrangement. In that case, a wife having instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees, upon trust to permit the wife to enjoy it and accommodate herself and children; and an income of 4000*l.* a year was also provided for her separate use, to keep up the establishment for herself and children, "upon such a scale, and regulated in such a manner, as she should think fit;" and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house, "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband

partook of the establishment. Lord *Langdale*, M. R., held, that the deed was not void on any ground of public policy; and that, being *a family arrangement*, and a compromise of disputed rights, there was a sufficient consideration; that it was not void for uncertainty; and that the Court would enforce its due performance both by the wife and the husband. "It has been said," observed his Lordship, "that an arrangement of this sort greatly alters the ordinary relation between husband and wife. No doubt it does; but if it is said, that it entirely destroys the ordinary duties, as they before existed, between husband and wife, I think that proposition cannot be maintained. What personal relation is directly affected by this? If, indeed, the parties do not endeavour to accommodate themselves to this state of things, —if they seek every occasion, from time to time, of jarring, and are determined not to agree together, —then it furnishes, no doubt, foundation enough of difference, and, unfortunately, of great misery to both; but it is equally true that they might, notwithstanding a provision in the deed, go on harmoniously, without any dispute, and in perfect conformity with all the ordinary duties between husband and wife. If, however, they are determined to quarrel about these things,—if, instead of maintaining a good temper and showing a mutual forbearance, they seek every occasion for irritation and quarrel, then, no doubt, the means of disagreement will be found in this arrangement, as, unfortunately, they are but too frequently found in the ordinary relation of man and wife. I feel, therefore, very considerable difficulty in coming to the conclusion that this arrangement is illegal, or contrary to the policy of the law, or that it places the husband altogether in the power of the wife, against the law. . . . . *With regard to the other points—want of consideration and the want of mutuality*—I do not think that they ought to influence the mind of the Court at all. *This is not a matter of pecuniary consideration, but a family arrangement,—a compromise of litigated rights between the parties.*" See also *Joddrell* v. *Joddrell*, 14 Beav. 397.

As to the construction of deeds of separation, see *Hulme* v. *Chitty*, 9 Beav. 437; *In re Andrews*, 1 Ir. Ch. Rep. 410.

The judicial separation of husband and wife is now regulated by the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85; 21 & 22 Vict. c. 61; 23 & 24 Vict. c. 144; and 29 & 30 Vict. c. 32.

The existence of a separation deed, none of the provisions of which had been acted upon, was held to be no ground for refusing relief to the wife on account of the desertion of the husband some time after the execution of the deed: *Cock* v. *Cock*, 13 W. R. (Div.) 188.

TOWNLEY *v.* SHERBORNE.

Saturday, June 6th, 9 Car. 1.

S. C., Cro Car. 312.

[REPORTED BRIDG. REP. 35.]

LIABILITY FOR A CO-TRUSTEE.]—*How far a person is liable for the acts and receipts of a co-trustee.*

UPON hearing and debating of the matter, as well on the 15th as the 18th of June last, the Court being assisted with Mr. Justice *Hutton* and Mr. Justice *Jones*, upon the plaintiff's bill of review, for the reviewing and reversal of a decree made in a cause, wherein Richard Mountford, deceased, executor of Thomas Challoner, was plaintiff, against the now plaintiff, and Thomas Forster, Esquire, concerning the sum of 1700*l.*, raised out of the rents and profits of certain lands and tenements in Linsted, Ardingley, and Worth, in the county of Sussex, in trust for the said Thomas Challoner, during his minority, and which the now plaintiff, by the decree of this Court, was to pay, in case the said Forster should fail to pay the same.

Argument for plaintiff.

Several matters were offered by the plaintiff's counsel, for the reversal of the said decree, *namely*, that the now plaintiff was decreed to pay the sum of 1700*l.*, as raised out of the profits of the infant's lands, settled upon an account made up by the said Forster with the said Thomas Challoner the infant, after he came of age, whereto the plaintiff Townley was neither party nor privy, nor ever consented, nor ought to be bound thereby.

And *secondly*, that the said plaintiff is by the said decree made liable to the payment of all the profits raised out of the said infant's estate, whereas he never received any profits at all; and although he gave some acquittances,

yet the same were only for the three first half-years, and no more, and were but to balance an account, the moneys disbursed amounting to as much as the receipts; and there being three other co-trustees with him, the plaintiff's counsel conceived that he ought not to be charged with more than he himself received, especially for that the other parties trusted, and who received the profits, were, or were reputed to be, men of ability and responsible. Touching which last point, (being that whereon the plaintiff's counsel chiefly insisted for the reversal of the said decree as against the now plaintiff,) it appeared unto this Court, that Challoner, father of Thomas the infant, did heretofore make a lease of the said lands to one Weeks, for five-and-thirty years, and afterwards conveyed away the reversion to Thomas Challoner, his brother; and after the death of Francis (according to an award made between the said Weeks and Thomas Challoner the brother, who was uncle to Thomas the infant) the lease of five-and-thirty years and the reversion in fee simple were to be assigned to parties trusted by the said Weeks, and one Barbara Challoner, mother of the said infant, and by the said Thomas the uncle, the lease to be in trust for Weeks for life, the remainder to Barbara for life, the remainder to Thomas the infant, and the reversion in fee to be in trust for the said Thomas the infant. But upon the limitation or condition that the said Thomas the infant, when he came of age, should make some assurance to Thomas the uncle, according to the award, wherein, if he failed, then the trust limited to him should cease, and the trustees should be seised for Thomas the uncle. In pursuance whereof, the now plaintiff and the said Forster were trusted, together with one Langworth and Lovell, to take the estate in the lease, and did take an assignment thereof from Weeks, the 12th of June, 9 Jacobi; and all the trustees sealed the counterpart; and the same day the now plaintiff and Forster assigned their moiety in the said lease to one Mr. Peacock and Robert Forster, who were not privy nor acquainted therewith; and on the 13th of June, the 9th of King James, the said Thomas Challoner

the uncle passed over the inheritance to the now plaintiff and Thomas Forster, whereby it was probable that the said assignment made by the now plaintiff and Thomas Forster, of their interest in the moiety of the lease, was to keep the same from being extinguished; after which assurance so made, Weeks, during his life, and Barbara after him, during her life, received the profits of the said lands; and Barbara, in the year of our Lord 1614, died. And it appeared, that, soon after the death of the said Barbara, viz,, 23rd of March, 12 Jacobi, Langworth, one of the trustees of the lease, being dead, whereby his interest in the moiety survived in Lovell, and Thomas Challoner the uncle procured the said Lovell to assign over his interest in the said lease to the said Thomas Challoner the uncle, liable to the said trust, as by a copy of the assignment now read appeared. And it appeared by the confession of the now plaintiff, and by his answer to the former bill, and by the acquittances now produced, that the now plaintiff joined with the said Thomas Forster in giving acquittances for the three first half-year's rents; but it did not appear that he ever received any after, or gave any more acquittances; but it doth appear by the proofs, that the said Thomas Challoner the uncle, who had the assignment from Lovell, did receive the rents of the tenants, and paid the same over to the said Thomas Forster; and that, when the infant came of age, he called the same Thomas Forster and Thomas the uncle to an account; and that they did account; and that the said Thomas Forster did then deliver him a book of account, which the defendant now produced in Court; by which it did appear, that, for the three first half-years, the rents were received by the said Thomas the uncle, and by him paid to the now plaintiff and the said Thomas Forster, for the use of the infant; but for all the subsequent time the same were received by the said Thomas Challoner the uncle, and by him paid to the said Thomas Forster alone, who (as was not now denied) was at the time of such receipts, generally taken to be of great ability, and responsible, as it also appeared by the proofs; that the said infant, after

he came of age, had declared the said Thomas Forster to be his debtor, and did by his will, read in Court, give the said sum of 1700*l.* to the said Mountford as a debt owing by the said Thomas Forster solely, not mentioning the now plaintiff. Upon all which this Court was fully satisfied that the now plaintiff received no penny of profits after the three first half-years; but whether he ought to be charged with all that the said Thomas Forster received, being a co-trustee with him, in respect the said Thomas Forster is now declined in his estate (as is conceived) this Court somewhat doubted. And although a precedent was produced, wherein this Court had charged parties trusted, but only according to their several and respective receipts, and not one for the other, yet, in respect the defendant's counsel opposed the same, alleging many precedents to be on the other side, and the Lord Keeper (*a*) conceived the case to be of great consequence, and thought not fit to determine the same suddenly, but to advise thereof, and desired the Lords the Judges' assistants to take the same into their serious considerations, and to assist him with their advice therein, whereby some course might be settled that parties trusted might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties trusted, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side.

(*a*) *Coventry.*

And the Lord Keeper and the Lords the Judges' assistants, afterwards conferring together, and, upon mature deliberation, conceiving the case to be of great importance, his Lordship was pleased to call unto him also Mr. Justice *Crook*, Justice *Barclay*, and Mr. Justice *Crawley*, for their assistance also in the same, and appointed precedents to be looked over, as well in this as in other Courts, if any could be found, touching the point in question; whereupon several precedents were produced before them, some in this Court and some in the Court of Wards, where parties trusted were chargeable only according to

their several and respective receipts, and not one to answer for the other; but no precedent on the contrary was produced to them.

Whereupon his Lordship, after long and mature deliberation on the case, and serious advice with all the said Judges, did this day, in open Court, declare the resolution of his Lordship and the said Judges: That where lands or leases were conveyed to two or more upon trust, and one of them receives all, or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court to answer for the receipts of him so dying or decayed, unless some purchase, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by. And, it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale or perception of the profits; and, if such of these friends, who carry themselves without fraud, should be chargeable out of their own estates for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust.

Resolutions of the Lord Keeper and the Judges.

And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall, by law, charge him only, and not his co-executor; and, in that case, *equitas sequitur legem*, there having been many precedents resolved in this Court, that one executor shall not answer nor be charged for the act or default of his companion.

Executor not charged for the act or default of his co-executor.

And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, *it falling out many times that some of the trustees live far from the lands*, and are put in trust out of other respects than to be troubled with the receipt of the profits (*a*).

(*a*) See *Williams* v. *Nixon*, 2 Beav. 472.

But his Lordship and the said Judges were of opinion, that if two trustees were, and one of them, without warrant of the party that trusteth him, or of a Court of equity, assigneth his estate, and the assignee doth receive the profits, and becometh non-solvent, he that made the assignment shall answer it for him, but the other original trustee shall answer for no more than what he receiveth himself, because the assign cometh not in by him, or his assent or appointment. And that in case, if the original trustee, that did not make the assignment, receive the whole profits and become non-solvent, neither the assignor nor the assignee shall be answerable for them.

And if an obligation be made to two in trust, and one of them release the whole debt, as by law he may, this shall not charge his companion for any part. And albeit, in all presumption, this case hath often happened, yet no precedent hath been produced to his Lordship or the Judges, that in any such case the co-trustee hath been charged for the act or fault of his companion. And, therefore, it is to be presumed that the current and clear opinion hath gone, that he is not to be charged (it having not, till of late, been brought in question) in a case that, by all likelihood, hath frequently happened.

But his Lordship and the said Judges did resolve, that if, upon the proofs or circumstances, the Court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he may be charged, though he received nothing.

And his Lordship and the said Judges did declare, that in this particular case they did not find any material proof against Mr. Townley, to make his case worse than the general case aforesaid, but rather better (except only for the three half-years' rent, which he joined in acquittance with Mr. Forster); for the receipt of the profits alone by Mr. Forster is no breach of trust in Mr. Townley; and Mr. Challoner, when he came of full age, took Mr. Forster for his debtor.

And therefore it was ordered and decreed, that so much

of the said decree as chargeth Mr. Townley with any more of the profits than the three half-years, for which he joined his acquittance, shall be reversed; but as for those three half-years' profits, if the same were not disbursed or employed for the use of Mr. Challoner, then for so much thereof as hath not been so disbursed or employed, the said complainant Mr. Townley ought to be answerable, and the defendant may call the plaintiff before Mr. Page, one of the Masters of this Court, to audit the account touching these three half-years, if any difference be thereabouts. And lastly, it is ordered, that the recognisances given on the plaintiff's part, to perform the order of this Court, be discharged.

BRICE *v.* STOKES.

July 22, 1805.

[REPORTED 11 VES. 319.]

LIABILITY OF TRUSTEE FOR THE RECEIPTS OF HIS CO-TRUSTEE.]—*A trustee charged, though he did not receive the money under the circumstances, having joined in the receipt: the sale unnecessary; and permitting his co-trustee to keep and act with the money contrary to the trust.*

Not charged in respect of the interest of one of the cestuis que trust, having notice of the breach of trust, and acquiescing.

BY the decree in this cause, an account was directed of the money arising by sale of part of the testator's estates, come to the hands of Henry Mooring, John Fielder, and John Sparrow, the trustees, or their executors, &c.; and an inquiry, in what manner the purchase-money was paid, the receipt signed, and in what manner and by whom the interest was paid during the lives of Mooring and Fielder, and in whose hands the principal remained.

The Master's report stated the will of John Taylor, devising and bequeathing to his executors, Sparrow, Mooring, and Fielder, their heirs, executors, &c., all his freehold and leasehold estates, upon trust to pay the rents and profits to the testator's niece, Elizabeth Sparrow, while unmarried, and after her marriage, upon trust for her, her heirs, executors, &c.; and he gave full power to his said trustees and executors, and the survivors, &c., to sell and dispose of all or any part of the said estates; and directed the monies arising from such sale or sales to be put out by his said trustees, or the survivors, &c., upon government or real security; and

such monies and the interest, and proceeds thereof, in the meantime, to be applied upon the trusts before directed as to the estates, and the rents, &c.; and he declared, that the trustees, and the survivor, &c., should have full power and authority to make such settlement of all or such of the estates as should be unsold, and the money produced by the sale, as the said trustees should judge fit, on the marriage of Elizabeth Sparrow, to the use of her and her issue, and under such restrictions as his said trustees, or the survivors of them, should think fit and proper; and he directed, that his said trustees and executors should not be answerable or accountable for any loss which might happen of all or any part of his real and personal estate, so as such loss be not through their wilful neglect or default; and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults only.

The report also stated the marriage of Elizabeth Sparrow with Thomas Brice, the plaintiff, in 1783, upon which occasion a settlement was made to the separate use of Mrs. Brice for life, with remainders to her husband surviving her, for his life, and to the issue. She died leaving no issue in September, 1784. That settlement also contained a power, similar to that in the will, to the trustees to sell, with the consent of Mrs. Brice, if living, the receipt of the trustees or the survivor to be a discharge to the purchaser, and forthwith, and with all convenient speed, to invest the money in their names, upon government or real securities, &c.; with a declaration, that the trustees, their heirs, &c., should not be chargeable with, or accountable for, any more of the said trust monies and premises, than he or they should actually receive, nor with or for any loss which should happen, of the same monies and premises, or any part thereof, so as such loss happened without his or their wilful default; nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults.

The report further stated that, by indentures dated the 27th of November, 1784, it was witnessed, that Mooring and Fielder, in consideration of the sum of 1260*l.* to them paid (with the approbation of Thomas Brice) by Robert Lillington, conveyed part of the freehold estate to him and his heirs; for which sum of 1260*l.*, the said consideration-money, Mooring and Fielder respectively signed a receipt on the back of the deed. No part of that sum was laid out; but some money, by way of interest on part of it, was paid by Fielder to Brice. Fielder died insolvent, in April, 1794, and Mooring died in October following.

The Master certified, that, though the evidence appeared exceedingly contradictory, yet, as the receipt for the 1260*l.*, the consideration-money, written on the back of the conveyance, was signed both by Mooring and Fielder, and witnessed by four witnesses as to the signatures by them, it must be presumed that they received such consideration-money; therefore the defendant Stokes, as executor of Mooring, and Braxton, the surviving administrator with the will annexed of Fielder, ought to be charged with the consideration-money and interest.

Exceptions were taken by the defendant Stokes to the Master's report, for charging the defendant, as executor of Mooring, with the sum of 1260*l.*, as having been received by him with Fielder, and interest.

The examination of the plaintiff Brice stated, that he was ignorant of the treaty for the sale, except that, for the purchaser's satisfaction, he joined in the conveyance. Mooring resided at Christchurch, twelve miles from Lymington, where the plaintiff and Fielder resided, the latter being an attorney. The plaintiff never received any money from Mooring, but received various sums from Fielder, by way of interest for part of the trust estate. On account of Mooring's residence at a distance, the plaintiff never applied to him for any interest during the life of Fielder, but always applied to Fielder, who lived near him.

The evidence as to the fact of the payment was contra-

dictory. Mooring's widow stated, that she was presen at the execution of the conveyance, but did not see the money paid to any one. Fielder told Mooring it was necessary for him to execute the conveyance and sign the receipt, to which Mooring objected, alleging, that Fielder never consulted him in the management of the trust: but Fielder pressed him, saying, it was only matter of form, for he should receive the purchase-money, and place it in the stocks for the benefit of the children; and at length Mooring, after much hesitation, executed.

There was also evidence, that, among Mooring's papers was found an account, in the handwriting of Fielder, showing that the whole of the money was received by Fielder, and the greater part invested in securities; and that, by an account discovered among Fielder's papers, it appeared that he received the money, deducted 400*l.* for legacies, retaining the 860*l.*, for which he paid interest to the plaintiff.

Mr. *Romilly* and Mr. *Hart*, in support of the exceptions.—Upon the evidence, this transaction is much in the dark. The question is, whether, from the mere circumstance, that this trustee joined in the receipt, in order to make a title, he ought to be charged personally, and whether he may not discharge himself by showing, that, though he joined in the receipt, the other trustee received all the purchase-money. It was indispensably necessary for the trustee to join for conformity. The distinction between the cases of an executor and a trustee, though much discussed, has never been overruled. As it is not necessary for the executor to join, his act in joining makes him liable; but as it is necessary for a trustee to join, the mere circumstance that he joins in the receipt, in order to make a title, is not sufficient to charge him, unless you go farther, and show that he actually received the money.

Mr. *Richards* and Mr. *Bell*, for the report.—This is not the ordinary case, but the case of a trustee voluntarily joining in this sale, for the mere purpose of converting

real estate into personal, the personal estate being equal to all the charges, and no purpose to be answered. The nature of the trust called upon both the trustees to take care that the cestuis que trust should be as safe as if the estate had remained as it was. As there was no other object, therefore, than merely to secure the property for the benefit of the infant cestuis que trust, Mooring was bound to see to the application. The signature of the receipt throws it upon him to show that he did not receive the money. The effect of the distinction is merely, that the Court will more easily believe that the trustee did not receive the money; but it does not go the length of throwing the proof that he did receive it, when he has signed the receipt, upon the cestui que trust. The circumstances account for the fact, that the interest was paid by Fielder. It was natural that he, being an attorney, should be trusted for that purpose. How can this Court infer that it was not laid out upon security in their joint names, or that Mooring did not receive the whole from Fielder? There is no evidence that can weigh against the signature of the receipt. The paper writing by Fielder charges him, admitting that he received the money; but it does not discharge Mooring. To counteract the evidence from the receipt, he must produce the most satisfactory evidence that he joined for conformity only, and is, therefore, within the indulgence allowed to trustees.

Another principle upon which these trustees must be charged, arises from the deed of settlement executed, under which they are to exercise a discretion whether it is proper to sell the estate,—a most important duty imposed upon them. The will is, therefore, out of the question. The Court will not, after that, hear a trustee say, it is immaterial to him what becomes of the fund. He does not, as he might, give up the trust under the will, but he accepts another trust under the deed; the only object of which was to take care of the property, which is very different from the case of a trust thrown upon him, and not assumed voluntarily. This is a case, therefore, of gross and wilful negligence.

LORD CHANCELLOR ELDON.—It does not appear for what purpose this sale was made, except for the mere purpose of converting real estate into personal. If the sale was made for a purpose not authorised by the settlement, Brice, the husband, being an executing party, could not complain of that sale. The money must, upon this evidence, be taken to have been paid to Fielder.

Distinction between trustees and executors, in favour of the former, where one who has not received the money has joined in the receipt, approved of by Lord *Eldon*.

At law, where trustees join in a receipt, primâ facie, all are to be considered as having received the money. But it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity.

In the case of executors, it has been said, and well said, to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and therefore answerable for the application, as far as it is connected with the particular transaction in which he joins. Upon considering the cases paring down the rule of late, I repeat what I have said upon a former occasion (*Chambers* v. *Minchin*, 7 Ves. 198), that it is much safer for executors to abide by a general rule of that sort than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases, which will raise very different inferences in different minds.

In this case it was absolutely necessary that all the trustees should join in the receipt; for the law empowering the sale is the settlement, which, in principle and terms, requires that the purchaser should not be discharged but upon the joint receipt of all. The money was not, in a strict sense, received by both trustees; for the weight of evidence is, that Mooring let Fielder, a professional man, circumvent him a little in taking into his own hands the money, probably upon some confidence that he would lay it out either in the funds, or such other security as it might be invested in, consistently with the

settlement, viz., a good real security. It is a clear fact now, that it remained with Fielder until his death in 1794.

Two questions arise: 1st, whether Brice the husband can complain with respect to his interest in the produce of this sale as against Mooring? 2ndly, whether those who are to take after him can complain?

Rule as to cestui que trust acquiescing in breach of trust by the trustee.

It is clear, upon settled cases, that, if there are two trustees, and a transaction takes place, in which the fund is taken out of the state in which it ought to have remained, and is not placed in the state in which it ought to be, but is kept in hands that ought not to retain it, if any particular cestui que trust has acted in authorising that as much as the trustee who has not the money in his hands, and continues to permit it to be so treated in a question between that cestui que trust and that trustee, the latter cannot be called upon by the former. There is very satisfactory evidence that Brice must be considered as having for ten years permitted this money to remain with Fielder alone, and therefore cannot complain, as against Mooring, that it was not laid out by Fielder with Mooring. Upon the evidence, Brice received the interest from Fielder alone, having no communication with Mooring until shortly before or after the death of Fielder, and made no demand upon Mooring. He ought to be taken upon the account to know, that, as late as 1786, this was cash in the hands of Fielder, charged in account as one of the executors having that money. There is not one item in respect of which he debits himself, that does not expressly name the security upon which the money was out, except the sum of 860*l.*; and then it is no longer interest at 4*l.* per cent. but 5*l.* per cent., charging himself with a larger interest, after he received it, than he gave credit for before he received it. Afterwards, from 1787, he proceeds dealing with Fielder only, receiving the interest of that particular sum until 1794. The result of the evidence is, that, with Brice's permission, this money was suffered to remain with Fielder upon his personal security: that if Mooring knew as much as Brice, so Brice

knew as much as Mooring, and cannot complain that this was a misapplication, permitting it with respect to his own interest.

Mooring also placed so much confidence in Fielder, that though the money got into the hands of Fielder alone, it is very difficult to say, as against those who come after Brice, that Mooring is not to be answerable. This is a sale under a power, but without necessity. This is an act that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine that it was necessary. There was no necessity in respect of which the other should join. But, though a trustee is safe, if he does no more than authorise the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that, for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, was right, after the knowledge of the trustee that it had got into a course of abuse. Of that, it seems, Mooring was distinctly informed, the paper connected with the marriage settlement stating upon the face of it a breach of trust. Though not very intelligible, it shows that an account of the securities taken by Fielder for 1260*l.* was put into the hands of Mooring. That gave him information that Fielder was lending some of the money upon notes, some upon bonds; and, as soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it.

The conclusion is, that Brice cannot call upon Mooring as to the interest; but as to the principal, Mooring is

answerable, but he is not to be charged with more than was actually misapplied.

Townley v. *Sherborne*, and *Brice* v. *Stokes*, are leading authorities as to the liability of persons for the acts and defaults of their co-trustees and co-executors—a subject which will be considered at some length in this note; although it is proposed, in the first place, to notice some of the duties of trustees and executors, with respect to their cestui que trust, and of the liabilities which result therefrom, but more especially with respect to the getting in, the custody, and investment, of the property committed to their care.

It may here be first mentioned that in charging trustees with breaches of trust it is immaterial how the trust was created, whether for valuable consideration, or by the voluntary gift of the trustees themselves (*Drosier* v. *Brereton*, 15 Beav. 221), and that persons, participating in a breach of trust, although they have derived no benefit therefrom (*Wells* v. *Wells*, W. N. 1877, p. 2), or assuming to act as trustees, although they are not actually or legally such, will incur the same liabilities, in respect of a breach of trust, as trustees regularly appointed (*Rackham* v. *Siddall*, 16 Sim. 297; 1 Mac. & G. 607; *Pearce* v. *Pearce*, 22 Beav. 248; *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 58; *Aveline* v. *Melhuish*, 2 De G. Jo. & Sm. 288; *Hennessey* v. *Bray*, 33 Beav. 96; *Quinton* v. *Frith*, 2 I. R. E. 396); and that when persons have accepted property as trustees, and held it as such, they are not at liberty to dispute the title of their cestui que trust, though the title be doubtful: *Neligan* v. *Roche*, 7 I. R. Eq. 332.

Where, however, a person had possessed himself of the assets of a testator or of an intestate, without having administered, a bill for an account to the extent of the specific assets he had received as executor de son tort, has been held to be defective if there were no legal personal representative before the Court. See *Penny* v. *Watts*, 2 Ph. 149; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Cary* v. *Hills*, 15 L. R. Eq. 79; *Rowsell* v. *Morris*, 17 L. R. Eq. 20; sed vide contra, *Rayner* v. *Koehler*, 14 L. R. Eq. 262; *Coote* v. *Whittington*, 16 L. R. Eq. 534; *In re Lovett*, 3 Ch. D. 198.

Where a trustee employs an agent, so long as the acts done by the person so employed are confined to mere agency on behalf of the trustee—his employer—generally speaking, the agent cannot be made accountable as a constructive trustee: Per *Stuart*, V. C., in *Morgan* v. *Stephens*, 3 Giff. 235. And see *Myler* v. *Fitz-*

patrick, 6 Madd. 360; *Keane* v. *Robarts*, 4 Madd. 332; *Nickolson* v. *Knowles*, 5 Madd. 47; *Lockwood* v. *Abdy*, 14 Sim. 437; *Fyler* v. *Fyler*, 3 Beav. 550; *Maw* v. *Pearson*, 28 Beav. 196; *Marshall* v. *Sladden*, 7 Hare, 428; *In re Bird*, 16 L. R. Eq. 203; *Barnes* v. *Addy*, 9 L. R. Ch. App. 244.

But where the agent obtains possession of the trust funds, and his acts are not in strict conformity with his duty as agent, he ceases to be a mere agent, and will be liable as a trustee. Thus, in *Morgan* v. *Stephens*, 3 Giff. 226, a solicitor got possession of trust monies, and through his intervention the executrix, who was entitled to the income only, was enabled to misapply the principal. It was held by Sir *John Stuart*, V. C., that an account ought to be directed against the solicitor as if he had been a trustee. See also *Attorney-General* v. *The Corporation of Leicester*, 7 Beav. 176; *Pannell* v. *Hurley*, 2 Coll. 241; *Salomans* v. *Laing*, 12 Beav. 377; *Bodenham* v. *Hoskyns*, 2 De G. Mac. & G. 903; *Bridgman* v. *Gill*, 24 Beav. 302; *Hardy* v. *Caley*, 33 Beav. 365; *Portlock* v. *Gardner*, 1 Hare, 606; *Lee* v. *Sankey*, 15 L. R. Eq. 204, 211; *Archer* v. *Lavender*, 9 I. R. Eq. 220.

But it has been held that where trustees authorise agents to receive trust money, who misappropriate it, so that it is lost, a bill by the cestuis que trust seeking to charge the agents alone cannot be maintained, as it is only through the trustees that the agents can be made liable: *Robertson* v. *Armstrong*, 28 Beav. 123.

In order that a trustee may be rendered liable for a breach of trust, it is essential that he should have a knowledge of the trust. "For however formally a trustee may have been appointed, however extensive may have been the powers that were conferred upon him, he will not be held liable for the non-performance of a trust of which he was ignorant:" *Youde* v. *Cloud*, 18 L. R. Eq. 634, 642; and see *Selby* v. *Bowie*, 9 Jur. (N. S.) 425.

As to getting in Outstanding Property.]—Trustees and executors ought not to leave money outstanding upon *personal security;* and though, in the exercise of a fair discretion, they are not obliged to commence legal proceedings unnecessarily, they must exert themselves to get it in, and, although the money may have been advanced by the testator himself, if necessary, to commence compulsory proceedings (*Lowson* v. *Copeland*, 2 Bro. C. C. 156; *Bailey* v. *Gould*, 4 Y. & C. Exch. Ca. 221; *Powell* v. *Evans*, 5 Ves. 839; *Caney* v. *Bond*, 6 Beav. 486; *Fenwick* v. *Greenwell*, 10 Beav. 412; *Bullock* v. *Wheatley*, 1 Coll. 130; *Ticker* v. *Smith*, 3 Sm. & Giff. 42, 46); even against a co-executor (*Styles* v. *Guy*, 1 Mac. & G. 422; *Egbert* v. *Butter*, 21

Beav. 560; *Candler* v. *Tillett*, 22 Beav. 257); and where a debt is payable by instalments, trustees will not be justified in giving any great indulgence; for the debtor's inability to pay the sums accumulated, by permitting them to run together, will be constantly augmented (*Caffrey* v. *Darby*, 6 Ves. 488). In fact, a direction to convert with all *convenient speed*, is no more than the ordinary duty implied in the office of executor: *Buxton* v. *Buxton*, 1 My. & Cr. 93.

In *Tebbs* v. *Carpenter* (1 Madd. 291), executors were directed by the testator to receive rents and invest them in the 4*l.* per Cents. They employed a person to receive the rents, but according to the Master's report, there were arrears amounting to 1500*l.*; and the impression on the Master's mind, as appeared by his report (*Ib.* p. 298), was, that, by using proper means, the whole might have been recovered. It was held by Sir *Thomas Plumer*, V. C., that the executors were liable to make good the arrears, though without interest. "It cannot," said his Honor, "be admitted as an excuse, that they devolved the care of this estate to another; they must answer for his negligence. I am anxious not to discourage persons from acting as executors, by throwing difficulties in their way, and am willing to make every proper allowance; but I must not forget the established doctrine of this Court. If persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer infants to be injured by their negligence. . . . . If there be *crassa negligentia*, and a loss sustained by the estate, it falls upon the executors. Here, for want of evidence, I cannot say that all this rent could not have been recovered; and I am reluctantly obliged to assume, that no exculpatory evidence could be produced, and therefore they must be charged with these arrears. Interest upon the arrears was but faintly pressed for, and ought not to be given. Interest was asked for in *Lowson* v. *Copeland* (2 Bro. C. C. 156), but refused." See also *Wiles* v. *Gresham*, 2 Drew. 258; *M'Gachen* v. *Dew*, 15 Beav. 84; *Grove* v. *Price*, 26 Beav. 103; *Waring* v. *Waring*, 3 Ir. Ch. R. 335; *Macken* v. *Hogan*, 14 Ir. Ch. R. 285; *Rowley* v. *Adams*, 2 Ho. Lo. Ca. 725.

It is clear that an executor ought not, without express authority, to *carry on the trade* of the testator (*Kirkman* v. *Booth*, 11 Beav. 273), except for the purpose of winding up the concern; but he may, and in some cases is bound to complete the contracts entered into by his testator: *Collinson* v. *Lister*, 20 Beav. 356. The Court, however, has jurisdiction in an administration suit to direct that a trade or business in which infants are interested be continued, and will so direct if it

be for their benefit: *Perry* v. *Perry*, 3 I. R. E. 452.

Executors must be allowed a reasonable time for breaking up a testator's domestic establishment and discharging his servants: *Field* v. *Peckett*, 29 Beav. 576.

Although a loss may have taken place by an executor not converting the assets, he will not be liable for it, if the delay was caused by his exercising a *reasonable discretion*, even although there may have been a direction in the will that he was to convert with all convenient speed. And a difference of opinion between two executors as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand. Thus, in *Buxton* v. *Buxton* (1 My. & Cr. 80), John Buxton, an executor, whose testator died on the 21st of March, 1826, in the exercise of his discretion did not sell some Mexican bonds for more than a year after the death of the testator, viz. part in the month of June, and part in the month of October, 1827, although there was a direction in the will to pay legacies within four months, and to *convert with all convenient speed*, and although Alice Buxton, his co-executrix, requested him to sell at an earlier period. Lord *Cottenham*, then Master of the Rolls, held, that as John Buxton appeared to have acted throughout with diligence and good faith, he was not liable for the loss consequent on his not having sold the bonds sooner. "Except," said his Lordship, "the provision for the payment of the legacies within four months, there is nothing peculiar in the will. A direction to convert with all convenient speed is no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion. If a reasonable discretion were to be denied to an executor if it were to be laid down as an inflexible rule, that he ought to convert the assets without waiting or considering how far it was for the interest of those who are beneficially entitled, there would, of necessity, be always an immediate sale: the executor would be bound to sell, at whatever loss. Such a rule would be, in its operation, most injurious, and it has never been acted upon by the Court, which, in cases of this kind, has always considered what is for the interest of all parties concerned." And after stating the cases of *Lowson* v. *Copeland* (2 Bro. C. C. 156); *Powell* v. *Evans*, 5 Ves. 839, and *Tebbs* v. *Carpenter* (1 Madd. 290), his Lordship adds: "In the two cases first adverted to, there was not

only considerable delay, far exceeding that which occurred in the present case, but also several additional circumstances implying or amounting to crassa negligentia on the part of the executors, and showing that they took no care or trouble, and did not attempt to exercise any judgment as to the time when the money should be called in.

"In the present case nothing of that kind can be imputed. On the part of the executor, there was a vigilant attention throughout; he exercised his best discretion, and, if he has erred, it was an error in the judgment he formed with respect to the propriety of leaving the property in that state of investment in which he received it from the testator. If, therefore, he was entitled to exercise a discretion,—and the proof is that he did so, although he came to an unfortunate conclusion,—the question is, whether he is to be charged with the loss. I can find no case, and none has been produced, in which an executor has been called upon to bear the loss that has arisen, because in the bonâ fide exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately.

"If, then, an executor be, in general, entitled to exercise such a discretion, the next question is, how far that discretion was limited in the present instance by the application made to Buxton by his co-executrix; in other words, did that application render it his imperative duty to sell? If that were so, the effect would be to vest the whole discretion in Alice Buxton, and totally to deprive John Buxton of any. If a discretion rests with one of two executors, it must surely follow that the discretion cannot be taken away by the other coming to a different conclusion. One is not bound to agree with the other. In case of a diversity of opinion, they can only resort to some higher authority which is competent to control them both. The Master's view, however, was different, although certainly one would have supposed that the time which there was most reason to consider as the proper time was the month of July, soon after the time when the first application was made to the executor, rather than the following October. I cannot, therefore, think, that if Buxton was entitled to exercise a discretion in the matter, he was bound to surrender his own judgment, because one of his co-executors entertained a different opinion from himself." And see *Prendergast* v. *Lushington*, 5 Hare, 171, 176; *Selby* v. *Bowie*, 4 Giff. 300; 11 W. R. (L. J.) 606.

Where a loss is occasioned in consequence of trustees having taken *no steps* at a proper period to get in the trust property, they will be liable for the loss (*Grove* v. *Price*, 26 Beav. 103; *Devaynes* v. *Robinson*, 24 Beav. 86; *Fry* v. *Fry*, 27 Beav. 144; and see *Wroe*

v. *Seed*, 4 Giff. 425; *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 605). And in *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232, where the loss took place two years and a quarter after the testator's death, one of the trustees, who did not attain twenty-one until seventeen months after the death of the testator, was held liable equally with his co-trustees.

Where executors have neglected to realise assets which are outstanding upon an improper investment, there is no fixed period from which the loss for which they are liable is to be calculated, as it depends upon the nature of the property and the evidence affecting it. Thus in *Hughes* v. *Empson*, 22 Beav. 181, where the executors found a portion of the testator's property invested in Crystal Palace Shares which were at a premium at the testator's death, but subsequently fell to a discount: the executors were charged by the certificate of the Chief Clerk with the value at the end of two months; but Sir *J. Romilly*, M. R., varied the certificate to twelve months. "I concur," said his Honor, "with the argument that there is no fixed period, and that it is impossible to say it is one year. You cannot fix one period for selling every species of property. Thus, suppose the testator possessed a large quantity of horses, it would be culpable to keep them, at a great expense, incurring necessarily a great outlay for their maintenance, instead of selling them at once. . . . Under the circumstances, I consider that the executor may properly exercise a reasonable discretion, and I cannot fix any particular period. I think, in my own view, that two months would have been a reasonable time, but he might fairly have considered twelve months. I shall, therefore, only charge him with the loss which would have occurred if he had sold them at the end of twelve months. I have considered whether I could lay down any general rule, but find it impossible. The question depends on the particular nature of the property and the evidence affecting it." See also *Bate* v. *Hooper*, 5 De G. Mac. & G. 338; *Wilkinson* v. *Duncan*, 23 Beav. 469; *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 605.

The result of the authorities seems to be, that there is no fixed rule that conversion must take place at the end of the year from the testator's death, but that is the *primâ facie* rule, and that executors who do not convert by that time must show some reason why they did not do so, and where the question is distinctly and fairly raised upon the pleadings, there is an *onus* thrown on the executors to justify the delay. Per Sir *W. Page Wood*, L. J., in *Grayburn* v. *Clarkson*, 3 L. R. Ch. App. 606; *Sculthorpe* v. *Tipper*, 13 L. R. Eq. 232.

In ordinary cases it is the duty of trustees to get in the trust

funds, and the Court charges them for neglecting that duty; but where a discretion is given to trustees upon the question, whether the funds should be got in or not, it is the duty of the trustees not to call them in, if in the exercise of their discretion they are of opinion that it is inexpedient to adopt that course. And in cases of this latter description, it is incumbent upon those who seek to charge a trustee to establish a case of misconduct on his part: *Paddon* v. *Richardson*, 7 De G. Mac. & G. 563, 582, 583. See also *Horton* v. *Brocklehurst*, 29 Beav. 511.

As the Court, in the administration of an estate, would not permit a *real security* to be called in without an inquiry as to its expediency (*Howe* v. *Earl of Dartmouth*, 7 Ves. 150), so an executor is not obliged to call in a mortgage, if the security be good, and the money be not wanting to pay debts (*Orr* v. *Newton*, 2 Cox, 276), and even if a trustee found part of the trust funds invested upon a second mortgage, it does not seem that he would be bound to call it in. See *Robinson* v. *Robinson*, 1 De G. Mac. & G. 252.

If, however, a trustee has reason for supposing that a security is not good, his duty will be to call the money in at once: *Ames* v. *Parkinson*, 7 Beav. 384; *Harrison* v. *Thexton*, 4 Jur. N. S. 550.

Although an executor or administrator should have taken no steps at all to obtain payment of a sum of money, if it appears that if he had done so, they would have been, or there is reasonable ground for believing that they would have been, ineffectual, then he is exonerated from all liability. Per Sir *J. Romilly*, M. R., in *Clack* v. *Holland*, 19 Beav. 271; and see *East* v. *East*, 5 Hare, 343, 348; *Maitland* v. *Maitland*, 16 Sim. 233; *Ratcliffe* v. *Winch*, 17 Beav. 217; *Hobday* v. *Peters*, 28 Beav. 603; *Ball* v. *Ball*, 11 Ir. Eq. Rep. 370, 375; *Stiles* v. *Guy*, 16 Sim. 232; *Maitland* v. *Bateman*, 1b. 233, n.; *Alexander* v. *Alexander*, 12 I. Ch. R. 1.

Trustees in the exercise of a sound discretion, may release or compound a debt (*Blue* v. *Marshall*, 3 P. Wms. 381; *Ratcliffe* v. *Winch*, 17 Beav. 216; *Forshaw* v. *Higginson*, 8 De G. Mac. & G. 827). But where trustees compounded with a bankrupt-debtor to the trust, they have been held liable to make good the full amount of the debt, where it was impossible to show that the bankrupt would have obtained his certificate, or that the debt might not have been recovered in full: see *Wiles* v. *Gresham*, 5 De G. Mac. & G. 770; affirming *S. C.*, 2 Drew. 258, in which case, however, Lord Justice *Turner* expressed a doubt whether the trustees should have been charged without further inquiry. See also *Jeron* v. *Bush*, 1 Vern.

342; *Gorge* v. *Chansey*, 1 Ch. R. 125; *Re Alexander's Minors*, 13 I. Ch. R. 137.

But executors under wills executed since the 28th August, 1860, are authorised "to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration, all debts, accounts, claims, and things whatsoever, relating to the estate of the deceased . . . . without being responsible for any loss to be occasioned thereby. 23 & 24 Vict. c. 145, s. 30.

It seems, moreover, that trustees are not liable on the ground that they did not accept a compromise: *Ex parte Ogle*, 8 L. R. Ch. App. 714, 715.

When trustees are ordered by the Court to realise securities and they neglect to do so, they will be liable for the loss sustained by their neglect, that is to say, the difference between the price which the securities actually realised, and that which they would have realised if sold at the time when the trustees were directed to sell them: *Davenport* v. *Stafford*, 14 Beav. 319, 338.

It is, moreover, the duty of trustees to do, or procure to be done, such acts as are necessary for the security of trust property, by putting it out of the power of third parties to deal with it. Suppose, for instance, the subject of a settlement is a fund standing in the names of other trustees of the settlor, the trustees of the settlement must give notice of it to the former trustees; for if they neglect to do so, and the settlor is thereby enabled to deal with the fund in favour of third parties, who gain priority by giving the first notice, the trustees of the settlement must make good the loss: *Jacob* v. *Lucas*, 1 Beav. 436; and see *Macnamara* v. *Carey*, 1 I. R. Eq. 35.

Upon the same principle, where a trustee of a settlement (requiring registration) neglected to see that it was registered, and by reason of his neglect the settlor was enabled to mortgage the property, he was held answerable for the loss occasioned thereby: *Macnamara* v. *Carey*, 1 I. R. Eq. 9. See also *Lester* v. *Lester*, 6 I. Ch. Rep. 513.

So where the trustees of a policy of assurance neglected to give notice to the office of the assignment, and also to endorse it upon the policy, they were held liable to make good the loss to the trust estate, occasioned by the assured mortgaging the policy, and its subsequent surrender to the office: *Kingdon* v. *Castleman*, W. N. 1877, p. 15.

As to the liability of a trustee who is abroad, see *Byrne* v. *Norcott*, 13 Beav. 336.

As to the Custody of Trust Pro-

perty.]—Trustees or executors are bound to take the same care of trust property as they would of their own ; and if they have done so, they will not be liable for any accidental loss—as, for instance, by a robbery of the property while in their own possession (*Morley* v. *Morley*, 2 Ch. Ca. 2), or by a robbery or loss whilst in the possession of others to whom it has necessarily (that is to say, in the ordinary course of business) been intrusted. Thus, in *Jones* v. *Lewis*, 2 Ves. 240, where an administratrix put goods, to be delivered to the plaintiff, into the hands of her solicitor, from whom they were stolen, Lord *Hardwicke* held, that she was not liable for the loss. "I do not know," said his Lordship, "that bailees, executors, administrators, or trustees, are bound to keep goods always in their own hands. They are to keep them as their own, and take the same care. If, therefore, a man lodged trust-money with a banker, if lost, in many cases the Court has discharged the trustee, especially if lost out of the banker's hands by robbery. In the present case, what has been done is, what she would have done with her own, leaving them with her solicitor, in order to be delivered to the plaintiff when proper so to do. And why might she not do that ? It is the same as if they had been in her own custody ; and there is no pretence that they were collusively put into the hands of her solicitor. It would be too hard to charge her with these things lost."

So, executors or trustees will not be liable, if, in the ordinary discharge of their duty, they deposit the assets in a bank, in their own names, although the bank may fail—if, for instance, in the case of executors, the deposit be made within a year after the testator's death, and it is necessary for them to have money *in hand* for the payment of debts, legacies, or other purposes (*Johnson* v. *Newton*, 11 Hare, 160 ; and see *Wilks* v. *Groom*, 3 Drew. 584 ; *Swinfen* v. *Swinfen*, 29 Beav. 211) ; or to keep money in the bank with the view of investing it on a mortgage, in order to meet deferred legacies : *Fenwick* v. *Clarke*, 31 L. J. N. S. (Ch.) 728.

Nor will they be liable for a deposit on a sale, necessarily left in the hands of the auctioneer as the agent both for them as vendors, and for the purchasers : *Edmonds* v. *Peake*, 7 Beav. 239. So, pending the preparation of a mortgage security, a trustee is justified in investing the money in Exchequer bills : *Matthews* v. *Brise*, 6 Beav. 239.

But if money be left unnecessarily in the hands or in the power of third parties, it will be at the risk of the trustees or executors ; if, for instance, money be left in the hands of a banker more than a year after the death of a testator, and after debts and lega-

cies have been paid, and whether it be productive or unproductive: *Darke* v. *Martyn*, 1 Beav. 525; *Moyle* v. *Moyle*, 2 Russ. & My. 710; *Gibbins* v. *Taylor*, 22 Beav. 344; *Rehden* v. *Wesley*, 29 Beav. 213: and see *Lunham* v. *Blundell*, 27 L. J. N. S. (Ch.) 179; *Browne* v. *Butter*, 24 Beav. 159. In *Castle* v. *Warland*, 32 Beav. 660, a testator died in August, 1861, and his executors remitted to their solicitor 80*l.* to obtain probate, and 25*l.* to pay legacy duty. The solicitor became bankrupt in November, 1861, and the money was lost. Sir *J. Romilly*, M. R., allowed the executors the 80*l.*, but not the 25*l.*, as it was advanced prematurely. See also *In re Bird*, 16 L. R. Eq. 203, where an executor was allowed 310*l.* which he sent by a cheque to a solicitor, who having informed him that he had compromised two debts due from the estate for that amount, misappropriated the 310*l.*, which afterwards became irrecoverable.

But trustees will be liable for money left in a bank which fails, where they have been ordered to pay it into Court (*Wilkinson* v. *Bewick*, 4 Jur. N. S. 1010), or to new trustees: *Lunham* v. *Blundell*, 4 Jur. N. S. 3.

So, if money be handed by a trustee to his solicitor to invest, and the solicitor misapplies it, the trustee will be liable: *Bostock* v. *Floyer*, 1 L. R. Eq. 26; 35 Beav. 603.

So, where trustees for sale, having sold the property, place the conveyance executed by them, and having their receipt indorsed, in the hands of a solicitor, who receives and misapplies the money, they are liable for a breach of trust: *Ghost* v. *Waller*, 9 Beav. 497; *Rowland* v. *Witherden*, 3 Mac. & G. 568.

So, where a trustee properly invested money in Exchequer bills, pending the necessary delay in completing a contemplated mortgage security, he was held by Lord *Langdale*, M. R., personally liable, because he left them undistinguished in the hands of the broker, who acted as banker: *Matthews* v. *Brise*, 6 Beav. 239. And a trustee or executor will also be liable, if, upon failure of a bank, it be found that the money has been placed to his own credit, or mixed with his own moneys: he ought to pay it to the credit of the trust; for if, instead of distinguishing it, he pays it to his own account, on his becoming bankrupt it would go to the credit of his estate; and if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid to his account (*Massey* v. *Banner*, 1 J. & W. 241; *Wren* v. *Kirton*, 11 Ves. 377; *Pennell* v. *Deffell*, 4 De G. Mac. & G. 386, 392; *Great Eastern Railway Company* v. *Turner*, 8 L. R. Ch. App. 149); whereas, if he pays the money into a bank to the separate

account of the trust estate, his cestui que trust upon his bankruptcy will be able to recover it from the bank: *Ex parte Kingston, In re Gros,* 6 L. R. Ch. App. 632.

Although a trustee may not have parted with the control over a trust fund, so as to enable another person to deal with it without his concurrence, he will still be liable, if he parts with his *exclusive* control by associating and incorporating with himself the authority of another person. Thus, in *Salway* v. *Salway,* 2 Russ. & My. 215, a receiver paid into a banking-house the sums he received to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held by Lord *Brougham,* reversing the decision of Sir *John Leach,* M. R. (reported 4 Russ. 60), that the receiver was liable for the loss. "Is it not," said his Lordship, "one part of the discretion of a trustee—taking him to be a mere naked trustee—is it not one part of the discretion of an agent, to whom the receiver may more properly be likened, to keep the funds in the hands of the bankers so long only as they shall be safely there lodged, and to seize the moment when peril threatens to withdraw them to a place of safety? Will it be said that he is able to exercise that discretion, when he has tied up his own hands, and can no longer exercise it himself, but must apply for the consent and co-operation of another?" This decision, under the name of *White* v. *Baugh,* was affirmed by the House of Lords: 2 Russ. & My. 220; 9 Bligh, 181; 3 C. & F. 44.

Upon the same principle, that trust property ought not unnecessarily to be left with strangers, so it ought not to be left under the entire control of a co-trustee. Thus, if money is paid into a bank, to the credit of the trust estate, it should be in the names of all trustees jointly, and to be payable upon their joint order or cheque. See *Clough* v. *Bond,* 3 My. & Cr. 490: there on the death of Ann Dixon, intestate, administration of her estate was granted to her son Thomas Reup Dixon, and her daughter, Emily Bond, the wife of John Bond. The assets were, in May, 1831, paid into a banking-house, to the joint account of John Bond and Thomas Reup Dixon; and the whole of the fund, with the exception of the share of one of the next of kin, who was abroad, was soon afterwards paid away amongst the several parties entitled by means of cheques signed by the two persons in whose names the account stood. John Bond died in 1831, and ten months afterwards, Thomas Reup Dixon drew out the balance, and, having applied it to his own use, absconded. It was held, by Lord

Cottenham, affirming the decree of Sir *L. Shadwell*, V. C., (reported 8 Sim. 594, nom. *Clough* v. *Dixon*), that the estate of John Bond was answerable for the loss. "It will be found," said his Lordship, "to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property, when it ought to be sold, and it be afterwards lost, without any fault of his, he is liable: *Phillips* v. *Phillips* (Freem. Ch. Ca. 11): or if he leave money due upon personal security, which, though good at the time, afterwards fails: *Powell* v. *Evans* (5 Ves. 839); *Tebbs* v. *Carpenter* (1 Madd. 290). And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorised fund. Thus, he is not liable, upon a proper investment in the 3*l.* per Cents., for the loss occasioned by the fluctuations of that fund: *Peat* v. *Crane* (2 Dick. 499, n.); but he is for the fluctuations of any unauthorised fund: *Hancom* v. *Allen* (2 Dick. 498); *Howe* v. *Earl of Dartmouth* (7 Ves. 137—150, ante, p. 296). So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving, to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator: *Langford* v. *Gascoyne* (11 Ves. 333); *Lord Shipbrook* v. *Lord Hinchinbrook*, (11 Ves. 252; 16 Ves. 477); *Underwood* v. *Stevens* (3 Mer. 712).

"Applying these principles to the present case, the inquiry is necessarily confined to two points: first, was the payment into Child's, of the money in question, in the joint names of Mr. Bond and Mr. Dixon, a proper mode of deposit?

and, if not, secondly, was the loss occasioned by such mode of deposit? Bond had nothing to do with the estate, except as husband of the administratrix. During the coverture he was entitled to interfere in her right; but that authority was determinable with the determination of the coverture. In the event, therefore, which happened, of his death before his wife, her authority would remain to be exercised by herself alone, and so she would be enabled to control her co-administrator—a security to the estate of which he had no right to deprive it. By depositing the money in his own name and that of the co-administrator Dixon, he did exclude the administratrix from ever possessing this control, so far as affects the funds in question, and, in the event of Dixon's death before him, gave to himself the absolute power over it, and in the event which has happened, of his dying first, enabled Dixon to appropriate it to himself without the control of his co-administratrix. This mode of deposit, therefore, was an act by which, without necessity, one of the personal representatives was excluded, who had at one time possession, and by which exclusive possession was likely to vest in a person not entitled to it; and, that event having happened, and such person having, by virtue of such possession, appropriated the fund to himself, there can be no doubt that the deposit was improper, and that it has been the cause of the loss. The principle, therefore, of the case referred to, subjects Bond's estate to the liability of making good this fund; for, although the wife was the personal representative, and she survives, yet the devastavit consisted in the improper deposit, which took place during the coverture; the money lost was part of the estate which came to the hands of the husband, and from which nothing has taken place that can discharge him. He was himself the author of the devastavit, and his estate is liable. . . . . I have, therefore, no difficulty in dismissing the petition of appeal with costs:" *Trutch* v. *Lamprell*, 20 Beav. 116; *Browne* v. *Butter*, 24 Beav. 159.

So, where two trustees instead of investing the trust monies on proper securities deposited them in a bank, and the surviving trustee drew out the balance and applied it to his own use, it was held by Sir *J. Romilly*, M. R., that the estate of the deceased trustee was liable to make good the loss: *Gibbons* v. *Taylor*, 22 Beav. 344. See also *Ingle* v. *Partridge*, 32 Beav. 661; 34 Beav. 411.

When the trust funds comprised stocks or securities which were payable to bearer and passed by delivery, and of which the interest was payable upon coupons, it has been held that the trustee might, without a breach of trust, deposit such securities in a box at a banker's on account of all the

trustees, one being allowed by the rest to keep the key of the box in order to obtain the coupons; and though the bankers, without the privity or concurrence of the co-trustees, delivered the box to the trustee who had the key, the co-trustees remaining ignorant of the fact, were not liable to make good securities which the latter subsequently withdrew from the fund: *Mendes* v. *Guedalla*, 2 J. & H. 259.

But where two of three trustees had committed a box containing such securities to the third (a stockbroker) for the purpose of conversion, it has been held that they were bound to ascertain, when the box was returned to the bankers, that such conversion had been effected, and the new securities restored to the joint custody of all the trustees (*Ib.*); and where two of three trustees under such circumstances rested satisfied with the assurance of the solicitor for the trust that he had seen the box returned to the bankers without more, it was held by Sir *W. Page Wood*, V. C., that they were liable to make good such of the new securities as the third trustee had appropriated to his own use (*Ib.*).

Trustees authorised by a testator to invest his property upon the stocks, shares, or securities of any incorporated company paying a dividend are not justified in allowing part of his assets to remain on shares, as invested by the testator himself, which by the rules of the company could only stand in the name of a single trustee (*Consterdine* v. *Consterdine*, 31 Beav. 330), but where such shares were specifically bequeathed, it has been held that they might, with the consent of the tenant for life, be lawfully held in the sole name of one trustee. (*Ib.*)

It is the duty of a trustee to keep trust property distinct from his own private property, for if he mixes them together the *onus* will lie upon him of distinguishing one from the other, and if he fail to do so, the whole will be held to belong to the trust: *Fellowes* v. *Mitchell*, 1 P. Wms. 83; *Chedworth* v. *Edwards*, 8 Ves. 46; *White* v. *Lincoln*, 8 Ves. 363; *Lupton* v. *White*, 15 Ves. 432; *Panton* v. *Panton*, 15 Ves. 440 cited; *Gray* v. *Haig*, 20 Beav. 219; *Duke of Leeds* v. *Amherst*, 20 Beav. 239; *Mason* v. *Morley*, 34 Beav. 471, 475; *Cook* v. *Addison*, 7 L. R. Eq. 466.

Where the trust has terminated, trustees will be justified in paying the proceeds of the trust estate to an executor of the person absolutely entitled, and they will not be liable for his misapplication of it. Thus, in *Waugh* v. *Wyche*, 2 Drew. 318, a trustee of the legal estate in a mortgage in trust for A. absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor. It was

held by Sir *R. T. Kindersley*, V. C., that the money having got into the hands of the executor, the trustee was not liable. See also *Hayes* v. *Oatley*, 14 L. R. Eq. 1.

Where leasehold houses or buildings have been destroyed by fire, an executor will not be liable by reason of his not having insured them against fire: *Bailey* v. *Gould*, 4 Y. & C. 221; see also *Ex parte Andrews*, 2 Rose, 410; *Fry* v. *Fry*, 27 Beav. 146; *Dobson* v. *Land*, 8 Hare, 216.

As to Investment.]—Notwithstanding the opinion of Lord *Northington*, in *Harden* v. *Parsons*, 1 Eden, 148, it is clear that trustees or executors will not be justified in lending the trust money on personal security (*Terry* v. *Terry*, Prec. Ch. 273; *Adye* v. *Fuilleteau*, 1 Cox, 24; *Vigrass* v. *Binfield*, 3 Madd. 62; *Walker* v. *Symonds*, 3 Swanst. 63; *Darke* v. *Martin*, 1 Beav. 525), even to a person to whom the testator had been accustomed to lend money on personal security (*Styles* v. *Guy*, 1 Mac. & G. 423), although it be joint (*Holmes* v. *Dring*, 2 Cox, 1), or with sureties (*Watts* v. *Girdlestone*, 6 Beav. 188), unless they have an express authority to do so (*Forbes* v. *Ross*, 2 Bro. C. C. 430; *S. C.*, 2 Cox, 113; *Child* v. *Child*, 20 Beav. 50; *Pickard* v. *Anderson*, 13 L. R. Eq. 608); mere general expressions, leaving the nature of the investment apparently discretionary, not being sufficient (*Pocock* v. *Reddington*, 5 Ves. 794; *Wilkes* v. *Steward*, G. Coop. 6; *Mills* v. *Osborne*, 7 Sim. 30); and trustees authorised to lend money on personal security will not, unless expressly authorised so to do (*Paddon* v. *Richardson*, 7 De G. Mac. & G. 563; and see *In re Kershaw's Trusts*, 6 L. R. Eq. 323), be allowed to lend to one of themselves (*Forbes* v. *Ross*, 2 Bro. C. C. 430; 2 Cox, 113; —— v. *Walker*, 5 Russ. 7; *Stickney* v. *Sewell*, 1 My. & Cr. 814; *Francis* v. *Francis*, 5 De G. Mac. & G. 108), or to a relation, for the purpose of accommodating him (*Langston* v. *Ollivant*, G. Coop. 33; *Stickney* v. *Sewell*, 1 My. & Cr. 15; *Cock* v. *Goodfellow*, 10 Mod. 489; *Fitzgerald* v. *Pringle*, 2 Moll. 534). And the terms upon which money is authorised to be lent upon personal security must be strictly complied with. Thus, if a power is given to trustees to lend the trust-money to the husband, on his bond, *with the consent of his wife in writing*, the trustees will be liable, if they lend to the husband without the security of a bond, or without having previously obtained the wife's written consent (*Cocker* v. *Quayle*, 1 Russ. & My. 535): her subsequent consent, though in writing, will not exonerate them: *Bateman* v. *Davis*, 3 Madd. 98.

Where, however, trustees had power to lend a certain sum to a tenant for life, the power was held

not to be exhausted by one loan, but that after repayment, it might be exercised by lending the same sum again (*Versturme* v. *Gardiner*, 17 Beav. 338); and where a testator empowered his trustees to lend such part of the trust-monies as they should think proper to A. and B. who were respectively his son and son-in-law, it was held that this authorised a loan to either: *Parker* v. *Bloxam*, 20 Beav. 295.

A power given to trustees to advance money on "real or personal security" will, it seems, authorise an advance of money upon a person's personal undertaking as distinguished from the security of personal property. See *Pickard* v. *Anderson*, 13 L. R. Eq. 608. There trustees of a marriage settlement were empowered, with the consent of the husband and wife, to invest the funds on such security, "either real or personal," as they should think proper. At the date of the marriage a sum of 2,500*l*., part of the trust funds, was outstanding on the note of hand of the husband, having been advanced to him by the intended wife prior to the marriage. A separation having taken place, but the wife, nevertheless, desiring that the fund should remain in the husband's hands, it was held by *Bacon*, V. C., that this investment might be continued until further order, on the husband executing a bond to the trustees for 2,500*l*. See also *Forbes* v. *Ross*, 2 Bro. C. C. 430; *Langston* v. *Olivant*, G. Coop. 33.

It is not necessarily a breach of trust for an executor to take a new bond in lieu of an old one, instead of calling up the money due thereon. In *Charlton* v. *Earl of Durham*, 4 L. R. Ch. App. 433, a testator gave the residue of his estate to two executors upon certain trusts. Part of his estate consisted of a bond, given by the trustees of a minor, who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly, in the place of the bond given by the trustees. Ten years afterwards a part of the money was paid by the obligor to one of the executors, who misappropriated the money. It was held by the Lords Justices, affirming the decision of Sir *W. M. James*, V. C., that, under the circumstances, the acceptance of the bond from the obligor, in the place of the bond from his trustees, was not a breach of trust by the executors.

Until the recent interposition of the legislature, in the absence of any express authority to invest, although some Judges have thought that an executor or trustee would be justified in making an investment upon good real securities (*Brown* v. *Litton*, 1 P. Wms. 141; *Knight* v. *Earl of Plymouth*, 1 Dick. 126; *Pocock* v. *Reddington*, 5 Ves. 800), the current of decisions appears

to have been against such an investment (*Ex parte Calthorpe*, 1 Cox, 192; *Norbury* v. *Norbury*, 4 Madd. 191; *Widdowson* v. *Duck*, 2 Mer. 494; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgeway*, 1 Hog. 309; *Ex parte Ellice*, Jac. 234; *Raby* v. *Ridehalgh*, 7 De G. Mac. & G. 104); à fortiori if an investment in the funds were directed: *Pride* v. *Fooks*, 2 Beav. 430.

Nor would trustees or executors have been justified, without an express authority, in investing money in any other stock or funds than *Government or Bank Annuities;* for example, as observed by Lord *Hardwicke*, "Neither South Sea Stock nor Bank Stock are considered as good security, because they depend upon the management of the governor and directors, and are subject to losses; for instance, it is in the power of the South Sea Company to trade away their whole stock while they keep within the terms of their charter. But South Sea Annuities and Bank Annuities are of a different consideration; the directors have nothing to do with the principal, and are only to pay the dividends and interest till such time as the government pay off the capital; and it is not in their power to bring any loss upon them, and they therefore are only and properly good securities:" *Trafford* v. *Boehm*, 3 Atk. 444; and see *Howe* v. *Earl of Dartmouth*, ante, p. 296; *Mills* v. *Mills*, 7 Sim. 501. And as the Court has selected for its own purposes the 3*l.* per Cents. Consolidated Bank Annuities, trustees or executors could not, upon a proper investment in the 3*l.* per Cents., be liable for any loss occasioned by the fluctuations in that fund: *Peat* v. *Crane*, 2 Dick. 499, n.; *Clough* v. *Bond*, 3 My. & Cr. 496. It would indeed appear, from *Hansom* v. *Allen*, as reported in 2 Dick. 498, that trustees would be held liable for any fluctuation in the value of any *government funds* in which they invested, instead of the 3*l.* per Cent. Consolidated Bank Annuities; but that case, which, however, is no authority for such a proposition, was afterwards reversed in the House of Lords (see 7 Bro. P. C. 375, Toml. edit.); and it is by no means probable that the Court would act with such harshness.

Where it was more convenient to invest trust funds in the 3*l.* per Cents. Reduced, as where the income of the trust fund was directed to be paid on the days when the dividends of the 3*l.* per Cents. Reduced were payable, an investment in that stock would be directed by the Court: *Caldecott* v. *Caldecott*, 4 Madd. 189.

If power be given to the trustees by the instrument creating the trust to invest in the public funds, or upon government or real securities, the trustees are not confined to 3*l.* per Cents., but may invest in any other

government security: *Baud* v. *Fardell*, 7 De G. Mac. & G. 628.

As to investments in Exchequer Bills, see *Ex parte The South Eastern Railway Company*, 9 Jur. 650; *Ex parte Chaplin*, 3 Y. & C. Exch. Ca. 397; *Knott* v. *Cottee*, 16 Beav. 77.

Although trustees may have full power by a will to invest money as in their absolute discretion they may think fit, that will not enable them, in favour of a tenant for life and so as to bind remainder-men, to invest upon securities, which at the time are commanding a higher rate of interest in consequence of their being determinable: *Stewart* v. *Sanderson*, 10 L. R. Eq. 26.

Of late the legislature has on several occasions very widely enlarged trustees' powers of investment. Thus, by Lord St. Leonards' Act (22 & 23 Vict. c. 35), it is enacted that, "When any trustee, executor, or administrator *shall not, by some instrument creating his trust, be expressly forbidden* to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." Sect. 32. It having been held that this section did not apply to trustees appointed by instruments executed and in operation before the passing of the Act (*Re Miles' Trusts*, 27 Beav. 579; *Dodson* v. *Sammell*, 1 Drew. & Sm. 575), it has since been made retrospective by 23 & 24 Vict. c. 38, s. 12.

And by 23 & 24 Vict. c. 38, trustees, executors, or administrators, *having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities*, or any of them, may invest such trust funds, or any part thereof, in any of the stocks, funds, or securities, in or upon which by general order cash *under the control of the Court* may from time to time be invested: s. 11.

Again, by general order made the 1st day of February, 1861, in pursuance of 23 & 24 Vict. c. 38, s. 10, "*Cash under the control of the Court* may be invested in Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and New 3*l.* per Cent. Annuities."

As might have been supposed, there have been numerous decisions upon the construction and operation of these Acts, which it may be useful to mention.

In the first place, it has been decided that the 32nd section of 22 & 23 Vict. c. 35, does not apply to a case where the trust fund is already invested in Bank Annuities; and the trustee has no power, independently of the Act, to vary any investment: *In re Warde*, 2 J. & H. 191; sed vide contra *Waite* v. *Littlewood*, 41 L. J. Ch. 636.

Bank Stock and East India Stock are clearly within both the Acts and orders, but not, it seems, the New East India Loan: *Peillon* v. *Brooking*, 4 L. T. Rep. N. S. 731. And the Court will in no case authorise an investment in the New East India Loan: *Re Colne Valley and Halstead Railway*, Johns. 528; 1 De G. F. & Jo. 53; *Re Fromow's Estate*, 8 W. R. (V. C. S.) 272.

As a general rule, it seems, upon the application of the tenant for life, in the absence of special circumstances, making an increase of income beneficial to those in remainder, irrespective of pecuniary calculations, the Court will not authorise a transfer from Consols, or New Three per Cent. Stock, into another investment authorised by 23 & 24 Vict. c. 39, and producing a larger income, if on pecuniary calculation it may be injurious to those in remainder. See *Cockburn* v. *Peel*, 3 De G. F. & Jo. 170, 172, where a transfer from Consols into East India Stock was refused: see *In re Boyce's Minors*, 1 Ir. R. Eq. 45.

There are, however, cases where, from the exigencies of families, it would be desirable for the children that the income of the parents should be increased, and in such cases the circumstances should be stated in the petition: per *Turner*, L. J., in *Cockburn* v. *Peel*, 3 De G. & Jo. 174. And see *Hurd* v. *Hurd*, 11 W. R. (V. C. K.) 50; *Re Ingram's Trusts*, 11 W. R. 980; *Vidler* v. *Parrott*, 12 W. R. (V. C. K.) 976; *Re Longford's Trusts*, 2 J. & H. 458.

In the *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 379, a fund in Court was ordered to be invested in Bank Stock and East India Stock on the application of the tenant for life, herself the settlor, the reversioners who opposed such investment being only volunteers. And see *Bishop* v. *Bishop*, 9 W. R. (V. C. K.) 549.

So where the object of the trusts is to produce a certain annuity for the tenant for life, and trustees have the power of varying securities if an investment in Parliamentary Stocks of Great Britain according to the power should prove insufficient to produce the annuity, the Court, on finding that to be the case, will, on the application of the person entitled to the annuity, and without the consent of those entitled in remainder, direct the conversion of the Parliamentary Stock into East India Stock: *Mortimer* v. *Picton*, 12 W. R. (L. C.) 292.

See also *Hurd* v. *Hurd*, 11 W. R. 50 ; *Fluid* v. *Fluid*, 7 L. T. N. S. 590.

The Court, however, seems more readily to order Consols in Court to be invested in Bank Stock (*Cohen* v. *Waley*, 9 W. R. (V. C. S.) 137 ; *Re Langford's Trusts*, 2 J. & H. 458 ; *In re Boyce's Minors*, 1 I. R. Eq. 45), or upon mortgage of freehold securities : *Re Simson's Trusts*, 1 J. & H. 89 ; and see *Mortimer* v. *Picton*, 12 W. R. (L. C.) 292.

Where a testator died in 1854, being possessed amongst other personalty of English and Irish Bank Stock, having by his will given the same to trustees upon trust to convert such part of his personal estate as should not consist of money or securities for money in government securities into money, and to invest the same in the public stocks or funds of Great Britain, and to stand possessed thereof upon trust for several persons in succession, and the Bank Stock was not converted at the time of the passing of 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, it was held by the Lords Justices, after the passing of those Acts, that the trustees were not bound to convert the Bank Stock, and that for the period between the death of the testator and the passing of 22 & 23 Vict. c. 35, the tenant for life was not entitled to the full dividends of the Bank Stock, but to an amount equal to the dividends of so much Consols as might have been purchased, if the Bank Stock had been sold and converted into stock immediately after the testator's death : *Hume* v. *Richardson*, 10 W. R. (L. J.) 528 ; 8 Jur. N. S. 686 ; 4 De G. F. & Jo. 29.

When the fund is not in Court, trustees in making an investment in East India Stock, will be entitled to the protection of the Court, if they act *bonâ fide* to the best of their discretion : *Cockburn* v. *Peel*, 3 De G. & Jo. 174, per *Turner*, L. J.

Doubts having arisen as to the legal effect and signification of the words "East India Stock" in the 32nd section of 22 & 23 Vict. c. 35, it was by 30 & 31 Vict. c. 132, enacted "that the words 'East India Stock' in the Act passed in the session holden in the 22nd and 23rd years of Her Majesty, c. 35, shall include and express as well the East India Stock which existed previously to the 13th day of August, 1859, when the said Act received the assent of Her Majesty, as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received Her Majesty's assent on or after the 13th day of August, 1859 ; and it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in the stock created by the last-men-

tioned Act or Acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock which existed previously to the 13th day of August, 1859." (Sect. 1.) And it is also enacted "that it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control, in *any securities the interest of which is or shall be guaranteed* by Parliament, to the same extent and in the same manner as he may invest such trust fund in such securities as aforesaid." (Sect. 2.)

In some cases it has been held that money received by trustees upon a sale under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120; 23 & 24 Vict. c. 38), may be invested in any of the investments in which cash under the control of the Court may be invested: *In Re Cook's Settled Estates*, 12 L. R. Eq. 12; and see *Wall* v. *Hall*, 11 W. R. 298; *In re Birmingham Blue Coat School*, 1 L. R. Eq. 632; *In re Wilkinson's Estate*, 9 L. R. Eq. 343; *Re Thorold's Settled Estates*, 14 L. R. Eq. 31.

In other cases, however, it has been held that the purchase-money of land sold under the Settled Estates Act is not to be considered money under the control of the Court, and cannot therefore be invested as such. See *In re Boyd's Settled Estate* (16 L. R. Eq. 533 cited), decided by Lord Chancellor *Selborne*, sitting as Master of the Rolls, following *In re Shaw's Settled Estates* (14 L. R. Eq. 9).

By another Act it is enacted that trustees having trust money in their hands *which it is their duty to invest at interest*, shall be at liberty, at their discretion, to invest the same in any of the Parliamentary Stocks, or public funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: provided always, that no such original investment as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person: 23 & 24 Vict. c. 145, s. 25.

Where trustees or executors are authorised to advance money upon mortgage, if they act with ordinary prudence, they will only

advance two-thirds of the value of property even of a permanent value,—as freehold land; but the same rule does not apply to property in houses and buildings, which fluctuates in value and is always deteriorating, upon which still less ought to be advanced, especially where they are used in trade, and whose value depends upon the accidental absence of competition in trade: see *Stickney* v. *Sewell*, 1 My. & Cr. 9: in which case it was also held, that trustees are not justified in lending money upon mortgage to one of themselves. See also *Macleod* v. *Annesley*, 16 Beav. 600; *Stretton* v. *Ashmall*, 3 Drew. 9; *Fowler* v. *Reynal*, 2 G. & Sm. 749; 3 Mac. & G. 500; *Waring* v. *Waring*, 3 Ir. Ch. Rep. 331; *Francis* v. *Francis*, 5 De G. Mac. & G. 108; *Vickery* v. *Evans*, 33 Beav. 376; *Budge* v. *Gummow*, 7 L. R. Ch. App. 719.

When trustees advance money bonâ fide upon the mortgage of property, after it has been duly surveyed and valued by a competent person, they will not be liable, although eventually less may be realised by the mortgaged estate than the sum advanced (*Jones* v. *Lewis*, 3 De G. & Sm. 471); but the evidence of the mortgagor, or his steward, or land agent, would not be considered as proper evidence of the value, as they are not disinterested persons: *Norris* v. *Wright*, 14 Beav. 291, 301.

And where trustees employ a surveyor who is ignorant of the locality where the property proposed for a security is situated, and a portion of his report is of an unsatisfactory character, the trustees will not be excused from any loss, although the surveyor may have valued the property at a sum considerably larger than that advanced by them. See *Budge* v. *Gummow*, 7 L. R. Ch. App. 719. There trustees about to advance money upon property consisting of an hotel at Broadstairs, sent down a London surveyor, who valued the hotel at 1900*l.* and the license at 800*l.* The trustees advanced 1400*l.* on a mortgage in fee of the hotel, which was then let for 120*l.* a year. The tenant of the hotel soon afterwards failed. The hotel was afterwards shut up, and subsequently let for 50*l.* a year. The mortgagor never paid any interest, and the trustees advanced him sums for repairs, making, with the principal and interest due, a sum of 2114*l.* It was held, by the Lords Justices reversing the decision of *Bacon*, V. C., that the trustees were chargeable for the loss. "It appears to me," said *James*, L. J., "that that report of the surveyor is one upon which no sensible or prudent man would ever lend such a sum as 1400*l.* The value of the hotel licence was thrown in, but how could a land surveyor who was a stranger to the place

estimate the value of the licence? The trustees ought to have ascertained, as they might easily have done, that the hotel was but recently opened, and that the licence could have no such value. The value of an hotel is necessarily of a very speculative character, and may, like the property in the case of *Stickney* v. *Sewell* (1 My. & Cr. 8) arise from accident."

It seems to be at least doubtful whether a trustee is not guilty of a breach of trust in advancing trust money upon a *second* mortgage, unless he get the legal estate: at all events the circumstance of an advance being upon a second mortgage makes it the more incumbent upon a trustee to look more strictly at the question of value than if it were a first mortgage. See *Norris* v. *Wright*, 14 Beav. 291, 307, 308. In *Drosier* v. *Brereton*, 15 Beav. 221, where trustees lent trust-monies on a *second* mortgage of house property greatly out of repair, and the principal was lost, it was held by Sir *John Romilly*, M. R., that they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declared they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default. See *Fitzgerald* v. *Pringle*, 2 Moll. 534; *Lockhart* v. *Reilly*, 1 De G. & Jo. 476; *Waring* v. *Waring*, 3 I. Ch. Rep. 331.

But a charge under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), is declared thereby not to be such an incumbrance as to preclude trustees of money, with power to invest the same in the purchase of land or on mortgage, from investing it upon land so charged, unless the terms of the trust, or power, expressly provide that the security to be so taken shall not be subject to any prior charge. Sect. 61.

Where a trust fund is lost in consequence of the ignorance or the negligence of the solicitor employed by the trustees to invest it upon a mortgage, as for instance, by his not inquiring whether incumbrances had been created, or not obtaining a sufficient abstract of title, or a proper valuation of the proposed security, the loss will fall on the trustees, and not on the cestuis que trusts: *Hopgood* v. *Parkin*, 11 L. R. Eq. 74. Whether this would be the case if a fraud were practised upon the trustees, is questioned. *Ib.* 74. However, in *Eaves* v. *Hickson* (30 Beav. 136), Lord *Romilly*, M. R., held, that if a person obtained trust property from trustees by means of a forgery, the loss fell on them, and not on the cestuis que trusts. So, in *Sutton* v. *Wilders*, 12 L. R. Eq. 373, trustees employed Mousley, a solicitor, to invest a sum of 5500*l.* This solicitor was the only one employed in the trans-

action, both by the trustees and the mortgagor. It turned out that the mortgagor, who had conveyed property to the trustees in fee, to secure the 5500*l.* was only a tenant for life thereof, with power to raise 2500*l.* for his own benefit, and that the said deed had been altered after execution, by turning the 2500*l.* into 5500*l.* Upon the death of the mortgagor, the solicitor having died insolvent, and the security proving insufficient, it was held by Lord *Romilly*, M. R., that the trustees were liable for the loss occasioned to the trust estate. "If trustees," said his Lordship, "employ a solicitor who neglects his duty—the principals are liable. Here it is even more so, because the trustees did not examine anything, or require any opinion on the title, or the like, but trusted implicitly to their solicitor who defrauded them. . . . . Either Mousley was or was not their solicitor. If he was not, they did not take proper precautions by applying to their own solicitors; and if he was, then they employed the solicitor of the mortgagor, which, though not of itself culpable, requires trustees who do so to take additional precautions. If it be said that the loss was caused by forgery, and that no precaution would have prevented it, then I have held, that when a forgery is committed upon any person, the loss must fall on him, whether he be the principal or trustee; and this view of mine has, I believe, been affirmed by the House of Lords in the case of a forgery upon one of the railway companies: *Midland Railway Company* v. *Taylor*, 8 Ho. Lo. Ca. 751." See, also, *Bostock* v. *Floyer*, 1 L. R. Eq. 26.

A rent-charge charged on land by virtue of the Drainage Act (12 & 13 Vict. c. 100) is not to be deemed such an incumbrance as shall preclude a trustee of money held in trust, and with a power for the investment thereof in the purchase of land, or on mortgage, from investing the same in a purchase thereof, or upon a mortgage of such land so charged, unless the terms of such trust or power shall expressly provide that the land to be so purchased or taken in mortgage shall not be subject to any rent-charge under the provisions of the Act: sect. 20.

It seems that it is not a breach of trust in a trustee to take a mortgage without a power of sale: *Farrar* v. *Barraclough*, 2 Sm. & Giff. 231.

An investment on an assignment by a railway company of "the undertaking tolls, &c.," the principal not payable till seven years, is an improper investment, although the trustees have power to invest in real securities: *Mant* v. *Leith*, 15 Beav. 524.

An investment in railway mortgages and railway debenture stock is not authorised by a power to invest "upon the security by way

of mortgage of any freehold, copyhold, or leasehold hereditaments : " *Mortimore* v. *Mortimore*, 4 De G. & Jo. 472 ; and a power to invest upon " approved securities," although it might authorise an investment upon mortgage of freehold estate might not be held to extend to railway securities : *Re Simson's Trusts*, 1 J. & H. 89. Nor does a power to invest trust funds " upon the security of the funds of any company incorporated by Act of Parliament " warrant their investment in preference railway shares : *Harris* v. *Harris*, 29 Beav. 107.

A mortgage upon the security of a judgment on lands (*Johnston* v. *Lloyd*, 7 I. Eq. Rep. 252), upon an estate for life (*Lander* v. *Weston*, 3 Drew. 389 ; *Fitzgerald* v. *Fitzgerald*, 6 I. Ch. Rep. 145), except in the case of leases for lives renewable for ever in Ireland (*Macleod* v. *Annesley*, 16 Beav. 600), will not be authorised by the ordinary power to advance money on real securities. It seems, however, although there does not appear to be an express decision upon the point, that an investment upon the mortgage of land held for *a long term* of years would be unobjectionable (*Townend* v. *Townend*, 1 Giff. 211), but it might not be safe for trustees to invest upon the securities of leaseholds for short terms, especially if they were burthened by onerous covenants. *Ib.* ; and see *Wyatt* v. *Sharratt*, 3 Beav. 498 ; *Fuller* v. *Knight*, 6 Beav. 209. A mortgage of *copyholds* of adequate value, duly surrendered, appears to be unobjectionable : *Wyatt* v. *Sharratt*, 3 Beav. 498.

A power, however, to invest " upon the stock, shares, or securities of any incorporated company paying a dividend, authorises an investment in railway stock bearing a fixed rate of interest : " *Consterdine* v. *Consterdine*, 31 Beav. 330.

By the Debenture Stock Act, 1871 (34 Vict. c. 27), it is enacted, that " where a power has before the passing of this Act been or shall at any time hereafter be given to trustees (including executors and administrators, and any other persons holding funds in a fiduciary capacity), to invest trust funds in the mortgages or bonds of a railway company, or of any other description of company, such power shall, *unless the contrary is expressed* in the instrument creating the power, be deemed to include a power to invest such funds in *the debenture stock* of a railway company, or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly." (Sect. 1.)

Moreover, by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, which, however, is not retrospective), trustees having a power to lend on *real* securities shall (unless the contrary be provided) have power, at their discre-

tion, to invest their trust money on charges under the Act or on mortgages thereof. Sect. 60.

A power to invest "upon freehold or copyhold hereditaments" authorises an investment upon the mortgage of freehold ground rents: *Vickery* v. *Evans*, 12 W. R. (M. R.) 237.

So a power to invest in the purchase of lands or hereditaments in fee simple in possession, authorises an investment in the purchase of freehold ground rents: *In re Peyton's Settlement Trust*, 7 L. R. Eq. 463.

A power, however, to invest in government stock, or upon real securities, does not authorise a sale of stock and the investment of the proceeds on a mortgage for securing the retransfer of the stock: *Whitney* v. *Smith*, 4 L. R. Ch. App. 513.

A power to invest in "foreign funds" does not authorise an investment in bonds or debentures of foreign municipal towns or railways (*Ellis* v. *Eden*, 23 Beav. 543; *In re Langdale's Settlement Trust*, 10 L. R Eq. 39), and an investment in such bonds will not be considered an investment in the "funds" although such bonds are guaranteed by the British government: *Burnie* v. *Getting*, 2 Coll. 324.

The Court does not seem inclined, in the case of infants, to transpose trust-monies from the funds to mortgage securities under a power, for it has been said "that in ninety-nine cases out of a hundred the expenses arising from a mortgage security more than counterbalance the increase of income:" *Barry* v. *Marriott*, 2 De G. & Sm. 491. And see *Ex parte Franklyn*, 1 De G. & Sm. 528.

But it is not necessarily a breach of trust under a will containing a direction to invest on real securities, to continue in their actual state of investment part of the assets consisting of turnpike bonds: *Robinson* v. *Robinson*, 1 De G. Mac. & G. 247: see also *Halgate* v. *Jennings*, 24 Beav. 623.

It seems that when part of the testator's property is invested on mortgage an executor is justified in making such further advances as may be absolutely necessary to secure the first advance. It would be dangerous to lay down any rule which would prevent an executor from exercising a bonâ fide discretion in any such case, or even to charge him with a devastavit in case the result should disappoint his expectations. But if a loss should be the result, it appears to be a preliminary condition before such advances could be allowed to him in taking his accounts, that he should have carefully investigated the probabilities of success, before he advanced the money of his cestuis que trust for any such purpose: *Collinson* v. *Lister*, 20 Beav. 356, 366.

Trustees, authorised to advance money upon landed securities in

England, Wales, or Great Britain, may, under 4 & 5 Will. 4, c. 29 (Lynch's Act), unless expressly restricted, advance *money upon real securities in Ireland*, with the consent of the person whose consent may be required. And if infants unborn, or insane persons, are interested, the loan must be made under the direction of the Court, obtained in a cause or upon petition in a summary way. (See *Ex parte French*, 7 Sim. 510; *Morris* v. *Wright*, 14 Beav. 291; *Ex parte Lord William Pawlett*, 1 Ph. 570;) and the power of trustees has since been extended to the making of investments on landed securities in any part of the United Kingdom. See 22 & 23 Vict. c. 35, s. 32, ante, p. 902.

By a subsequent Act (33 & 34 Vict. c. 34), corporations and trustees holding money in trust for any public or charitable purpose, may invest the same in real securities, although not complying with the conditions and solemnities required by 9 Geo. 2, c. 36, commonly called the Mortmain Act, sect. 1. But it is provided, that in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure, or otherwise barred or released, the same shall be thenceforth held in trust to be sold and converted into money, and shall be sold accordingly; and if any decree shall be made in any suit for the purpose of redeeming or enforcing such security, such decree shall direct a sale (in default of redemption) and not a foreclosure of such premises. Sect. 3.

If trustees bound by the terms of their trust to invest money in the public funds, instead of doing so, retain the money in their hands, the cestui que trust may elect to charge them either with the amount of the money, or with the amount of the stock which they might have purchased with the money: *Shepherd* v. *Mould*s, 4 Hare, 303.

Where there are no circumstances to lead to the conclusion that an executor has made any profit by his misconduct, in retaining in his hands funds which he ought to have invested, he will not be charged with interest at five per cent., or upon the principle of annual rests, but with simple interest at four per cent. (*Attorney-General* v. *Alford*, 4 De G. Mac. & G. 843, and cases there cited; *Turner* v. *Maule*, 3 De G. & Sm. 497); but where there is an express trust for accumulation, a trustee retaining trust funds in his hands will be charged with interest at 4*l.* per cent. with annual rests: *Knott* v. *Cottee*, 16 Beav. 77, 80. The pendency of an administration suit in the Duchy Court of Lancaster is no justification for non-investment by personal representatives: *Holgate* v. *Haworth*, 17 Beav. 259.

As to charging trustees with interest on trust-monies which they have retained and dealt with improperly, see note to *Robinson* v. *Pett*, ante, p. 221.

The question has arisen, whether where there are several distinct investments by trustees not authorised by the trust, in some of which a loss has been incurred for which the trustees are chargeable, and on others there has been a gain, which the trustee has no right to claim for his own benefit, the court will set off one against the other. Lord *Langdale*, however, held that such set-off could not be allowed. "I could not," said his Lordship, "enable a trustee thus to repay himself for the losses which he has sustained, without giving him the benefit acquired from a fortunate but improper investment of the trust funds. I have no authority to do that, that I am aware of:" *Robinson* v. *Robinson*, 11 Beav. 371, 375. This case was reversed upon another point, but this does not affect Lord *Langdale's* opinion upon this question. See also, *Wiles* v. *Gresham*, 2 Drew. 271. Indeed, Lord *St. Leonards*, in a bill he brought in, had a clause enabling the court to set off the losses against the gains of trustees in such cases, but it did not obtain the sanction of the legislature.

If trustees are directed to invest trust-money on *government or real securities*, and they do neither, after some conflict of decisions it has been finally settled, that in such cases cestuis que trusts will not be allowed the option of charging trustees with the monies which would have been produced if the trust-monies had been invested in the funds, and that they are only entitled to have the trust-monies replaced, with interest at 4*l.* per cent. See *Marsh* v. *Hunter*, 6 Mad. 295; *Shepherd* v. *Mould*, 4 Hare, 500; *Rees* v. *Williams*, 1 De G. & Sm. 314; *Robinson* v. *Robinson*, 1 De G. Mac. & G. 247, reversing *S. C.*, 11 Beav. 371; and see *Knott* v. *Cottee*, 16 Beav. 77, 80; *Aspland* v. *Watte*, 20 Beav. 474. We may therefore consider the cases of *Hockley* v. *Bantock*, 1 Russ. 141; *Kellaway* v. *Johnson*, 5 Beav. 319; *Watts* v. *Girdlestone*, 6 Beav. 188; and *Ames* v. *Parkinson*, 7 Beav. 379, to be overruled.

If trustees invest trust-monies on an unauthorised security, they are responsible for any future loss traceable to that first error: *Fyler* v. *Fyler*, 3 Beav. 550.

And where they have committed a breach of trust by an improper sale of the trust-fund, they will not be discharged from the consequences of that breach of trust by replacing the fund in some other stock, not being the stock the sale of which constituted the breach of trust. Thus, in *Lander* v. *Weston*, 3 Drew. 389, trustees sold stock and lent the money to the tenant for life on

improper security: one of them died, and the survivor received the money lent, and invested it in a different security, and shortly afterwards sold it out, and again lent it to the tenant for life, and it was lost. It was held by Sir *R. T. Kindersley*, V. C., that the original breach of trust was not cured, and that the estate of the deceased trustee was liable for the whole fund.

And where the executor of a trustee had been ordered by the court to invest a sum of money in stock, to the credit of a cause, and he neglected to do so for two years, during which the funds fell, it was held by the Master of the Rolls of Ireland (*Smith*) that he was bound to pay the price of the sum in stock: *Geraghty* v. *Geraghty*, 3 Ir. Ch. Rep. 414.

Where trustees bonâ fide, without authority, expend part of the trust-monies in improving the real estate, they will, at any rate if the real and personal estate constitute a mixed fund, be only disallowed the amount of loss (if any) occasioned to the estate by the expenditure. See *Vyse* v. *Foster*, 8 L. R. Ch. App. 309. There the testator devised his real estate upon trust for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at the cost of 1600*l.* out of the testator's personal estate. This villa had ever since been let at 80*l.* a year, most of the other land had been sold, and the evidence tended to show that the outlay had benefited the estate. Sir *James Bacon*, V. C., having declared that the 1600*l.* must be disallowed the trustees in passing their accounts, it was held on appeal by the Lords Justices that the trustees could, at the most, only be disallowed the amount of the loss occasioned by their expenditure. "As the real and personal estate," observed Lord Justice *James*, "constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, bonâ fide laid out on other part of the estate, in the exercise of their judgment, as the best means of increasing the value of the whole. If they were mistaken in this, which does by no means appear, the utmost they could be fairly chargeable with would be the loss, if any, occasioned by the mistake in judgment. . . If the plaintiff prefers it, the trustees, being willing, may be ordered as between them and her to take the villa themselves as at the price of 1600*l.* and the value of the site as unbuilt on, as to which an affidavit may be produced to us. There can be no substantial question as to this, as the prices

realised for the adjoining lots are known."

Of late very wide powers of investment are often given to trustees, but such powers should be exercised by them with due caution. Thus, before trustees invest any money in any company authorised by the power, they must make every necessary inquiry and satisfy themselves that it is really a solvent company: *Consterdine* v. *Consterdine*, 31 Beav. 333; *In re Langdale's Settlement Trust*, 10 L. R. Eq. 39.

Where trustees have advanced trust-monies in a manner not authorised by the trust, proceedings may be taken in Chancery to recover the monies so advanced by a breach of trust: *Hardy* v. *Metropolitan and Finance Company*, 7 L. R. Ch. App. 427, reversing *S. C.*, 12 L. R. Eq. 386.

After an administration decree has been made, all powers of management of the estate which may be vested in trustees are subject to the control of the Court, and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. See *Bethell* v. *Abraham*, 17 L. R. Eq. 24. There trustees having power to invest certain monies belonging to a testator's estate at their discretion, and also having power to continue or change securities from time to time as to the majority should seem meet, applied to the Court in a suit for the administration of the trust estate, for liberty to invest the monies in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate. It was held by Sir *G. Jessel*, M. R., that if the trustees had the discretion they claimed (which was doubtful), the Court ought not in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. See also *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Widdowson* v. *Duck*, 2 Mer. 494, 499; *Cafe* v. *Bent*, 3 Hare, 245, 249; *Sillibourne* v. *Newport*, 1 K. & J. 602.

How far persons are liable for the Acts or Defaults of Co-trustees and Co-executors.]—In the principal case of *Townley* v. *Sherborne*, so far back as the reign of Charles I., it was held by Lord Keeper *Coventry*, who justly considered it a matter of great consequence, after much deliberation, that a trustee should not be liable for the acts or defaults of his co-trustee. And see *Leigh* v. *Barry*, 3 Atk. 584; *Anon.*, 12 Mod. 560. The same rule seems also to be applicable as between co-executors: *Hargthorpe* v. *Milforth*, Cro. Eliz. 318; *Anon.*, Dyer, 210, a. Where, for instance, as in *Townley* v. *Sherborne*, one trustee receives the rents of the trust estate, or one executor receives part of the assets (*Littlehales* v. *Gascoyne*,

3 Bro. C. C. 73; *Riky* v. *Kemmis*, 1 L. & G. t. Sugd. 122, and cases in note; *Williams* v. *Nixon*, 2 Beav. 472), his co-trustee or co-executor will not ordinarily be liable for any misapplication thereof: and see *Cottam* v. *Eastern Counties Railway Company*, 1 J.& H. 243.

But any fraud, or improper dealing, or gross negligence, on the part of a trustee or executor, where, for instance, he stands by and sees a devastavit or breach of trust committed by his co-trustee or co-executor, will render him likewise responsible for it. Thus, in *Mucklow* v. *Fuller*, Jac. 198, it was held by Lord *Eldon*, that a trustee, who, as executor, had proved the will, thereby became liable, notwithstanding the usual indemnity clause, to make good the loss occasioned by his suffering a debt due from his co-executor and co-trustee to remain, contrary to the directions of the testatrix, outstanding. But his Lordship said that there might, if necessary, be an inquiry, if the money could have been received from the co-trustee. See, also, *Candler* v. *Tillet*, 22 Beav. 257. So, in *Booth* v. *Booth*, 1 Beav. 125, a testator bequeathed to Booth, his partner in a trade, and to Batkin, his personal estate, upon trust to place the same out at interest, upon some good and sufficient security or securities, for the benefit of his wife and children. Booth and Batkin both proved the will, and Booth retained the testator's monies in the trade, which were lost. Batkin took no active part in the trusts, but was cognisant of the breach of trust, and took no proceedings to prevent it. It was held by Lord *Langdale*, M. R., that Batkin was responsible for the consequences of the breach of trust. "The two executors," observed his Lordship, "proved the will; they take on themselves the trust and the duty of performing it. From that moment it was their duty to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied; but Batkin, unfortunately, did not consider, that, by proving the will, he had undertaken any duty, or incurred any responsibility. He says, he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty, or be responsible for anything. It is important that it should be well understood, that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has undertaken. I am of opinion that he became liable for the performance of the trusts, and for any consequences arising from a breach of them.

"Part of the testator's property was engaged in trade: that trade ought to have been put an end to, and the property invested. Batkin, it appears, went to the place

of business from time to time; and it is, therefore, clear that he knew what ought to be done was not performed. He acquiesced, week by week, and year by year, in the breach of trust which his co-executor was committing. There is no corrupt motive, no receipt of money which he misapplied, to be attributed to him, but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he has undertaken. He permitted his co-executor to carry on the trade, and, consequently, must be considered in this Court, a party to this breach of duty. It is said, in extenuation, that he did this from the best motives: he thought the brother of the testator was the proper person to carry on the business; he thought there would be more profit made by this mode of dealing with the property, and that it was more advantageous for the children. All this might have been very right to do and to acquiesce in, if he had undertaken to make good any loss which might occur in the course of the experiment: he could not, however, so act without incurring that responsibility, if a loss occurred." See also *Dix* v. *Burford*, 19 Beav. 409.

And not only where a person permits a co-executor to remain without paying a debt due to the testator, but also where he passively allows him to receive the assets, and retain them in his hands without properly investing them, he will be liable for any loss which may be thereby occasioned, not because through any act of his, the co-executor obtained possession of the assets, but from the fact of his having permitted a breach of trust by not having taken effectual measures to correct it and secure the property. See *Lincoln* v. *Wright*, 4 Beav. 427. These authorities, which are opposed to some early dicta, have been examined and approved of by Lord *Cottenham*, in the leading case of *Stiles* v. *Guy*, 1 Hall & T. 523; *S.C.*, 1 Mac. & G. 422, who (affirming the decree of Sir *L. Shadwell*, V. C., 16 Sim. 230) held executors liable to make good the loss arising to the testator's estate, by reason of their allowing a co-executor, who, at the death of the testator, had part of the estate in his hands, to retain it until he became bankrupt. "If," observed his Lordship, "a person named executor does not choose to accept the office, he has only to renounce, or, at least, to abstain from proving. But if he proves, he thereby accepts the office, and becomes bound to perform the duties of it, and is liable for the consequences of his neglecting to perform them. Of these duties a principal one is to call in and collect such parts of the estate as are not in a proper state of investment. If he knows, or has the means of knowing, that

part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty which he has undertaken, to interfere and take measures, if necessary, for putting such property in a proper state of investment? Or is it no part of his duty because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for any such distinction." And, after citing *Mucklow* v. *Fuller*, *Booth* v. *Booth*, and *Lincoln* v. *Wright*, his Lordship adds, "From what I have already said, it will have been seen that I approve of the principle of these decisions, and that I cannot discover any principle for distinguishing between losses by not calling in debts due from debtors to the estate, and balances due from executors. These cases establish, that it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other; and the moment that principle is established, all ground of distinction between the two classes of cases ceases.

"Finding, therefore, a principle adopted and acted upon for many years, and in many decisions, of the justice and grounds of which I fully approve, I cannot feel any disposition to shake its authority, because I cannot reconcile it with dicta and doctrines of a much earlier date, respecting the security of an executor who is passive.

"I have discussed this case much more at large than any difficulty in it would seem to warrant, because I thought it material to draw the attention of those who may hold the office of executors, to the consideration that they cannot safely rely upon what they may find in the earlier cases, laying it down that a devastavit by one of two executors shall not charge his companion, provided he has not, intentionally or otherwise, contributed to it. The later authorities to which I have referred, must show them that passiveness will in many cases furnish no protection, but that negligence and inattention in not interfering with and taking proper measures to prevent or correct the improper conduct of their co-executor, may subject them to responsibilities from which the language of the earlier cases might lead them to suppose they were exempt. The co-executors appear in this case to be free from any moral blame: they derived no benefit, but have suffered much from the breach of trust of Anthony Guy; but they knew that part of the testator's property remained in his hands, and that it was, therefore, not in a proper state of investment. They knew, therefore, that a breach of trust by him was actually in operation, and, excepting some unprofitable applications for accounts and a settlement, nothing

was done by them to secure the property so known by them to be in peril." See also *Scully* v. *Delany*, 2 Ir. Eq. Rep. 165; *West* v. *Jones*, 1 Sim. N. S. 205; *Dix* v. *Burford*, 19 Beav. 409; *Egbert* v. *Butter*, 21 Beav. 560; *Thompson* v. *Finch*, 22 Beav. 326; *Cowell* v. *Gatcombe*, 27 Beav. 568.

But under a decree against executors for the common accounts, each is chargeable only with his actual or constructive receipts; and therefore, in such a suit, an executor will escape liability by showing either that he has been wholly passive, or that he has only acted so far as it was necessary to enable his co-executor to administer the estate: *Terrell* v. *Matthews*, 1 Mac. & G. 433.

Having considered how far a person is liable for the acts and defaults of co-trustees or co-executors, it remains to be seen how far they will be liable for joining with them in signing receipts; but, as a distinction adverted to by Lord *Eldon*, in the principal case, of *Brice* v. *Stokes*, has been taken between the consequences of joining with co-trustees and with co-executors in receipts, it will be more convenient to examine the cases separately, in order to see how far that distinction has been supported by the authorities.

As to joining with Co-trustees in Receipts.]—In the principal case of *Townley* v. *Sherborne*, it was held, that a person was liable for having joined with his co-trustees in receipts, although the money for which they were given never actually came to his hands. But it has been clearly established, that a person who joins with his co-trustees in a receipt for trust-money, when it is indispensable that he should do so, for the sake of conformity, will not *thereby alone* be rendered liable for the misapplication of the money which comes to the hands of his co-trustees: *Heaton* v. *Marriott*, cited Prec. Ch. 173; *Fellows* v. *Mitchell*, 1 P. Wms. 81; *In re Fryer*, 3 K. & J. 317.

The principle of this doctrine is consistent with natural equity; "for," as observed by Lord *Cowper*, "it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the receipts, is but notional." See *Fellows* v. *Mitchell*, 1 P. Wms. 81.

But the trustee who, for mere conformity, joins in a receipt, must, in order to discharge himself, prove that his co-trustees received the money. To use the words of Lord *Eldon*, in the principal case of *Brice* v. *Stokes*, "At law, where trustees join in a receipt, primâ facie all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to show

that the money acknowledged to have been received by all, was in fact received by one, and the other joined only for conformity."

In *Fellows* v. *Mitchell*, 1 P. Wms. 81, where two trustees in a mortgage for 2000*l.* (one of whom became insolvent), joined in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the purchase-money, Lord Keeper *Cowper*, upon the authority of *Heaton* v. *Marriott*, held, that each trustee was answerable only for as much as he actually received. "But," added his Lordship, "it may be reasonable, where, upon proof, it cannot be distinguished how much was received by the one trustee, and how much by the other, to charge each with the whole; for, in such case, the trustees are to blame for not keeping distinct accounts. It is like one throwing corn or money into another's heap, where there is no reason that he who made this difficulty should have the whole: on the contrary, because it cannot be distinguished, he shall have no part."

But although a trustee is not ordinarily liable for joining in a receipt which puts the trust-monies under the power of a co-trustee, nevertheless, if, as in the principal case of *Brice* v. *Stokes*, the transaction is unnecessary, and he permits his co-trustee to keep and deal with the trust-monies contrary to the trust, he will be charged with any loss occasioned by his co-trustee. "Though," observes Lord *Eldon*, "a trustee is safe if he does no more than authorise the receipt and retainer of the money, as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and, therefore, with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this: not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee, that it had got into a course of abuse. . . . . As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it." And see *Walker* v. *Symonds*, 3 Swanst. 1; *Booth* v. *Booth*, 1 Beav. 125; *Brumridge* v. *Brumridge*, 27 Beav. 5; *Ingle* v. *Partridge*, 32 Beav. 661.

Upon the same principle, in *Thompson* v. *Finch*, 22 Beav. 316, where two trustees executed a release for trust-money, but one alone obtained possession of it,

and invested it on improper security, it was held by Sir *J. Romilly*, M. R., that the other trustee was liable, inasmuch as it was his duty to have seen that it was properly invested: affirmed 8 De G. Mac. & G. 560. See also *In re Fryer*, 3 K. & J. 317.

And a trustee is bound to make proper inquiries for what purpose the trust-monies are wanted. Thus, in *Hanbury* v. *Kirkland*, 3 Sim. 265, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with the consent of the wife. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5*l.* per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied; the trustee sold the stock and absconded. Sir *L. Shadwell*, V. C., upon the ground that the co-trustees had, without any act of discretion, executed the power of attorney without inquiring, as they ought to have done, what was the intended security, and who was the mortgagor, held them liable. "If," said his Honor, "this case is to be decided by the rule laid down in *Brice* v. *Stokes*, that rule would condemn the trustees; for *they have taken no care of the property*. . . . . I am of opinion, that the trustees have been guilty of most culpable negligence; and it is my duty to decree that they do reinvest the stock, and account for the dividends since the last payment, and pay the costs in the suit." And see *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Mendes* v. *Guedalla*, 2 J. & H. 259.

As to joining with Co-executors in Receipts.]—With regard to executors joining in receipts, there is a distinction between their case and that of trustees, because, as before observed, a trustee must generally join for the sake of conformity, and does not, by so doing, assume any power over the trust fund. But an executor, as it is not generally necessary for him to join (for one executor is competent to give a receipt), by interfering in the transaction unnecessarily, "the inference," as laid down by Lord *Eldon*, "is just the other way; he is to be considered as assuming a power over the fund, and is, therefore, answerable for the application, as far as it is connected with the particular transaction in which he joins." See also *Aplyn* v. *Brewer*, Prec. Ch. 173; *Ex parte Belchier*, Amb. 219; *Leigh* v. *Barry*, 3 Atk. 584.

Where, however, the act of signing a receipt by an executor is merely nugatory, and has not the effect of putting the trust funds in the possession of a co-executor who received the money previously, it will not render him liable. This was all that was decided by Lord *Northington*, in *Westley* v. *Clarke*, 1 Eden, 357, although, from the expressions in his judgment, it might be concluded that he intended, not merely to modify, but to break down the rule. In that case, Thompson, an attorney, and one of the co-executors, called in money due on a mortgage for a term of years, *and received the money*, and the same day sent round his clerk to his co-executors, with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. On Thompson becoming bankrupt, without having accounted for the money which he had received, a bill was filed by legatees to charge the co-executors with the money so received by Thompson; but Lord *Northington* held, that they were not liable. "If," said his Lordship, "it appears plainly that one executor only received and discharged the estate indebted, and assigned the security, and the others joined *afterwards*, without any reason, and without being in a capacity to control the act of their co-executor, either before or after that act was done, what grounds has any Court in conscience to charge them? Equity arises out of a modification of acts, where a very minute circumstance may make a case equitable or iniquitous. And though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the right to curtesy or dower, yet there can be no rule for the future determination of this Court, concerning the acts of men. . . . The only act that affected the assets, was the first that discharged the debt, and, according to the sense of the bar, transferred the legal estate. Then, *that* they are not to answer for, and the second is nugatory." And see *Candler* v. *Tillett*, 22 Beav. 257.

This decision, though somewhat doubted by Lord *Thurlow*, in *Saddler* v. *Hobbs*, 2 Bro. C. C. 117, is approved of by Lord *Alvanley*, in *Scurfield* v. *Howes*, 3 Bro. C. C. 94, and *Hovey* v. *Blakeman*, 4 Ves. 608. Nor does Lord *Eldon* attempt to overrule it in the principal case, although he speaks, most probably, with reference to *Westley* v. *Clarke*, as one of the cases that had pared down the rule. See also *Chambers* v. *Minchin*, 7 Ves. 198. The dictum, however, of Lord *Northington*, in *Westley* v. *Clarke* (see 1 Eden, 360), "that the rule amounts to no more than that a joint receipt, given by executors, is a stronger proof that they actually joined in

the receipt, because generally they have no occasion to join for conformity," has not been approved of. And in an important case, where Lord *Eldon* had again occasion to consider the subject, his Lordship observed, "that without going through all the cases, it is obvious, that, primâ facie, there is this distinction between executors and trustees: that one executor can, and one trustee cannot, give a discharge; and it may frequently happen, as, in *Brice* v. *Stokes*, it actually happened, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money. That rule is now altered. Whether the alteration is wholesome, may be a question. It may be laid down now, as in *Brice* v. *Stokes*, that, though one executor has *joined* in a receipt, yet, whether he is liable shall depend on his *acting*. The former was a simple rule, that *joining* shall be considered as *acting;* but in the cases since the rule, that *joining alone* does not impose responsibility, scarcely two judges agree:" *Walker* v. *Symonds*, 3 Swanst. 63.

The rule, as now recognised, is perhaps better explained by Lord *Redesdale*. "The distinction," he observes, "seems to be this, with respect to a mere signing: that, if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning. He became responsible for the application of the money, just as if he had received it." *Joy* v. *Campbell*, 1 S. & L. 341. And again, in *Doyle* v. *Blake*, 2 S. & L. 242, his Lordship observes, "The true consideration in a question of this kind is, whether the executor who merely joins in the receipt, had a control; and his joining in the receipt is evidence of that control, although the money was actually received by the other."

We may conclude, therefore, that where funds belonging to executors are not under the individual control of each executor, although one of them joins with his co-executor in any act or receipt which will have the effect of putting the funds into his hands,

as the joining was absolutely necessary, and was not, therefore, evidence that the executor so joining thereby assumed a control over the fund, the principle which governs the case of trustees will be applicable, and he will not be liable, at any rate where he has used due caution, for the misapplication of the fund by his co-executor. Thus, it is laid down by Lord *Rosslyn*, in *Horey* v. *Blakeman*, 4 Ves. 608, that if a bill of exchange is remitted to two agents, payable to them personally, who, on the death of the principal, become executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, is not sufficient to charge him who does not receive it.

So, if stock is standing in the names of two executors, the joining of one executor with the other in a sale would be considered with reference to the principles applicable to trustees: *Chambers* v. *Minchin*, 7 Ves. 197.

But an executor will not be justified in so joining, upon the mere representation by his co-executor that the stock is wanted for the purpose of administration; for if he neglects to make proper inquiries, he will be liable for the misappropriation of his co-executor; but he will not be charged for so much as was properly applied. This subject was much discussed in the important case of *Lord Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252, 16 Ves. 477, where three executors, two years and a half after the death of the testator, joined in executing a power of attorney to a co-executor for the sale of stock, upon his representation that it was required for payment of debts; it was held by Lord *Eldon*, that they were liable for so much of the money arising from the sale of the stock as was misappropriated by their co-executor, but not for such part as they could prove was applied in payment of debts, although at the time he was in possession of other funds, part of the assets which he had not received through them, and which funds he wasted; and his Lordship held, that if it could not be ascertained that any part of the money had been applied in payment of debts, the executors would be liable for the whole sum; and he directed an inquiry, whether the specific money received by the co-executor was applied in discharge of any, and what debts. "This case," said his Lordship (16 Ves. 479), "depends upon the principle applicable to trustees. The fund being vested in the names of all the executors, it was necessary that all should join in the act which placed the property in the possession of one of them; and my mind had reached this conclusion, that, as these executors could not be held answerable for the balance for which their co-executor was to account sepa-

rately, they had a right to contend, at least, that they should be allowed so much of the fund as had been applied to the purpose to which it ought to have been applied, as they might have been compelled so to apply it.

"The question, therefore, arose as to the difference, the proof of due application being upon the executors; and the circumstances are, that, all of them having proved the will, proceeded to have the stock transferred into their own names. During two years and a half from the death of the testatrix, until July, 1779, when the transaction upon which this question arises took place, this individual had been acting in the executorship, trusted, and very naturally trusted, by the other executors, upon whom no moral blame attaches, but merely that degree of negligence which is frequently observed in very honourable men. The law, it must not be forgotten, supposes that something is to be done in a year; and these executors, intrusting their co-executor during the period I have mentioned, ought, at least, to have made some inquiry what had been doing in these affairs. If, making that inquiry, they were misled, that is a distinct case; but making no inquiry, they are satisfied with the information, which proves groundless, that he wants the money for the purpose of paying debts. They ought to have inquired how that could be; and though it is not a consequence that they might not place the remainder of the property in his hands, it must surely be at their risk, if they were aware that he had been, not acting according to his trust, but grossly violating it. This, therefore, being the case of executors, who, making no inquiry whatever, permitted their co-executor to do just what he pleased, has no resemblance to *Bacon* v. *Bacon* (5 Ves. 331)—taking that decision to be right, as to which I give no opinion—or any other case; and a decision that executors are not to be charged in such a case would amount to this, that executors can in no case be chargeable." See also *Underwood* v. *Stevens*, 1 Mer. 712; *Bick* v. *Motly*, 2 My. & K. 312; *Williams* v. *Nixon*, 2 Beav. 472; *Hewett* v. *Foster*, 6 Beav. 259.

Where an executor gave a receipt for money due to the estate, purporting to be signed by his co-executor as well as himself, he having in fact forged the name of his co-executor, it was held that, although the debtor intended to have the receipt of both of the executors, the receipt of one was sufficient to discharge him: *Charlton* v. *Earl of Durham*, 4 L. R. Ch. App. 433.

Executor paying over assets unnecessarily to Co-executor.]—According to the same principle, by which an executor is liable for

joining with his co-executor in a receipt, he is also liable if he receive the whole or part of the testator's assets, and pay it over voluntarily and unnecessarily to his co-executor, and the same is embezzled or lost. See *Townsend* v. *Barber*, 1 Dick. 356, in which case an executor, who possessed fourteen East India Bonds, part of the testator's assets, having permitted another executor to get them into his possession, who disposed of them and afterwards became bankrupt, his estate was held liable to answer the value of the bonds.

So, in *Langford* v. *Gascoyne*, 11 Ves. 333, the widow of the testator gave a bag of money to Spurrell, who delivered it over to Gascoyne, one of his co-executors, without Lambert, the other co-executor, who, it seems, was present at the time, having said or done anything whereby, or in consequence of which, the money was so placed in the hands of Spurrell. It was held by Sir *W. Grant*, M. R., that Spurrell and Gascoyne, but not Lambert, were to be charged with the money contained in the bag. "The rule," observed his Honor, "in all the cases is, that if an executor does any act, by which money gets into the possession of another executor, the former is equally answerable with the other; not where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes in any way to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse, as there was in *Bacon* v. *Bacon*, 5 Ves. 331, a justifiable object.

"In this case, Spurrell chooses to part with his money, of which he had the possession, probably from an innocent motive, thinking Gascoyne more fit to be trusted with it than himself or the other executor. But in most of these cases, where executors were charged, the motive was innocent, only the result was unfortunate. I feel very great reluctance to charge an executor in such a case; but it is impossible, without breaking through the rule, not to say, he has exercised an act of judgment and discretion,—an act of selection,—by putting the money into the hands of Gascoyne rather than the other executor, or keeping it himself, depriving himself and the other executor of any control over it. He did that act, and this loss is the consequence. This is a very hard case, but so are all these cases.

"As to the other executor, Lambert, it is impossible to charge him. He has neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne. It is not incumbent upon one executor by force to prevent its getting into the hands of another."

See also *Trutch* v. *Lamprell*, 20 Beav. 116.

So an executor is liable if by any other means he puts the assets into the possession of his co-executor: thus, if he joins him in indorsing (*Hovey* v. *Blakeman*, 4 Ves. 608) or drawing (*Saddler* v. *Hobbs*, 2 Bro. C. C. 114) a bill. And see *Gregory* v. *Gregory*, 2 Y. & C. Exch. Ca. 313; but see *Balchen* v. *Scott*, 2 Ves. jun. 678.

And, upon this principle, it is laid down by Chief Baron *Hale*, in *Gill* v. *Attorney-General*, Hard. 314, that though, in the case of joint-executors, none is chargeable for more than comes to his hands severally, yet if, by agreement amongst themselves, one be to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole: because the receipts of each are pursuant to the agreement made betwixt both; and see *Moses* v. *Levi*, 3 Y. & C. Exch. Ca. 359.

But the rule does not apply, if, in the discharge of a necessary duty, an executor pays over money to his co-executor. Thus, in *Bacon* v. *Bacon*, 5 Ves. 331, an executor residing in London paid 700*l.* to Kirby, his co-executor, who resided in the country, who had been the confidential attorney and agent of the testator, to pay the debts of the testator owing to creditors in his neighbourhood, Kirby informing him, that he had no money belonging to the testator in his hands; and, upon Kirby afterwards producing a book of accounts, containing a list of debts, which he alleged he had paid, exceeding 700*l.*, and also an account of debts remaining unpaid, which, with the debts alleged to have been paid, exceeded 1200*l.*, he induced his co-executor to advance a further sum of 500*l.*, in order to enable him to discharge the debts then remaining unpaid, Lord *Rosslyn* held, that the executor who had paid the money should not be charged with the loss of it. "Supposing," said his Lordship, "that Kirby had not been co-executor, but that the executor, living in London and receiving money of the testator's, had remitted to the attorney of the testator to pay the debts, could he have been liable? Kirby was in no insolvent circumstances. He was a man in business at Ipswich, had been attorney of the testator (I take him no higher than that), was acquainted with all his affairs, had his accounts in his hands, and the first payment was three weeks after his death. In the ordinary management of executor, how was he to pay the funeral expenses and the number of small debts appearing upon the books of the testator, without sending the money? The payment is made by the defendant only, because he happened to have money of the testator's in his hands at the time. If the business was transacted in the ordinary manner,

unless there was some circumstance to awaken suspicion, surely the allowance is fair." *In re Bird*, 16 L. R. Eq. 203.

So, where three executors and trustees were authorised to carry on the testator's farming business, which was by arrangement managed by one of them, it was held by Sir *J. Romilly*, M. R., that in taking the accounts the executor who managed the farm was to be considered as an agent: *Toplis* v. *Harrell*, 19 Beav. 423; and see *Home* v. *Pringle*, 8 C. & F. 288.

Upon the same principle, Lord *Redesdale*, putting the case of an executor living in London, remitting money to his co-executor in Suffolk, to pay debts owing there, observes, "He is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way:" *Joy* v. *Campbell*, 1 S. & L. 341; and see *Chambers* v. *Minchin*, 6 Ves. 193.

Nor will an executor be liable for the loss of a fund which he handed over to his co-executor, if he had no legal right to retain it (*Davis* v. *Spurling*, 1 Russ. & My. 64); nor if, having disclaimed and renounced, he applies it as the agent of the one who proved the will (*Dove* v. *Everard*, 1 Russ. & My. 231; *Stacey* v. *Elph*, 1 My. & K. 195). Secus, if he has once acted: *Doyle* v. *Blake*, 2 S. & L. 245.

In *Churchill* v. *Lady Hobson*, 1 P. Wms. 241, Lord *Harcourt*, took a distinction between the effect of a legatee and creditor seeking to charge an executor joining in a receipt with his co-executor, which, according to Lord *Northington*, seems to have this meaning, "that a creditor may at law charge both executors on a joint receipt; but that, in this Court, where alone legacies are received, such receipt shall not be conclusive, but the Court will see who actually received, and charge that person accordingly:" *Harden* v. *Parsons*, 1 Eden, 148; but Lord *Thurlow*, in *Saddler* v. *Hobbs*, 2 Bro. C. C. 117, said that it seemed to him an odd distinction. However, it seems to be admitted, that, as legatees are bound by the terms of the will, and creditors are not, in many cases executors would be discharged as against legatees, when they would not as against creditors; for example, in *Doyle* v. *Blake*, 2 S. & L. 231, 240, 245, where the testator appointed executors, and directed them to turn all his property into cash, and deposit it with Martin Horan, Lord *Redesdale* said, that, if the executors had collected the effects, and had paid the amount to Martin Horan, still, if a creditor had remained unpaid, he might

have charged them, upon the insolvency of Horan; whereas, in the case of a legatee, the executors might justify themselves by the directions in the will. See *Wilson* v. *Keating*, 4 De G. & Jo. 593.

The usual indemnity clause, in instruments where trusts are created, that one trustee shall not be answerable or accountable for the acts, receipts, or defaults of his co-trustees, does not, it seems, give any protection against the acts of co-trustees, but merely expresses what a Court of equity would hold, in the absence of such clause. See *Worrall* v. *Harford*, 8 Ves. 8; *Dawson* v. *Clarke*, 18 Ves. 254; *Moyle* v. *Moyle*, 2 Russ. & My. 170; *Macdonnel* v. *Harding*, 7 Sim. 176; *Clough* v. *Dixon*, 8 Sim. 594; 3 My. & Cr. 490; *Muneh* v. *Cockerell*, 9 Sim. 339; 5 My. & Cr. 339; *Brumridge* v. *Brumridge*, 27 Beav. 5; *Reyden* v. *Wesley*, 29 Beav. 213.

And now, by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 31), "Every deed, will, or other instrument creating a trust either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words following (that is to say), "That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such monies, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

But the indemnity clause is sometimes extended so as to protect a trustee from the consequences of what might otherwise be a breach of trust. Thus, in *Wilkins* v. *Hogg*, 8 Jur. N. S. 25, a testatrix, by her will in 1854, after appointing three trustees, declared each trustee should be answerable only for losses arising from his own default, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee, and particularly that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his

co-trustee to receive any monies for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same monies. The three trustees joined in signing and giving receipts to two insurance companies for the two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had duly invested it. That trustee having misapplied the money, a bill was filed for the purpose of making his co-trustees personally liable. It was held by Lord *Westbury*, C., affirming the decision of Sir *John Stuart*, V. C. (reported 3 Giff. 116), that according to the true construction of the indemnity clause contained in the will, their concurrence in enabling their co-trustee to receive the money did not make them liable for the misapplication of the fund. His Lordship said that he should have been glad to find a case warranting the conclusion, that a duty having been undertaken, any words qualifying such duty should be nugatory; but such could not be held to be the law. It was perfectly competent to a testator to define what should be the incidents to the duty of a trustee as long as he kept within the bounds of law. This clause excluded the possibility of any liability, except for actual misappropriation. There were three modes in which a trustee would become liable, according to the ordinary rules of law,—first, where being the recipien. he hands over money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. The framer of this clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee, acting under this will, would be responsible. He would still be answerable for collusion, or if he handed over trust-money to his co-trustee with reasonable ground for believing, or suspicion that that trustee would commit a breach of trust, but no such case as this was made by the bill. The decision, therefore, of the Vice-Chancellor was a just conclusion, "and the grounds on which the appellants relied failed."

Independent of any express contract of indemnity, a trustee who accepts office at the request of a cestui que trust, is entitled to be indemnified by that cestui que trust personally against all

loss which may accrue in the proper execution of the trust. Where, for instance, the trustee of shares in a company is made a contributory on the failure of the company, he can compel the cestui que trust to repay him what he has been obliged to pay in respect of the shares in settlement: *Jervis* v. *Wolferstan*, 18 L. R. Eq. 18.

And in such a case trustees and executors, after the death of the cestui que trust, are entitled to be indemnified out of his estate, and for that purpose can call upon residuary legatees to refund what has been paid to them (*Ib.*); and the mere fact that the executor, previous to paying the residuary legatees, had notice of a contingent liability, as, for instance, that trustees on behalf of the testator as cestui que trust held shares in a company, which might be wound up, and in respect of which the trustees (whom the testator was bound to indemnify) might be liable as contributories, is immaterial. *Ib.*

Husband—how far liable for the devastavit of his wife, as executrix or administratrix.]—In this place may be considered how far a husband and his wife being an executrix or administratrix, are liable for devastavits. The husband will, it seems, be liable during coverture for any devastavit of his wife: *Adair* v. *Shaw*, 1 S. & L. 263; and see *Kings* v. *Hilton*, Cro. Car. 603; *Lumley* v. *Hutton*, 1 Roll. Rep. 268, 269; *Bachelor* v. *Bean*, 2 Vern. 61. He would, moreover, afterwards, upon taking out administration to his wife, in order to obtain possession of her choses in action, be liable under 30 Car. 2, c. 7, explained and made perpetual by 4 & 5 Will. & M. c. 24, s. 12. But see now 33 & 34 Vict. c. 93, s. 12, and 37 & 38 Vict. c. 50, ss. 1, 2, 3, 4, 5, Vol. 1, ante, pp. 585, 586, 587, 588.

If a devastavit were committed *during the coverture*, the husband during the life of his wife was liable both at law and in equity, as he would be presumed to have authorised the dealings of his wife (*Adair* v. *Shaw*, 1 S. & L. 266; *Smith* v. *Smith*, 21 Beav. 385), even though she might have been living separate from him (*Paget* v. *Read*, 1 Vern. 143); and assets admitted by husband and wife might be proved as a debt of the husband's on his bankruptcy: *Ex parte M'Williams*, 1 S. & L. 173.

At *law* the liability of the husband, for a devastavit committed during as well as before coverture, unless a judgment had been obtained against him and his wife (*Mounson* v. *Bourn*, Cro. Car. 519; *Baron* v. *Berkley*, 1 Lutw. 670; 1 Saund. 216, a, note to *Wheateley* v. *Lane*), or goods remained in his hands in specie, when they might be recovered by an action of trover or detinue (1 S. & L. 262), entirely ceased at the wife's

death: *Adair* v. *Shaw*, 2 S. & L. 261.

But *in equity*, the husband surviving the wife, would be liable for the assets which came to his hands, upon the ground that all persons who come into possession of property bound by a trust, with notice of the trust, will be affected by it. See Lord *Redesdale's* able judgment in *Adair* v. *Shaw*, 1 S. & L. 247, where he held, that the assets of a deceased husband of an administratrix, were chargeable in equity for the waste committed during the coverture; and see *Clough* v. *Bond*, 3 My. & Cr. 490, stated ante, p. 895; *Smith* v. *Smith*, 21 Beav. 385; and *Soady* v. *Turnbull*, 1 L. R. Ch. App. 494.

But, although the husband of an administratrix might have become liable to make good to the next of kin of the intestate the assets received by himself or his wife during the coverture, yet, if the husband, at his death, made his wife his executrix, and she possessed assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband was discharged; and, therefore, the next of kin could not sue an administrator *cum testamento annexo* of the husband: *Tyler* v. *Bell*, 2 My. & Cr. 89.

If the wife survived the husband —according to Lord *Redesdale*, even if she were covert when administration was taken out—she would be liable for waste, even though it were the act of the husband, because, in the language of the old cases, it was her folly to take a husband who should so misconduct himself: *Adair* v. *Shaw*, 1 S. & L. 258. And an executrix in such position, although only responsible *at law* to creditors, would, *in equity*, be responsible to legatees. In *Clough* v. *Dixon*, 8 Sim. 598, however, Sir *L. Shadwell*, V. C., says, "I do not think that the reasoning of Lord *Redesdale* is satisfactory, where he says, that a married woman, an executrix, would be responsible to the creditors of the testator after coverture." But his Honor, according to the distinction which has been taken, admitted, in a subsequent case, that where a person was executrix or administratrix *before* marriage, and the assets were wasted during the coverture, a creditor or legatee of the testator had a right to sue the executrix or administratrix as well as her husband: *Kingham* v. *Lee*, 15 Sim. 401; *Vaughan* v. *Vanderstegen*, 2 Drew. 385; *Soady* v. *Turnbull*, 1 L. R. Ch. App. 494.

Remedies against Trustees and Executors.] — Proceedings in equity for a breach of trust may be taken not only against trustees or executors, but also against their representatives, even although the loss may not have happened until after the death of the trustees (*Devaynes* v. *Noble*, 24 Beav. 86),

and although they may have distributed the assets without notice of the breach of trust, unless they have done so by order of the Court (*March* v. *Russell*, 3 My. & Cr. 31; *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 122; *Underwood* v. *Hatton*, 5 Beav. 37; *Waller* v. *Barrett*, 24 Beav. 413; *Taylor* v. *Taylor*, 10 L. R. Eq. 477); or pursuant to 22 & 23 Vict. c. 35, s. 29. Nor can trustees who have committed a breach of trust (*Phillipo* v. *Munnings*, 2 My. & Cr. 309; *Watson* v. *Saul*, 1 Giff. 188; *Downes* v. *Bullock*, 25 Beav. 61), or their representatives (*Obee* v. *Bishop*, 1 De G. F. & Jo. 137; *Story* v. *Gape*, 2 Jur. N. S. 706), set up the Statute of Limitations. See also *Butler* v. *Carter*, 5 L. R. Eq. 276; *Brittlebank* v. *Goodwin*, *Ib.* 495; *Coxwell* v. *Franklinski*, 11 L. T. Rep. N. S. 153.

By "the Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), it is enacted that "no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." Sect. 25, subsect. 2.

Nor will a settlor, who has covenanted to pay a sum of money, and who has constituted himself a trustee thereof (*Stone* v. *Stone*, 5 L. R. Ch. App. 74; and see *Ruffles* v. *Alston*, 19 L. R. Eq. 539), be able to set up the Statute of Limitations. See also *Burrowes* v. *Gore*, 6 Ho. Lo. Ca. 907. But if a settlor simply covenants to pay a sum of money to trustees, he does not thereby render himself a trustee, and a breach of such covenant will be barred by the statute (*Stone* v. *Stone*, 5 L. R. Ch. App. 74; *Spickernell* v. *Hotham*, Kay, 669), but trustees neglecting to enforce the covenant, and their representatives will remain liable: *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 514.

Where trustees are all guilty of a breach of trust, although the cestui que trust has obtained a decree against them jointly, he may, as each trustee is responsible for the whole loss, take out execution against any one of them separately (*Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Ex parte Angle*, Barnard. Ch. Rep. 425; *In re Chertsey Market*, 6 Price, 278, 279; *Walker* v. *Symonds*, 3 Swanst. 75; *Attorney-General* v. *Wilson*, 1 Cr. & Ph. 28); but as between the trustees themselves, a contribution or apportionment may in a proper case be ordered in the same suit (*Priestman* v. *Tindall*, 24 Beav. 244; *Costello* v. *O'Rorke*, 3 I. R. E. 172), or upon a new bill being filed (*Ex parte Shakeshaft*, 3 Bro. C. C. 198; *Perry* v. *Knott*, 4 Beav. 180; *Baynard* v. *Wooley*, 20 Beav. 583; and see *Fletcher* v. *Green*, 33 Beav. 513); but the Court will not interfere to enforce contribution or apportionment where fraud has been committed by the trustees:

Lingard v. *Bromley*, 1 V. & B. 114; *Attorney-General* v. *Wilson*, 1 C. & Ph. 28; *Tarlton* v. *Hornby*, 1 Y. & C. Exch. Ca. 336.

Moreover, as between the trustees themselves, the loss may be thrown primarily upon the trustee most in fault, or his estate (*Fetherstone* v. *West*, 6 I. R. Eq. 86), and where the breach of trust was a specialty debt as regarded the cestui que trust, it will constitute under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) a specialty debt to his co-trustees: *Lockhart* v. *Reilly*, 1 De G. & Jo. 464; but see *Priestman* v. *Tindall*, 24 Beav. 244.

Where a trustee is indebted to the estate, and is in default, he cannot claim any portion of the trust estate (*Irby* v. *Irby*, 25 Beav. 632), even although he may have become entitled thereto derivatively, for example, as being one of the next of kin of a cestui que trust who had died intestate: *Jacubs* v. *Rylance*, 17 L. R. Eq. 341.

But the Court has no power to intercept the interest of a defaulting trustee where the estate he takes is legal. See *Fox* v. *Buckley*, 3 Ch. D. 508. There a testator devised certain real estate for life to one of his executors and trustees. The devisee afterwards committed breaches of trusts, and then filed a petition for liquidation. It was held by the Court of Appeal, affirming the decision of *Little*, V. C., of the County Palatine of Lancaster, that as against the trustee in the liquidation, the life-estate of the executor and trustee, being legal, could not be taken and applied in replacing losses occasioned by the breaches of trust. See also *Ex parte Barff*, De G. 613; *Egbert* v. *Butter*, 21 Beav. 560.

In *Woodyatt* v. *Gresley*, 8 Sim. 180, the only case where a legal estate appears to have been impounded, depends entirely on a matter of contract.

Where a person not under disability having a partial interest in trust funds, as for instance a tenant for life, has been a party to a breach of trust, whatever benefit he may take under the settlement or will, is liable to be retained until the cestui que trusts or trustees have been recouped the amount of the loss sustained by the trust estate: *Ex parte Mitford*, 1 Bro. C. C. 398; *Priddy* v. *Rose*, 3 Mer. 105; *Burridge* v. *Row*, 1 Y. & C. C. C. 183, 583; *Lincoln* v. *Wright*, 4 Beav. 432; *M'Gachen* v. *Dew*, 15 Beav. 84; *Barratt* v. *Wyatt*, 30 Beav. 442; *Williams* v. *Allen*, 32 Beav. 650; *Lord Kilworth* v. *The Earl of Mountcashell*, 15 Ir. Ch. Rep. 565; *Keays* v. *Lane*, 3 I. R. E. 1, 7. And the rule is applicable to the case of a married woman being entitled to property to her separate use without restraint upon anticipation; secus where there is a restraint against anticipation. See note to *Hulme* v. *Tenant*, ante,

Vol. 1, p. 534; *Clive* v. *Carew*, 1 J. & H. 199.

Where a cestui que trust has derived any profit from a breach of trust, he will to that extent be bound to recoup the trustee (*Trafford* v. *Boehm*, 3 Atk. 440; *Greenwood* v. *Wakeford*, 1 Beav. 580; *Booth* v. *Booth*, 1 Beav. 125; *Fuller* v. *Knight*, 6 Beav. 205; *Burrowes* v. *O'Brien*, 15 Ir. Ch. Rep. 423; *M'Gachen* v. *Dew*, 15 Beav. 84); whose charge will take priority over the claims of the general creditors of a deceased cestui que trust: *Williams* v. *Allen*, 32 Beav. 650.

And if a cestui que trust, with knowledge of the fact, receives the income from an improper investment, he is bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund (*Davies* v. *Hodgson*, 25 Beav. 177); but a cestui que trust who has merely instigated the breach of trust without deriving any benefit therefrom, does not thereby render himself personally liable to recoup the trustees: *Raby* v. *Ridehalgh*, 7 De G. M. & G. 108.

When a trustee becomes bankrupt, what he owes to the trust may be proved against his estate (*Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Keble* v. *Thompson*, 3 Bro. C. C. 112; *Bick* v. *Motly*, 2 My. & K. 312; *Lincoln* v. *Wright*, 4 Beav. 427); and if he lent the trust money to a bankrupt firm of which he was a partner, proof may be made either against the joint estate of the firm or the separate estate of the trustee, or any other partner who, from his participation in the breach of trust, has rendered himself a constructive trustee (*Ex parte Heaton*, Buck, 386; *Ex parte Watson*, 2 V. & B. 414; *Ex parte Woodin*, 3 M. D. & De G. 399; *Ex parte Poulson*, 1 De G. 79); but not against both the joint and separate estates (*Ex parte Barnewall*, 6 De G. M. & G. 795, 801). But if the bankrupt be beneficially interested in the trust fund, the value of such interest must be deducted from the amount due from him, and the balance only can be proved against his estate: *Ex parte Turner*, 2 De G. Mac. & G. 927.

As to the right to prove when the trust money has been improperly invested, see *In re Montifiore*, 9 Jur. 562; *Ex parte Biddulph*, 3 De G. & Sm. 587; *Ex parte Geaves*, 25 L. J. (N. S.) Bk. 53; *Ex parte Norris, In re Biddulph*, 4 L. R. Ch. App. 280.

Although the original debt is barred when a bankrupt trustee obtains his order of discharge (*Ex parte Holt*, 1 Deac. 248), nevertheless where a trustee indebted to the trust becomes bankrupt, it is his duty to prove the debt, and if he neglect to do so, he will be liable to the loss, notwithstanding he has obtained his certificate or order of discharge. See *Orrett* v. *Corser*, 21 Beav. 52,

where Sir *J. Romilly*, M. R., said, "Suppose a person owing money to a trust estate becomes bankrupt, and the trustee is a distinct and separate person; knowing of the bankruptcy, he is bound to prove the debt; if he does not, he commits a breach of trust, and would be held liable for all that he might have received under the commission, if he had proved the debt as he ought to have done. Is the case altered because the trustee is himself the debtor? I think not. The original debt no doubt is barred; but the amount of dividends which the trustee might have received under the commission is a liability subsequently attaching to the trustee in that character, and is not affected by the bankruptcy or the certificate."

As to trustees and executors keeping trust monies in their hands which ought to be invested, see cases ante, cited pp. 911, 912, and *Colyer* v. *Colyer*, 32 L. J. Ch. (V. C. K.) 101.

Proof may be made against a bankrupt, one of several trustees, for money lost by a breach of trust, although he may have derived no benefit thereby (*Ex parte Shakeshaft*, 3 Bro. C. C. 197), and although the other trustee be solvent (*Ex parte Beilby*, 1 G. & J. 167); but proceedings in equity may at the same time be taken against the solvent trustee to compel contribution: *Lingard* v. *Bromley*, 1 V. & B. 114; *Joy* v. *Campbell*, 1 S. & L. 335, 339; *Ottley* v. *Browne*, Ball & B. 360; *Ex parte Shakeshaft*, 3 Bro. C. C. 197.

Where all the trustees are bankrupt, proof may be made against the estates of all, provided that more than 20*s.* in the pound is not received: *Keble* v. *Thompson*, 3 Bro. C. C. 112; *Ex parte Poulson*, 1 De G. 79.

Remedies against trustee barred —by concurrence—acquiescence or release, when]—The remedy of a cestui que trust against his trustee for a breach of trust, with regard to the investment or custody of the trust funds may be barred—either by the concurrence of the cestui que trust, his acquiescence or his executing a release.

In the principal case of *Brice* v. *Stokes*, it is laid down by Lord *Eldon*, that when the cestui que trust concurs with a trustee in the misapplication of the trust funds, he cannot be heard in a Court of equity to complain of the acts of the trustee which he has himself knowingly authorised, ante, p. 883; and see *Buckeridge* v. *Glasse*, 1 Cr. & Ph. 135; *Fellows* v. *Mitchell*, 1 P. Wms. 81; *Walker* v. *Symonds*, 3 Swanst. 64; *Byrchall* v. *Bradford*, 6 Madd. 13; *Wilkinson* v. *Parry*, 4 Russ. 272.

But persons under disability, as feme coverts (*Parkes* v. *White*, 11 Ves. 221; *Lord Montford* v. *Lord Cadogan*, 19 Ves. 639, 640; *Bateman* v. *Davis*, 3 Madd. 98; *Ryder*

v. *Bickerton*, 3 Swanst. 80, note; *Underwood* v. *Stevens*, 1 Mer. 717), or infants (*Wilkinson* v. *Parry*, 4 Russ. 276) who have concurred in a breach of trust, may nevertheless proceed against the trustees, except where they have by their own fraud induced the trustees to deviate from the proper performance of their duties: see *Savage* v. *Foster*, 9 Mod. 35, ante, p. 620; *Ryder* v. *Bickerton*, 3 Swanst. 82, note; *Vandebend* v. *Levingston*, 3 Swanst. 625; *Lord Montford* v. *Lord Cadogan*, 19 Ves. 640; *Davies* v. *Hodgson*, 25 Beav. 187; *Evroy* v. *Nicholas*, 2 Eq. Ca. Ab. 488; *Stikeman* v. *Dawson*, 1 De G. & Sm. 90; *Wright* v. *Snowe*, 2 De G. & Sm. 321.

As, however, a married woman, with regard to property settled to her separate use, is to be treated as a feme sole (*Hulme* v. *Tenant*, ante, Vol. 1, p. 521 and note), she may bind her separate estate by her concurrence in a breach of trust (*Clive* v. *Carew*, 1 J. & H. 199), unless she was herself either deceived, or was under the pressure of undue influence (*Whistler* v. *Newman*, 4 Ves. 129; *Walker* v. *Shore*, 19 Ves. 393; *Hughes* v. *Wells*, 9 Hare, 773), or she was restrained from anticipation: *Cocker* v. *Qayle*, 1 Russ. & My. 535; *Leedham* v. *Chawner*, 4 K. & J. 465; *Walrond* v. *Walrond*, 1 Johns. 24; *Clive* v. *Carew*, 1 J. & H. 199. See, also, cases collected, Vol. 1, p. 534.

The concurrence, however, of a feme covert in a breach of trust will not ordinarily affect any interest beyond that settled to her separate use. Thus, if a feme covert is entitled as tenant for life of a fund for her separate use, with a power to appoint the fund by will amongst certain persons, although she may concur in a breach of trust, she will not thereby prevent the persons taking under her appointment from proceeding against the trustees (*Kellaway* v. *Johnson*, 5 Beav. 319); but she may, it seems, do so where she has a general power of appointment. See *Brewer* v. *Swirles*, 2 Sm. & G. 219: there a married woman, with an absolute power of appointment over property settled to her separate use, having by her acts induced the trustees to lend the fund on unauthorised security, whereby it was lost, and, conceiving that she was herself unable to maintain a suit to charge the trustees for the loss, executed an appointment of the fund after it had been lost, in favour of her infant children. Sir *J. Stuart*, V. C., dismissed (though without costs) a bill filed by them for the purpose of charging the trustees.

Acquiescence on the part of cestuis que trusts may altogether discharge trustees from all liability. Thus, where a cestui que trust sui juris, acquiesces in an improper investment, he cannot afterwards call it in question. See *Harden* v.

Parsons, 1 Eden, 145; *Langford* v. *Gascoyne*, 11 Ves. 333; *Booth* v. *Booth*, 1 Beav. 125; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16; *Nail* v. *Punter*, 5 Sim. 555; *Walker* v. *Symonds*, 3 Swanst. 64; *Munch* v. *Cockerell*, 5 My. & Cr. 178; *Farrar* v. *Baraclough*, 2 Sm. & Giff. 231; *Raby* v. *Ridehalgh*, 7 De G. Mac. & G. 104. But it must be made with his full knowledge (*Montfort* v. *Lord Cadogan*, 17 Ves. 489; *Munch* v. *Cockerell*, 5 My. & Cr. 178; *Rehden* v. *Wesley*, 29 Beav. 213), and without any misrepresentation or concealment on the part of the trustees (*Walker* v. *Symonds*, 3 Swanst. 1; *Underwood* v. *Stevens*, 1 Mer. 712; *Burrows* v. *Walls*, 5 De G. Mac. & G. 233). And a cestui que trust will not be affected with constructive knowledge of a breach of trust merely because he might by inquiries have discovered it: *Thompson* v. *Finch*, 22 Beav. 325, 327; and the remarks of Lord *Westbury*, C., in *Farrant* v. *Blanchford*, 1 De G. Jo. & Sm. 107, 119.

Where a cestui que trust discovers a breach of trust, but does not receive any benefit from it, or connive at it for any purpose, and does not recognise the transaction, he is not precluded from complaining of it, merely on the ground that he had abstained from making such complaint until long after he first knew of it (*Phillipson* v. *Gatty*, 7 Hare, 516: and see *Griffiths* v. *Porter*, 25 Beav. 236), especially if his interest is reversionary: *Life Association of Scotland* v. *Siddal*, 3 De G. F. & Jo. 58.

A cestui que trust may by a release or a confirmation prevent himself from taking proceedings against trustees for a breach of trust (*French* v. *Hobson*, 9 Ves. 103, 107; *Wilkinson* v. *Parry*, 4 Russ. 272; *Aylwin* v. *Bray*, 2 You. & J. 517, cited); but neither will be binding upon him, unless he had full knowledge of the facts of the case (*Randall* v. *Errington*, 10 Ves. 423; *Walker* v. *Symonds*, 3 Swanst. 1; *Adams* v. *Clifton*, 1 Russ. 297; *Bennett* v. *Colley*, 2 My. & K. 232; *Downes* v. *Bullock*, 25 Beav. 62; *Lloyd* v. *Attwood*, 3 De G. & Jo. 650), and of their legal effect (*Cockerell* v. *Cholmeley*, 1 Russ. & My. 425; *Marker* v. *Marker*, 9 Hare, 16; *Burrows* v. *Walls*, 5 De G. Mac. & G. 254; and see notes to *Fox* v. *Mackreth*, Vol. 1, pp. 195, 196, and *Chesterfield*, v. *Janssen*, ante, Vol. 1, p. 657).

Persons under disability, as married women and infants, are not ordinarily bound by acquiescence or a release or confirmation (*Walker* v. *Symonds*, 3 Swanst. 69; *Ryder* v. *Bickerton*, 3 Swanst. 80, n.; *Hopkins* v. *Myall*, 2 Russ. & My. 86; *Nail* v. *Punter*, 5 Sim. 555; *Kellaway* v. *Johnson*, 5 Beav. 319; *March* v. *Russell*, 3 My. & Cr. 31, 42), except in the case of a feme covert as to property settled to her separate use, provided there be no restraint upon anticipation (*Clive* v. *Carew*, 1 Johns. &

Hem. 205; and see cases cited, in the note to *Hulme* v. *Tenant*, ante, Vol. 1, pp. 533, 534; but see *Derbishire* v. *Home*, 3 De G. Mac. & G. 80; *Davies* v. *Hodgson*, 25 Beav. 186); but the restraint does not affect income accrued due before the acquiescence, release, or confirmation: *Rowley* v. *Unwin*, 2 K. & J. 138.

Moreover, after an infant has attained twenty-one, nothing done by him will be effectual to release the trustees unless he has acted with full knowledge of the facts of the case (*Osmond* v. *Fitzroy*, 3 P. Wms. 131; *Hicks* v. *Hicks*, 3 Atk. 274; *Walker* v. *Symonds*, 3 Swanst. 69; *Wedderburn* v. *Wedderburn*, 2 Keen, J., 722; 4 My. & Cr. 41; *Kay* v. *Smith*, 21 Beav. 522), and under a proper legal adviser: *Lloyd* v. *Attwood*, 3 De G. & Jo. 614.

And by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), it is enacted that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." Sect. 2.

The acquiescence of a person entitled in remainder is not binding on him during the continuance of a preceding interest: *Bennett* v. *Colley*, 5 Sm. 181; 2 My. & K. 225; and see *Davies* v. *Hodgson*, 25 Beav. 177; sed vide *Brown* v. *Cross*, 14 Beav. 105, 112.

As to the punishment of trustees for fraudulent breaches of trust, see 24 & 25 Vict. c. 96, s. 80, the former Act, 20 & 21 Vict. c. 54, having been repealed by 24 & 25 Vict. c. 95: *Reg.* v. *Hassall*, 9 W. R. (C. C. R.) 708; *Reg.* v. *Fletcher*, 10 W. R. (C. C. R.) 753; *Wadham* v. *Rigg*, 1 Dr. & Sm. 216.

PENN *v.* LORD BALTIMORE.

May 15, 1750.

[REPORTED 1 VES. 444.]

POWER OF COURT OF EQUITY OVER PROPERTY OUT OF ITS JURISDICTION, BY A DECREE IN PERSONAM.]—*Specific performance decreed, of articles executed in England, concerning boundaries of two provinces in America.*

THE bill was founded on articles entered into between the plaintiffs and defendant, 10th May, 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent, granted 20th June, 8 Car. 1, by which the distinct property and government of Maryland, under certain restrictions, is granted to the defendant's ancestor, his heirs and assigns; farther, reciting charters or letters patent in 1681, by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stating a title to the plaintiffs, derived from James, Duke of York, to the three lower counties, by two feoffments, both bearing date 24th of August, 1682. The articles recite that several controversies had been between the parties, concerning the boundaries and limits of these two provinces and three lower counties; and make a particular provision for settling them, by drawing part of a circle about the town of Newcastle; and a line to ascertain the boundaries between Maryland and the three lower counties; and a provision in what manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before the 25th of December, 1733. There was, beside, a provision in the articles, that if there should be a want of a

quorum of commissioners meeting at any time, the party by default of whose commissioners the articles could not be carried into execution, should forfeit the penalty of 5000*l.* to the other party; and a provision for making conveyances of the several parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles; what else was in the cause, came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the Attorney-General should be made a party (*a*); who now left it to the Court to make a decree, so as not to prejudice the right of the Crown.

(*a*) See Ridg. Ca. t. Hardw. 444.

Objections raised by the defendant.

The first objection for defendant was, that this Court has not jurisdiction nor ought to take cognizance of it, for that the jurisdiction is in the King in Council.

Second objection, that, if there is not an absolute defect of jurisdiction in this Court, yet, being a proprietary government and a feudary seigniory held of the Crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries, by their own act; for such agreement to settle boundaries, and to convey in consequence, amounts to an alienation, which these lords proprietors cannot do. But supposing they may alien entirely, they cannot alien a parcel, as that is dismembering, for which there is a rule in the feudal books concerning *feuda indivisibilia*.

Thirdly, this agreement ought not to be carried into execution by this Court, as it affects the estates, rights, and privileges of the planters, tenants, and inhabitants within the district, and the tenure and law by which they live, without their consent.

Fourthly, supposing all this answered, yet this agreement is not proper to be established, from the general nature and circumstances. First, as it is merely voluntary, and the Court never decrees specifically without a

consideration; secondly, as the time for performance is lapsed; thirdly, that these articles are in nature of submission to arbitration, which cannot be supplied by interposition and act of this Court; fourthly, that defendant was imposed on or surprised in making this agreement; fifthly, that, if there was no imposition or fraud, defendant grossly mistook his original right, and, under that mistake and ignorance, the articles were founded and framed; sixthly, the agreement in some material parts is so uncertain, that it cannot be decreed with certainty, according to the intent of the parties, for that no centre is fixed, without which it is impossible to make a circle; nor is it sufficiently described, whether it should be a circle with a radius of twelve miles, or only a periphery of twelve miles; seventhly, there is a covenant for mutual conveyances, whereas the plaintiffs have no estates in the lower counties, so as to make an effectual conveyance to defendant; and an agreement must be decreed entirely, or not at all. On the plaintiff's own showing the legal estate and property is in the Crown; so that, at most, they have but an equitable right, in which the Crown is trustee; and then, this Court cannot decree a conveyance. In *Reeve* v. *Attorney-General*, 1741, lands were devised to a wife, and, after her death, to be sold, and the money to be divided among the plaintiffs. The testator died without heirs, so that the legal interest in the estate descended to the Crown, but with a trust to be sold. On a bill to have the will established, and to hold against the Crown, or the lands sold, his Lordship dismissed the bill, and said, where the Crown was trustee, the Court has no jurisdiction to decree a conveyance, but they must go to a petition of right; eighthly, this Court cannot make an effectual decree in the cause, nor enforce the execution of their own judgment.

Lord Chancellor Hardwicke.—I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and

the great labour and ability of the argument on both sides, it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate, rather than of a single Judge; and my consolation is, that, if I should err in my judgment, there is a judicature, equal in dignity to a Roman senate, that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence, which will fall in more naturally, and very intelligibly, under the particular points arising in the case.

Decrees in specie preferable to damages at law.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this Court, the specific performance of agreements being one of the great heads of this Court, and the most useful one, and better than damages at law, so far as relates to the thing *in specie*, and more useful in a case of this nature than in most others, because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, viz., the settling and fixing these boundaries in peace, to prevent the disorder and mischief which, in remote countries distant from the seat of government, are most likely to happen and most mischievous. Therefore, the remedy prayed by a specific performance is more necessary here than in other cases, provided it is proper in other respects; and the relief sought must prevail, unless sufficient objections are shown by defendant, who has made many and various for that purpose.

Jurisdiction of the Court, though submitted to by answering, yet, if a want of it appears at the hearing, no decree.

First, the point of jurisdiction ought in order to be considered, and, though it comes late, I am not unwilling to consider it. To be sure, a plea to the jurisdiction must be offered in the first instance, and put in *primo die;* and answering submits to the jurisdiction, much more when there is a proceeding to hearing on the merits, which would be conclusive at common law; yet a Court of equity, which can exercise a more liberal discretion than common law Courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than

where a plain want of equity appears. It is certain that the original jurisdiction, in cases of this kind relating to boundaries between provinces, the dominion and proprietary government is in the King and Council; and it is rightly compared to the cases of the ancient commotes and lordships marches in Wales; in which, if a dispute is between private parties, it must be tried in the commotes or lordships; but in those disputes, where neither had jurisdiction over the other, it must be tried by the King and Council; and the King is to judge, though he might be a party, this question often arising between the Crown and one lord proprietor of a province in America. So, in the case of the marches, it must be determined in the King's Courts, who is never considered as partial in these cases, it being the judgment of his Judges in B. R. and Chancery. So, where before the King and Council, the King is to judge, and is no more to be presumed partial in one case than in the other. *This Court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in England under seal, for mutual considerations, which gives jurisdiction to the King's Courts, both of law and in equity, whatever be the subject-matter.* An action of covenant could be brought in B. R. or C. B., if either side committed a breach; so might there be for the 5000*l.* penalty, without going to the Council. There are several cases wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the Court originally, will be brought within it. Suppose an order by the King and Council, in a cause wherein the King and Council had original jurisdiction, and the parties enter into an agreement under hand and seal for performance thereof,—a bill must be in this Court for a specific performance, and, perhaps, it will appear this is almost literally that case. The reason is, because none but a Court of equity can decree that. The King in Council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the

Original jurisdiction as to bounds of proprietary governments in King in Council.

Marches in Wales.

Matters out of jurisdiction, by the contract of parties brought within this jurisdiction.

King in Council cannot decree an agreement not acting in personam, as this Court can.

King in Council might look on that, and allow it as evidence of the original right; but if that agreement is disputed, it is impossible for the King in Council to decree it as an agreement. The Court cannot decree *in personam* in England, unless in certain criminal matters, being restrained therefrom by stat. 16 Car. 1, c. 10; and, therefore, the Lords of the Council have remitted this matter very properly to be determined in another place, on the foot of the contract. *The conscience of the party was bound by this agreement; and, being within the jurisdiction of this Court, which acts in personam, the Court may properly decree it as an agreement, if a foundation for it.* To go a step farther, as this Court collaterally, and in consequence of the agreement, judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical Court, just as the Court of law would maintain an action for damages in breach of covenant.

Propietors of these governments may settle bounds between themselves;

As to the second objection: If it was so, it would be very unfortunate; for suits and controversies might be, for that reason, endless; and this has subsisted above seventy years. This objection is insisted on at the bar, and not by the answer. The subordinate proprietors may agree how they may hold their rights between themselves; and, if a proper suit is before the King in Council, on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. In this respect also, it is properly compared to the case of lordships marches, and to counties palatine. When the marches subsisted, there might be a suit in B. R. concerning their boundaries; and the lord of each march in question need be the only party. If a matter of equity arose, either of the lordships marches might have sued in equity to settle, because this is the king's court of general jurisdiction as to matters of equity; and an agreement between the parties relative to these boundaries, if proper in other respects, to carry it

as in the marches and counties palatine;

into a specific performance, is a matter of equity. The Court might, indeed, by reason of their tenure, require the Attorney-General to be made a party, to know if he had anything to object; but then, might hold plea of the cause. Suppose both counties palatine were in subjects' hands (as both have been formerly), and subsisted so, and a question had arisen concerning the boundaries of these two counties palatine, and the respective Earls Palatine had entered into articles concerning these boundaries, this Court would have held plea of such articles as well as concerning the boundaries of manors, seigniories, and honours; for these are honours, only a franchise of a higher nature. To say that such a settlement of boundaries amounts to an alienation is not the true idea of it; for, if fairly made, without collusion, (which cannot be presumed,) the boundaries so settled are to be presumed to be the true and ancient limits. But suppose it savours in some degree of an alienation, why ought it not to be? There is no occasion to determine that, nor will I; but it is a new notion, that the lords proprietors of these provinces may not alien to natural-born subjects. This is no opinion; but the grants themselves are framed so as to be most open to alienation; being grants to them and their heirs, to be held in common socage, not *in capite* of the Crown, but as Windsor Castle is. What rule of law is there, that lands or a franchise granted to be held in common socage, not *in capite*, but as a particular honour or manor, cannot be aliened without licence? all the objections concerning knights' service or *capite* lands, are out of the case, and the Act 7 & 8 Will. 3, c. 22, s. 16, supposes the proprietors may alien to a natural-born subject. The first words of the clause there are, "that they and their assigns may be restrained from alienating without licence," which supposes that it was assigned, and this appears in the case of Carolina. As to the not alienating a parcel, the rule cited out of the feudists is not applicable, those books treating of different tenures; but I admit neither of these proprietors could dismember their provinces, so as to alter

which is not an alienation.

They may alien to subjects.

the nature of the thing granted, and thereby bind the Crown, of whom they held; for the tenure and services would still remain on the whole, and the Crown might demand the whole services from either. It is, therefore, something like the case of the office of high constable of England, held by tenure of grand sergeanty; which was very extraordinary, to hold the manors by tenure of such an office. In Kel. 170, and Dy. 285, the Judges reported their opinion to King Henry 8, that the tenure was not extinct by the division, but that the King had a right to insist on the performance of that office from the Duke of Buckingham, by reason of his moiety; but this exacting the performance of the service from either subject is at the King's pleasure to do or not. This is an instance, that, in honours and tenures of this kind, the king cannot be prejudiced by any alienation, division, or severance between the parties; and if material services are reserved on the grant (though here it is by fealty only, in lieu of all), the entire services might be exacted from either, not being apportionable. But the settling limits is not a dismembering, and if a licence to do this was necessary from the Crown, in law or policy, it sufficiently appears there was such; for it appears, by Orders of Council made in 1686 and 1709, the Crown has not only recommended, but ordered, this division to be made, so far as respects the three lower counties, as to which there is no dismembering; for the dividing line is thereby exactly the same; indeed, the circle is not within these Orders; but as to that no difficulty can arise.

Like office of high constable.

1 Inst. 106, 149, 165.

If part aliened, the tenure and services would remain on the whole, and exacted from either.

As to the third objection: The tenure of the planters, &c., remains just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement; but if they could, care is taken by the agreement to preserve them. The King of England is still their sovereign and supreme lord; both charters require the law of the respective provinces should be conformable to the law of England, as near as could be. Consider to what this objection goes: in lower instances, in the case of manors and honours in

Tenure of the planters preserved by the agreement: they need not be parties.

England, which have different customs and bye-laws frequently, yet, though different, the boundaries of these manors may be settled in suits between the lords of these manors, without making the tenants parties; or may be settled by agreement, which this Court will decree, without making the tenants parties, though in case of fraud, collusion, or prejudice to the tenants, they will not be bound; but, notwithstanding, it is binding on the parties, and to be established as to them. Suppose two bordering manors had been granted out in tail in recompense of services, the reversion in fee to the Crown; in a suit between the lords concerning the boundaries, it is not necessary to make the king or tenants parties to this suit. Indeed, the Crown would not be bound by that agreement or decree; but it is still binding between the parties. But in this case the same final answer occurs that does under the other objection, viz. that if there is no fraud or collusion, it must be presumed to be the true limits, being made between the parties in an adversary interest, each concerned to preserve his own limits, and no pecuniary or other compensation pretended. And (abstracted from the general question of want of jurisdiction) suppose either party insisted there was such a breach of the proviso here, as incurred the penalty, and brought debt in B. R. for that penalty, and the defendant there brought a bill here to be relieved (which probably would have been done), the Court must have relieved against the penalty, on performance of the articles; judging on the terms of the relief, and dispensing with the point of time, the Court could not have avoided it. Then how does this case differ? For it will not be pretended the King in Council would have had plea in that case; it must have come into the King's Courts of equity, which must have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumstances of the agreement.

Specific performance of agreements not decreed

First, it is true, the Court never decrees specifically without a consideration: but this is not without consider-

without consideration.

Settling bounds, a mutual consideration.

ation; for though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet, is a mutual consideration on each side, and in all cases make a consideration to support a suit in this Court for performance of the agreement for settling the boundaries (*a*).

(*a*) And see *Stapilton* v. *Stapilton*, and note, ante, p. 836.

Lapse of time in agreements relieved.

The objection of the time for performance being lapsed may be answered; for it is the business of this Court to relieve against lapse of time in performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance, as it plainly does not here.

This agreement not like an award.

Next, these articles are not like submission to arbitration. In those cases, generally the time is conditional so as determination be made by such a day; here the line and circle are agreed on by distinct, independent covenants, and that they shall form the boundaries of these tracts of lands; this, therefore, is a particular, certain, specific contract of the parties, that there shall be the boundaries; nothing left to the judgment of the commissioners, who are merely ministerial, to run the line, &c., according to the agreement, and set the marks. Therefore, it is not like an award, but is an agreement, which this Court will see pursued.

No fraud or surprise

As to any imposition or surprise, the evidence is clearly contrary thereto. It would be unnecessary to enter into the particulars of that evidence; but it appears, the agreement was originally proposed by the defendant himself; he himself produced the map or plan afterwards annexed to the articles; he himself reduced the heads of it into writing, and was very well assisted in making it: and farther, that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, viz. the defect of evidence on the part of the defendant, which amounts to stronger negative evidence than if it was by witnesses; for it was in his own power to have shown it, if otherwise. Then, am I to presume he was imposed on, in a plan, too, sent to himself by his own agents? As to the plan itself,

it was in his own power: with regard to the original of these minutes of the agreement, wrote by himself, though ordered by the Court to be produced, they are not produced; which negative evidence supports the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

Nor mistake.

I admit, that, though no imposition or fraud, yet a plain mistake contrary to the intent, would be a ground not to decree specific performance. But consider the evidence thereof: the defendant and his ancestors were conversant in this dispute about fifty years before this agreement was entered into, and had all opportunities; therefore, no ignorance, want of information, or mistake, are to be presumed; and in cases of this kind, after an agreement, and plain mistake contrary to intent of parties not shown, it is not necessary for the Court to resort to the original right of the parties; it is sufficient if doubtful. To consider the points in dispute; and first, upon the defendant's charter, in which it is insisted the whole 40th degree of north latitude is included, and if so, that it is not to be limited by any recital in the preamble. There is great foundation to say, the computations of latitude at the time of the grant vary much from what they are at present; and that they were set much lower anciently than what they are now, as appears by Mr. Smith's book, which is of reputation; but I do not rely on that, for the fact is certainly so. But whatever that was, does it take it in by the description? It comes to the question, whether the *usque ad* is inclusive or exclusive; therefore, however described the same question remains. But there is another argument used by the plaintiffs to restrain the defendant's charter from taking in the whole 40th degree, viz. the recital of it; for the plaintiffs say, the information, given to the Crown by Lord Baltimore, was, that, this part was land uncultivated and possessed by barbarians; whereas, it was not so, but possessed by Dutch and Swedes; and, therefore, the king was deceived in his grant. There is considerable evidence that Dutch and Swedes were settled on the east part of that country; but

Not necessary to resort to the original rights.

Former computations of latitude vary from the present.

The king deceived in his grant.

this is said to be no deceit on the Crown; for, though some stragglers were settled there, yet, if not recognised by the Crown, that is not a settlement. I am of a different opinion; for, in these countries it has been always taken, that that European country which has first set up marks of possession has gained the right, though not formed into a regular colony; and that is very reasonable on the arguments on which they proceeded. Then, will not that affect the grant? If the fact was so, that would be as great deceit on the Crown, in notion of law, as any other matter arising from the information of the party; because such grants tend to involve this Crown in wars and disputes with other nations; nor can there be a greater deceit than a misrepresentation tending to such a consequence; which would be a ground to repeal the letters patent by scire facias. Next, consider the dispute on Penn's charter, which grants to him all that tract of land in America, from twelve miles distance from Newcastle to the 43rd degree of north latitude, &c., under which the plaintiffs do not pretend a title to the three lower counties, which relate to the two feoffments in 1682. Upon that charter it is clear, by the proof, that the true situation of Cape Henlopen is as it is marked in the plan, and not where Cape Cornelius is, as the defendant insists; which would leave out great part of what was intended to be included in the grant; and there is strong evidence of seisin and possession by Penn, of that spot of Cape Henlopen, and all acts of ownership. But the result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries of these counties and rights of the parties doubtful. Senex, who was a good geographer, says, that the degrees of latitude cannot be computed with the exactness of two or three miles; and another geographer says, that, with the best instruments, it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles; which is near the whole extent between the two capes. It is, therefore, doubtful, and the most proper case for an agreement; which, being entered into, the parties could not resort

back to the original rights between them; for, if so, no agreements can stand; whereas, an agreement entered into fairly and without surprise ought to be encouraged by a Court of justice.

As to uncertainty of the agreement.

The objection of uncertainty arises principally on the question concerning the circle of twelve miles to be drawn about Newcastle; it was insisted on in the answer, and greatly relied on in America, but it is the clearest part of the cause. As to the centre, it is said that Newcastle is a long town; and therefore, it not being fixed by the articles, it is impossible that the Court can decree it; but there is no difficulty in it: the centre of a circle must be a mathematical point (otherwise it is indefinite), and no town can be so. I take all these sort of expressions and such agreements to imply a negative: to be a circle at such a distance from Newcastle, and no part to be farther. Then it must be no farther distant from any part of Newcastle. Thus, to fix a centre, the middle of Newcastle, as near as can be computed, must be found, and a circle describing round that town, which is the fairest way, for otherwise it might be fourteen miles in some parts of it, if it is a long town. Then what must be the extent of the circle? It is given up at the bar, though not in the answer. It cannot be twelve miles distant from Newcastle, unless it has a semidiameter of twelve miles; but there is one argument decisive, without entering into nice mathematical questions: the line to be the dividing line, and to be drawn north from Henlopen, was either to be a tangent or intersecting from that circle; and if the radius was to be of two miles only, it would neither touch or intersect it, but go wide. There is no difference as to the place or running of the line from south to north, though there is as to the cape from which it is to commence.

The title to convey.

Agreements to be decreed entirely.

Estoppel.

As to the seventh head of this objection, it is truly said, that agreements must be decreed entire, or not at all. As to the plaintiff's estate and possession, this must concern only the three lower counties, which plainly passed by the feoffment. I will lay aside the question of estoppel, which is a nice consideration; for the Duke of York, being

then in nature of a common person, was in a condition to be estopped by a proper instrument. In 1683 the Duke of York takes a new grant from the Crown, and, having granted before, was bound to make further assurance; for the improvements made by Penn were a foundation to support a bill in equity for further assurance. The Duke of York, therefore, while a subject, was to be considered as a trustee; why not afterwards as a royal trustee? I will not decree that in this Court, nor is it necessary, but it is a notion established in Courts of revenue by modern decisions, that the king may be a royal trustee; and if the person from whom the king takes by descent was a trustee, there may be grounds in equity to support that; and if King James II. after coming to the Crown, was a royal trustee, his successors take the legal estate under the same equity; and it is sufficient for the plaintiffs if they have an equitable estate. Then, consider this in point of possession of the Penns, the proof of which is very clear: they have been permitted to appoint governors of these lower counties, which have been approved by the Crown, according to the statute of King William. Indeed, all the acts of possession are with a *salvo jure* to the Crown; but the evidence for the defendant amounts to this: not of a real possession or enjoyment, but of attempts to take possession, sometimes by force, sometimes by inciting people to come there; otherwise, why would Lord Baltimore grant here for half what he granted in other places? Which shows plainly it was an invitation to get settlers there under their title. Now I am of opinion that full and actual possession is sufficient title to maintain a suit for settling boundaries; a strict title is never entered into in cases of this kind, neither ought it. But what ends this point of want of title to convey, is, that no part of the lower counties is left to be conveyed by the plaintiffs to the defendant; so that, nothing being to pass by the plaintiffs, it is not material whether they have title to convey or not. But now, in cases of this kind, of two great territories held of the Crown, I will say, once for all, that long possession and enjoyment, peopling and cultivating countries, is one

The king a royal trustee.

Possession sufficient in a suit to settle bounds.

of the best evidences of title to lands, or district of lands in America that can be; and so have I thought in all cases since I have served the Crown; for the great beneficial advantages arising to the Crown from settling, &c., is, that the navigation and the commerce of this country is thereby improved. Those persons, therefore, who make these settlements, ought to be protected in the possession, as far as law and equity can; and both these proprietors appear to have great merit with regard to the Crown and the public; for these two provinces have been improved in private families to a great degree, to the advantage of their mother country; this regards the three lower counties, the strength of which is vastly on the side of the plaintiffs.

Agreement decreed, though it could not be enforced in rem.

As to the Court's not enforcing the execution of their judgment, if they could not at all, I agree it would be vain to make a decree; and that the Court cannot enforce their own decree *in rem* in the present case. But that is not an objection against making a decree in the cause; for the strict primary decree in this Court, as a Court of equity, is *in personam*, long before it was settled whether this Court could issue to put into possession in a suit of lands in England, which was first begun and settled in the time of James I., but ever since done by injunction or writ of *assistant* to the sheriff; but the Court cannot to this day, as to lands in Ireland or the plantations. In Lord *King's* time, in the case of *Richardson* v. *Hamilton Attorney-General of Pennsylvania*, which was a suit of land and a house in the town of Philadelphia, the Court made a decree, though it could not be enforced *in rem*. In the case of *Lord Anglesey*, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem*; but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this Court. And, indeed, in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks, by the order in 1735, as if that was in view, liberty being thereby given to resort to that Board.

The primary decree in equity in personam.

Salvo jure to the Crown.

This opens a way to that part of the case relating to the Crown. The Attorney-General acts a very impartial part; and I shall express in the fullest words, that this decree is entirely without prejudice to any prerogative, right, or interest in the Crown. I will go farther, that, as I do not know how far that interest of the Crown may be, I will reserve liberty for either party to apply to this Court, if by any act or right of the Crown execution of this shall be obstructed; for the Court is at liberty to suspend its decree, if a difficulty to perform it is shown; and I will reserve further directions as between the parties, as to that matter, so *de novo* arising. Judgments have been at law with a *salvo jure* of the Crown; as in Rastal & Coke's Entries, in the title of Intrusion and *Quo Warranto*, which, particularly in the cases of lands relating to intrusion, is very analogous to the present.

Liberty to suspend the decree.

I am of opinion, therefore, to decree a specific performance of this agreement, without prejudice to any right, &c., of the Crown.

Costs against defendant.

Next, as to the point of costs; for which must be considered what passed in America and in England. As to what passed antecedent to granting the commission, it is very fair on both sides; all the objection arising from that is the defence against the performance, and that there are no grounds for the defence from fraud, imposition, or mistake, which are made the heads for it. But in America the defendant's commissioners behaved with great chicane in the points they insisted on; as, the want of a centre of a circle, and the extent of that circle, viz., whether a diameter of two or of twelve miles, the endeavouring to take advantage of one of the plaintiff's commissioners coming too late, to make the plaintiffs incur the penalty. It is plain from the articles, both sides should be answerable for default of their commissioners; the penalty shows the intent, though I own this is not that case; but I do not go on that. The defendant has been misled by his commissioners and agents in America, to make their objections his defence, which brings it nearer to himself; and though he would not at all have thought of it as from himself (so

that I impute nothing in the least dishonourable to him), yet I must take it as his own act, and then should not do complete justice if I did not give the plaintiffs the costs of this suit to this time, to be taxed, reserving subsequent costs.

His Lordship, having directed that the plaintiffs and defendant should quietly hold, according to the articles, altered that, for it would be improper to have a decree in this Court for quiet enjoyment of lands in America, which would occasion continual applications to this Court for contempts, &c., and that it ought to be the proper jurisdiction (*a*).

(*a*) See the decree, Belt's Supplement to Ves. sen. 194.

Mr. *Solicitor-General* in his argument cited the *Massachusetts Bay Company* v. *The King*, in 1746, in the council, as to settling boundaries, where, on petition by the plaintiffs to rehear, the committee reported that there was no instance of rehearing on an appeal, which would be mischievous unless on some very particular circumstances, as new discovery or fraud concealed; and therefore the petition was rejected.

In the important case of *Penn* v. *Lord Baltimore*, Lord *Hardwicke* recognised and acted upon the principle now so firmly established, that equity, as it acts primarily *in personam*, and not merely *in rem*, may, where a person, against whom relief is sought, is within the jurisdiction, make a decree, upon the ground of a contract, or any equity subsisting between the parties, respecting property situated out of the jurisdiction. See also *Scott* v. *Nesbitt*, 14 Ves. 438; and *Maunder* v. *Lloyd*, 2 J. & H. 718 where a bill filed by one of the parties in England to wind up a partnership in Hayti was entertained: and see *Hendrick* v. *Wood*, 9 W. R. 794; *Rainy* v. *Ellis*, 26 L. T. Rep. (N. S.) 602.

In the old case of *The Earl of Athol* v. *Earl of Derby*, 1 Ch. Ca. 220, a contract respecting the Isle of Man, though out of the jurisdiction, was enforced by the Court of Chancery in England. So, in *Archer* v. *Preston*, cited 1 Vern. 77; 1 Eq. Ca. Ab. 133, pl. 3, there was a contract concerning lands in Ireland; and the defen-

dant, coming into England, a bill was filed against him, and a ne exeat regno granted. And in *Toller* v. *Carteret*, 2 Vern. 495, where a bill was filed by the mortgagee for foreclosure of the Island of Sark, the defendant pleaded to the jurisdiction of the Court, that the Island of Sark was part of the Duchy of Normandy, and had laws of its own, and was not under the jurisdiction of the Court of Chancery; but the Lord Keeper, Sir *Nathan Wright*, overruled the plea, observing, "that the Court of Chancery had jurisdiction, the defendant being served with process here, and *equitas agit in personam*, which is an answer to the objection." See also *Paget* v. *Ede*, 18 L. R. Eq. 118, where it was held by *Bacon*, V. C., that a foreclosure decree, being a decree in personam, depriving the mortgagor of his personal right to redeem, the Court had jurisdiction to make such a decree in respect of a mortgage between an English mortgagor and mortgagee, of lands in the Island of Nevis, West Indies.

So, where there are trusts affecting lands situated in a foreign country, if the trustee is resident in England, they will be enforced: *Earl of Kildare* v. *Eustace*, 1 Vern. 419, 422; 1 Eq. Ca. Ab. 133, pl. 4.

And a tenant in common of lands in Ireland, resident here, was held liable to an account for waste committed, upon a bill filed by another tenant in common: *Carteret* v. *Petty*, 2 Swanst. 323, n. See *S. C.*, nom. *Cartwright* v. *Pettus*, 2 Ch. Ca. 214.

In *Lord Cranstown* v. *Johnston*, 3 Ves. 170, a creditor, having fraudulently obtained a judgment in one of the West Indian islands (St. Christopher's) against his debtor, then absent from the island, and sold his debtor's real estate there, and become the purchaser thereof, upon a bill being filed in England, the sale was set aside by Sir *R. P. Arden*, M. R. "Upon the whole," he observed, "it comes to this: that, by a proceeding in the island, an absentee's estate may be brought to sale, and for whatever interest he has, without any particular upon which they are to bid. The question is, whether any Court will permit the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued, very sensibly, that it is strange for this Court to say, it is void by the laws of the island, or for want of notice. I admit, I am bound to say, that, according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it: the question is, whether an English Court will permit such a use to be made of the law of that island, or any other country. It is sold, not to satisfy the debt, but in order to get the estate (which

the law of that country never could intend) for a price much inadequate to the real value, and to pay himself more than the debt for which the suit was commenced, and for which only the sale could be holden. It was not much litigated, that the Courts of equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon lands in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here: *Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp*, *Lord Kildare* v. *Eustace*, 1 Eq. Ca. Abr. 133; 1 Vern. 75, 135, 419. Those cases clearly show, *that, with regard to any contract made, or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England.* Lord *Hardwicke* lays down the same doctrine in *Foster* v. *Vassall*, 3 Atk. 589. Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings, as in a Court of law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws, to proceed behind the back of the debtor upon constructive notice, which could not operate to the only point to which a constructive notice ought: that there might be actual notice without wilful default: that he has gained an advantage which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this:—this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice." See *S. C.*, 5 Ves. 277; and *Jackson* v. *Petrie*, 10 Ves. 164.

It might be thought, from the language occasionally used by equity Judges, that the jurisdiction *in personam* affecting lands abroad, would be exercised in those cases only where, although out of the jurisdiction of the Court, they were situated within the colonies or empire. See *Foster* v. *Vassall*, 3 Atk. 589. But as the Court does not affect to control the Courts of other countries, there does not exist in practice, nor, indeed, upon principle, any reason for such distinction. See *Angus* v. *Angus*, West's Rep. t. Hardw. 23, where a bill having been filed relative to lands in Scotland, for discovery of rents and profits, and deeds, and frauds being alleged, Lord *Hardwicke* overruled a plea not averring that the parties were resident out of the jurisdiction, observing, that

the Court acted upon the *person*, as to the fraud and discovery, and that it would have been a good bill, as to fraud and discovery, if the lands had been in *France, if the person were resident in England*, for the jurisdiction of the Court, as to frauds, was upon the conscience of the party.

Where the lands are out of the jurisdiction, although they be within the colonies, the Court cannot affect them, directly or otherwise, than by proceedings *in personam*. Thus, in *Roberdeau* v. *Rous*, 1 Atk. 543, where a demurrer was put into a bill brought for the delivery of the possession of a moiety of lands in St. Christopher's, and likewise for an account of the rents and profits, although Lord *Hardwicke* held that the bill would lie for the account, he said, that the Court had no jurisdiction to put persons in possession in a place where they had their own methods on such occasions, to which the party might have recourse ; and that lands in the plantations were no more under the jurisdiction of this Court, than lands in Scotland, for it only *agit in personam*. So, in *Angus* v. *Angus*, West's Rep. t. Hardw. 23, upon a bill being filed for discovery, and for the possession of land in Scotland, although Lord *Hardwicke*, as fraud was alleged in the bill, overruled the plea, not stating the defendant to be out of the jurisdiction, yet he said, "I am in doubt as to parts of the bill for relief; for I cannot give the plaintiff possession any other way than by compulsion on the defendant's person, whilst it is within the jurisdiction of the Court. However, at present, the plea must be overruled without prejudice to the defendant's insisting, by way of answer, on the same matter, against any decree or order being made relating to the possession of the lands in Scotland, as he shall be advised." See *Innes* v. *Mitchell*, 3 Jur. N. S. 756; *Cood* v. *Cood*, 33 Beav. 314.

So, a partition of lands in Ireland will not be decreed in England ; as to which, Lord *Nottingham* is reported to have said, in *Cartwright* v. *Pettus*, 2 Ch. Ca. 214, "he could not here proceed, for he could not award a commission into Ireland. And the bill for a partition was in the nature of a writ of partition at the common law, which lieth not for lands in Ireland;" see *S. C.*, nom. *Carteret* v. *Petty*, 2 Swanst. 323, n. ; see also and consider, *Houlditch* v. *Lord Donegal*, 8 Bligh, N. S. 301, 345; *Ex parte Pollard*, Mont. & C. 239, reversing *S. C.*, 3 Mont. & Ayr. 340; *Waterhouse* v. *Stansfield*, 9 Hare, 234; 10 Hare, 254; *Martin* v. *Martin*, 2 Russ. & My. 507; *Nelson* v. *Bridport*, 8 Beav. 547.

Nor will a Court of equity direct an issue to try the validity of a will, of lands out of the jurisdiction. This was decided in *Pike*

v. *Hoare*, 2 Eden, 182, where the testator made his will in England, devising land in Pennsylvania. Although there were other reasons for refusing the issue, Lord *Northington* said, that he built his opinion materially upon the fact of the lands lying in Pennsylvania. "A will," said his Lordship, "of lands lying in any of the colonies is not triable in Westminster Hall. If it were, it would be introductive of great confusion, and be very detrimental to the colonies. We have colonies and factories in the four quarters of the world, and each colony and factory has distinct laws of its own. Judges in Westminster Hall are not acquainted with the laws of the several colonies and factories: they are local. In *Penn* v. *Lord Baltimore* (1 Ves. 444), Lord *Hardwicke* made the distinction, and said it was the *contract* that gave the Court jurisdiction in that case, the principles of equity being the same in all places. What weighs strongly with me is, that no issue was ever directed to try a will of lands in Ireland. It was attempted in *Lord Robert Manners' Case*, but given up; and that was as strong a case as this. Mr. Calwell, the testator, lived and died in England, never was but once in Ireland to see his estate, and his will was made in London." See also *Boyse* v. *Colclough*, 1 K. & J. 124; *Norris* v. *Chambers*, 29 Beav. 246; 3 De G. F. & J. 583; *Whitaker* v. *Forbes*, 10 L. R. C. P. 583.

In the principal case, Lord *Hardwicke* disclaims any original jurisdiction of the Court as to the direct question of the boundaries, and puts it expressly upon the articles entered into between the parties. See, however, *Tulloch* v. *Hartley*, 1 Y. & C. C. C. 114.

Upon the same principle, where a charity is to be established out of England, as in Scotland, the Court, not having jurisdiction to administer the fund, will pay the money to the persons whom the testator has selected as the instruments of his benevolence: *The Provost of Edinburgh* v. *Aubery*, Amb. 236; *Attorney-General* v. *Lepine*, 2 Swanst. 181; *Minet* v. *Vulliamy*, 1 Russ. 113, n.; *Emery* v. *Hill*, Id. 112; *Attorney-General* v. *Sturge*, 19 Beav. 597.

Where real property in a colony is vested in the Queen, not by prerogative, but under an Act of the provincial legislature, for the purposes of the province, and subject to any future directions which may be given by the provincial legislature, the Queen, for the purpose of any claims to such lands made under the provincial statutes is not to be regarded as within the jurisdiction of the English Court of Chancery, nor does the Petition of Right Act, 1860 (23 & 24 Vict. c. 34), give such jurisdiction: see *Re Holmes*, 2 J. & H. 527.

In some cases of doubtful au-

thority, a power was assumed, which certainly would not now be exercised, of granting sequestrations against the estates of defendants situated in Ireland: *Arglasse* v. *Muschamp*, 1 Vern. 75, and *Sir John Fryer* v. *Bernard*, 2 P. Wms. 261. But the reasons given by Lord *Macclesfield* in the latter case, as observed by Lord *Brougham* in *Lord Portarlington* v. *Soulby*, 3 My. & K. 109, plainly show, that he went upon a ground which would now be untenable, viz. what he termed the superintendent power of the Courts of this country over those in Ireland; and, indeed, he supports his order by expressly referring to the right then claimed by the King's Bench in England, to reverse the judgments of the King's Bench in Ireland—a pretension which has long ago been abandoned, and has, indeed, been discontinued by parliamentary interposition.

Where neither the plaintiff nor the defendant are resident in this country, and the subject-matter of the suit is not situated here, the Court will have no jurisdiction to interfere between them. See *Norris* v. *Chambres*, 3 De G. F. & J. 583; *Cookney* v. *Anderson*, 31 Beav. 452; *Blake* v. *Blake*, 18 W. R. (V. C. M.) 944; *Matthaei* v. *Galitzin*, 18 L. R. Eq. 340.

And where a person, though resident in England, is capable of being sued in his public character in the foreign country where the subject of the suit is situated, he cannot be sued here in Chancery by natives of that country. See *Doss* v. *Secretary of State for India in Council*, 19 L. R. Eq. 509. There the plaintiff, who represented certain creditors of the King of Oudh, in respect of a debt contracted in 1794, sued the Secretary of State for India, claiming to be entitled to a charge upon the revenue of the territory of Oudh. It was held by Sir *R. Malins*, V. C., that the plaintiffs, being natives of India, the subject-matter of the suit being in India, and the defendant being capable of being sued in India, an English Court of equity was not the proper tribunal to try the questions between the parties. "Where," said his Honor, "there is a complete tribunal capable of deciding the question where the property is and where the parties are, that is the tribunal to be resorted to. Now what is the property here? The object is to enforce a liability upon the revenues of Oudh; that is in India. There are Courts of law and equity for every part of India. If this is a case for a Court of equity, then there is a Court of equity there. There the plaintiffs are, for they reside at Benares; and the thing that is to be recovered is in India; and from the Courts there, there would be an appeal to the Supreme Court of appeal in this country, namely, the Privy Council. I agree with the observations of Mr.

Macnaghten, that the Secretary of State for India is also there, because they can just as well sue him in that country as in this."

Although it is difficult to reconcile all the cases upon the subject, the principle upon which the Court proceeds and the limits to its jurisdiction have been well laid down by a learned writer, viz., that "the claim to affect foreign lands through the person of the party must be strictly limited to those cases in which the relief decreed can be entirely obtained through the party's personal obedience: if it went beyond that, the assumption would not only be presumptuous but ineffectual:" Westlake's Private Internat. Law, p. 58.

Where a contract, though made abroad, is to deliver a thing in specie to a person in this country, and the thing itself is brought here, the Court here, in the exercise of its discretion, will see that the thing to be delivered does not leave this country, so as to defeat the right of the plaintiff to have it so delivered. See *Hart* v. *Herwig*, 8 L. R. Ch. App. 860. There a shipowner of Hamburg made at Hamburg an agreement with an Englishman for sale to him of a Hamburg ship whenever she might return from the voyage on which she then was, the seller to pay all charges up to the date of the delivery, and to make corresponding allowances in case the vessel arrived at her port of discharge in a damaged state over and above ordinary wear and tear, or under average. The ship returned, and was by the owner ordered to proceed to Sunderland. The master of the ship, who was authorized by the ship-owner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and the master for specific performance. He obtained leave to substitute service on the master for the owner, and moved for an injunction to restrain the defendants from removing the ship out of the jurisdiction. It was held by the Lords Justices, affirming the decision of Sir *R. Malins*, V. C., that the substituted service on the master was effectual and proper, and that the Court had jurisdiction to restrain the defendants from removing the ship and to grant the injunction.

As to service of a writ of summons, or notice of a writ of summons, out of the jurisdiction, see Order XI., Rules of the Supreme Court, 1875, and Rule 1a of the Rules of June, 1876, No. 8. See *Young* v. *Brassey*, 1 Ch. D. 277; *Great Australian Gold Mining Co.* v. *Martin*, 5 Ch. D. 1.

HARDING *v.* GLYN.

June 7th, 1739.

[REPORTED 1 ATK. 469.]

S. C., 5 Ves. jun. 501, stated from Reg. Lib. 1738 A.

POWER IN THE NATURE OF A TRUST.]—*H., by will, gives a leasehold house and furniture, goods and chattels therein, and also plate, jewels, &c., to his wife; but did desire her, at or before her death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of. The wife by her will gave the leasehold house to S., who was the son of one of the next of kin, and, after giving several legacies, bequeathed the residue of her personal estate to the defendant G. and two other persons, but neither gave, at or before her death, the goods in the house, or the jewels, to her husband's relations. It was held, that the wife was intended to take beneficially only during her life; that the appointment to S., being a relation of the testator's, though not one of his next of kin, was a good execution of the power; and that so much of the goods and jewels not disposed of by the wife, according to the power given to her by her husband, in case they remained in specie, or the value thereof, ought to be divided equally among such of the relations of the testator as were his next of kin at the time of the death of his wife.*

NICHOLAS HARDING, in 1701, made his will, and thereby gave "to Elizabeth his wife all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but *did desire her*, at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, *unto and amongst such of his own rela-*

tions as she should think most deserving and approve of;" and made his wife executrix, and died the 23rd of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell (*a*), in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and, after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given, at or before her death, the goods in the said house, or without having disposed of any of her husband's jewels to his relations (*b*).

The plaintiffs, insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she had not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates' effects.

(*a*) The bequest to Swindell was held good, although he was not one of the next of kin of the testator, and would not, therefore, have taken anything in the absence of the bequest; but, being a son of one of the next of kin, he was a relation, and, therefore, within the power when exercised by the testatrix. See *Brown* v. *Higgs*, 5 Ves. 501; 8 Ves. 572.

(*b*) It appears that the testatrix by her will bequeathed the plate to Caleb Harding, and it was declared by the decree that it was a good bequest, as being pursuant to the power in her husband's will. See statement from the Reg. Lib., 5 Ves. 501.

THE HON. JOHN VERNEY, M. R.—The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life. There are no technical words in a will; but the manifest intent of the testator is to take place; and the words "willing" or "desiring" have been frequently construed to amount to a trust (*Eales* v. *England* (*c*); and the only doubt arises upon the persons who are to take after her.

(*c*) Prec. Ch. 200; 2 Vern. 466.

Where the uncertainty is such that it is impossible for the Court to determine what persons are meant, it is very strong for the Court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust

in the wife, by way of power of naming and apportioning; and her non-performance of the power shall not make the devise void, but the power shall devolve on the Court; and though this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the Court to go by; and, therefore, I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order, that so much of the said household goods in Hatton Garden, and other the personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding his wife, which she did not dispose of according to the power given her thereby, in case the same remains *in specie*, or the value thereof be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.

"As a general rule," observes Lord *Langdale*, M. R., in an important case, "it has been laid down, that, when property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended, or entreated, or wished to dispose of that property in favour of another, the recommendation, entreaty, or wish, shall be held to create a trust.

"First, if the words are so used, that, upon the whole, they ought to be construed as imperative.

"Secondly, if the subject of the recommendation or wish be certain; and,

"Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.

"If a testator gives 1000*l.* to A. B., desiring, wishing, recommending, or hoping that A. B. will at his death give the same sum, or any certain part of it, to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given or upon the person or object of the wish.

"So, if a testator gives the residue of his estate after certain purposes are answered, to A. B., recommending A. B., after his death, to give it to his own rela-

tions, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable,—so capable of being made certain, that the rule is applicable to such cases.

"On the other hand, if the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus, the words, 'free and unfettered,' accompanying the strongest expression of request, were held to prevent the words of bequest being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told, that the question 'never turns upon the grammatical import of words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent, must be considered:' *Meggison* v. *Moore* (2 Ves. jun. 632, 633). And 'wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and quantum of the subject and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the Court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended:' *Morrice* v. *Bishop of Durham* (10 Ves. 536); or, as Lord *Eldon* expresses it in another case (*Wright* v. *Atkyns*, T. & R. 159), 'where a trust is to be raised, characterised by certainty, the difficulty of doing it is an argument which goes to a certain extent towards inducing the Court to say, it is not sufficiently clear

what the testator intended:'" *Knight* v. *Knight*, 3 Beav. 172; *S. C.*, 11 C. & F. 513, nom. *Knight* v. *Boughton*; *Cary* v. *Cary*, 2 S. & L. 189.

The three requisites, however, mentioned by Lord *Langdale*, to a precatory trust, must coexist. (See *Briggs* v. *Penny*, 3 Mac. & G. 554; *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 31. See the explanation, *Bernard* v. *Minshull*, Johns. 276). It may, however, be created by a settlement as well as by a will: *Liddard* v. *Liddard*, 28 Beav. 266.

First, *The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative.*—As laid down in the principal case, no technical words are necessary, but the testator's intent is to take place; and his words, "willing or desiring" that the person upon whom he has conferred property should make a disposition of it in favour of certain objects, will be construed as imperative, and amount to a trust (*Eales* v. *England*, Prec. Ch. 200; 2 Vern. 466); so, if he "request" (*Eade* v. *Eade*, 5 Madd. 118), "wish and request" (*Foley* v. *Parry*, 5 Sim. 138; 2 My. & K. 138; *Godfrey* v. *Godfrey*, 11 W. R. (V. C. W.) 554), "wish and desire" (*Liddard* v. *Liddard*, 28 Beav. 266); express it to be his "last wish" (*Hinxman* v. *Poynder*, 5 Sim. 546); his "dying request" (*Pierson* v. *Garnet*, 2 Bro. C. C. 38, 226); or "recommend" (*Tibbits* v. *Tibbits*, 19 Ves. 656; Jac. 317; *Horwood* v. *West*, 1 S. & S. 387; *Malim* v. *Keighley*, 2 Ves. jun. 333, 539; *Ford* v. *Fowler*, 3 Beav. 146; but see *Cunliffe* v. *Cunliffe*, Amb. 686, and the comments upon it in *Pierson* v. *Garnet*, 2 Bro. C. C. 46; *Malim* v. *Keighley*, 2 Ves. jun. 532; *Pushman* v. *Filliter*, 3 Ves. 9); "entreat" (*Prevost* v. *Clarke*, 2 Madd. 458); "not doubting" (*Parsons* v. *Baker*, 18 Ves. 476; *Taylor* v. *George*, 2 V. & B. 378); "under the firm conviction" (*Barnes* v. *Grant*, 26 L. J. N. S. (Ch.) 92); "in the full confidence" (*Curnick* v. *Tucker*, 17 L. R. Eq. 320; *Le Marchant* v. *Le Marchant*, 18 L. R. Eq. 414); "have fullest confidence" (*Wright* v. *Atkyns*, 17 Ves. 255; 19 Ves. 299; G. Coop. 111; 1 T. & R. 143; *Palmer* v. *Symmonds*, 2 Drew. 221; *Gully* v. *Crego*, 24 Beav. 185; *Shovelton* v. *Shovelton*, 32 Beav. 143); "heartily beseech" (*Meredith* v. *Heneage*, 1 Sim. 553); "I beg she will apportion" (*Corbet* v. *Corbet*, 7 I. R. Eq. 456); "authorise and empower" (*Brown* v. *Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192); "hope" (*Harland* v. *Trigg*, 1 Bro. C. C. 142; *Paul* v. *Compton*, 8 Ves. 375); "full assurance and confident hope" (*Macnab* v. *Whitbread*, 17 Beav. 299); "absolutely trusting" (*Irvine* v. *Sullivan*, 8 L. R. Eq. 673); "well know" (*Bards-*

well v. *Bardswell*, 9 Sim. 323; *Briggs* v. *Penny*, 3 Mac. & G. 546, 554; but see *Stead* v. *Mellor*, 5 Ch. D. 225, 227); "or of course he will give" (*Robinson* v. *Smith*, 6 Madd. 194); "in consideration he has promised to give" (*Clifton* v. *Lombe*, Amb. 519); "I would wish she should have power to give:" *Corbet* v. *Corbet*, 7 I. R. Eq. 456.

The context may, however, show that words of hope, or request, or recommendation, were not intended to interfere with the absolute discretion of the legatee: *Huskisson* v. *Bridge*, 4 De G. & Sm. 245; *Williams* v. *Williams*, 1 Sm. N. S. 358, 370; *Webb* v. *Wools*, 2 Sm. N. S. 267; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1; *Scott* v. *Key*, 35 Beav. 291; *Shepherd* v. *Nottidge*, 2 J. & H. 766; *Eaton* v. *Watts*, 4 L. R. Eq. 151; *M'Cormick* v. *Grogan*, 1 I. R. Eq. 313; *Greene* v. *Greene*, 3 I. R. Eq. 90, 629; *Creagh* v. *Murphy*, 7 I. R. Eq. 182; *In re Bond, Cole* v. *Hawes*, 4 Ch. D. 238.

The application of the rule by which words of recommendation are construed as imperative, is often attended with considerable difficulty, and perhaps ought not, consistently with sound principles of interpretation, to have been ever established. "The first case," observes Sir *Anthony Hart*, V. C., "that construed words of recommendation into a command made a will for the testator; for every one knows the distinction between them:" *Sale* v. *Moore*, 1 Sim. 504.

The tendency of the later decisions is against construing precatory or recommendatory words as trusts. *Ib.* 504. If, therefore, the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context, that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, no trust will be created: see *Bull* v. *Vardy*, 1 Ves. jun. 270; *Meggison* v. *Moore*, 2 Ves. jun. 630; *Knight* v. *Knight*, 3 Beav. 148; 11 C. & F. 513. Thus, the words "free and unfettered," accompanying the strongest expressions of request, were held to prevent the words of request from being imperative: *Meredith* v. *Heneage*, 1 Sim. 542; 10 Price, 230; *Hoy* v. *Master*, 6 Sim. 568. So, where there was a gift of stock to a person, and there was added, parenthetically (to enable him to assist such children of my deceased brother as he may find deserving of encouragement), it was held an absolute bequest, and that no trust was created for the children: *Benson* v. *Wittam*, 5 Sim. 22; *Wright* v. *Atkyns*, T. & R. 157, 163.

So, where it was declared in a will that a bequest of property to a legatee was "in his entire power" (*Eaton* v. *Watts*,

4 L. R. Eq. 151); or "left entirely to his good judgment" (*M'Cormick* v. *Grogan*, 4 L. R. Ho. Lo. 82); and where a testator "recommended but did not absolutely enjoin" a distribution among daughters (*Young* v. *Martin*, 2 Y. & C. C. C. 582), it was held that there was no trust.

In *Shaw* v. *Lawless* (5 C. & F. 129), a testator devised certain real estates to trustees, for the use of W. Shaw for life, with remainders over, and he directed the residue of his personal estate to be invested in the purchase of other real estates. He gave a legacy of 100*l.* to B. E. Lawless, as a token of esteem. The will then contained this clause:—"And it is my particular desire, that my said executors, while acting in the management of all or any of my affairs under this my will, as also my friend W. Shaw, when he shall enter into the receipt and perception of my said rents of K. V. and K., shall *continue* the said B. E. Lawless in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of the said estates fully to my satisfaction." It was held by the House of Lords, reversing the decision of Sir *Edward Sugden*, reported L. & G. t. Sugd. 154, who had reversed the decision of his predecessor, Lord *Plunkett*, and in affirmance, therefore, of his decree, that these words did not create a trust in favour of E. B. Lawless. Lord *Cottenham*, C., with whose opinion Lord *Brougham's* coincided, observed, that the question was whether the words amounted to a trust, or only to an expression of opinion and advice; that, during the life of the testator, Lawless was his agent: but then, he was agent only during the testator's pleasure; and by the terms of the will, the testator desired that he should *continue* in the agency. Was that desire to be considered a command? If he was to *continue* to act as agent, the natural presumption was, that he was to continue on the same terms as during the life of the testator. If so, that was during the pleasure of the holder of the estate, and that negatived the presumption of an estate or interest vested in Lawless. That Shaw was tenant for life, and had the legal estate, but if Lawless's title was what it had been argued to be, he had an equitable charge on the legal estate of Shaw; and as he was to have the usual fees of 5*l.* per cent., the result would be, that Lawless would not only be an equitable incumbrancer to that amount, but would have a right to manage and direct the estate, and would have

full power over the conduct of the property. If so, the testator must have intended that Shaw, to whom he gave the estate for life, should not have the direction of his own estate; for the two powers of direction and management are inconsistent with each other. The testator, on this view of the case, must be taken to have intended that the legal devisee for life should not have the management, but that the equitable incumbrancer should have the control and management of the property. But the trustees of the will were, during a considerable part of the time, to have not only the management of the estate which the testator devised, but were authorised and directed to lay out part of the personalty,—the residue, in the purchase of other lands. If Lawless was the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he had a clear interest in the residue, for he might take one-twentieth part of the residue, he might file a bill to control the application of the residue, and claim to be absolutely interested in what he was entitled to receive; namely, the one-twentieth part. That, when it was seen to what absurd extent that construction of the will necessarily led, no one could hesitate in coming to the conclusion, that it was at least very doubtful how far this could possibly have been the intention of the testator. That it was true, that all the Court requires is, that the subject and object should be defined and certain. Then, what was the subject in the present case? It was the right to be employed in the receipt of the rents, and the agency and management of the lands of another person, upon the usual fees. What was the necessary effect of this alleged right? It went to exclude Shaw from the management of his own estate, or from the receipt of the rents themselves. Then this question arose: — Suppose that he parted with the estate, would it, in the hands of a purchaser, be subject to the same liability to this claim of agency on the part of Lawless? Was it the desire or the wish of the testator that it should be so?—or did he merely wish that his devisee should employ a man whose conduct had given satisfaction to himself?

The rule said by Lord *Cottenham* to have been laid down by the House of Lords in *Shaw* v. *Lawless*, is this, that though recommendation may, in some cases, amount to a direction and create a trust, yet, that being a flexible term, if such a construction of it be inconsistent with any positive provision in the will, it is to be considered as a recommendation, and nothing more: *Finden* v. *Stephens*, 2 Ph. 142; *Knott* v. *Cottee*, 2 Ph. 192; *Johnston* v. *Rowlands*, 2 De G. & S. 356.

In *Knight* v. *Knight*, 3 Beav.

148, the testator being entitled to real estates in tail male, with remainder to his cousins in tail, with remainder to himself in fee, as right heir of the settlor, as to part under a settlement made by his grandfather, and as to other part under the will of his grandfather, suffered a recovery and acquired the fee simple. He afterwards made his will, by which he devised all his estates, real and personal, to his brother, Thomas Andrew Knight, if living at his decease, and if not, to his son; and in case he should die before the testator, to his eldest son, or next descendant in the direct male line of his said grandfather, according to the purport of his will, under which the testator had inherited those estates his industry had acquired. He constituted the person who should inherit his said estates his sole executor and trustee, to carry the same and everything therein duly into execution, "confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he had made out of so large a property according to the plain and obvious meaning of his words." He then gave some small legacies, and proceeded thus:— "I trust to the liberality of my successors to reward any other my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." Thomas Andrew Knight survived the testator. It was held by Lord *Langdale*, M. R., that Thomas Andrew Knight took absolutely, observing, after an elaborate examination of the authorities, that, "on the whole he was under the necessity of saying, that, for the creation of a trust, which ought to be characterised by certainty, there was not sufficient clearness to make it certain that the words of trust were intended to be imperative; or to make it certain what was precisely the subject intended to be affected; or to make it certain what were the interests to be enjoyed by the objects."

Upon appeal to the House of Lords, the decision of Lord *Langdale* was affirmed, Lord Chancellor *Lyndhurst* coming to the conclusion, upon the whole of the will, that the testator had no intention of creating a trust; and, moreover, that it was doubtful to what property the recommendatory words applied,—whether it was to be confined to the estates the testator took from his grandfather, or whether personal as well as real property was to be included; and he considered the circumstance, that an indefinite portion of the personal property was to be disposed of according to the liberality of his successors, raised another difficulty in the way of consider-

ing this as an imperative trust. Lord *Cottenham* came to the conclusion, that the judgment ought to be affirmed, because, assuming that the property was sufficiently described, and which way it should go, there was sufficient upon the face of the will, according to the rule laid down by Lord *Alvanley* in *Malim* v. *Keighley*, 2 Ves. jun. 335, to show that the testator did not intend to take away from the devisee the discretion of defeating the devise expressed. See *Knight* v. *Boughton*, 11 C. & F. 513; *Scott* v. *Key*, 35 Beav. 291.

The Court will not imply a gift to a class, where there is an express gift over, in default of appointment, to or among that class: *Davidson* v. *Procter*, 14 Jur. 31. And see *Walsh* v. *Acton*, 4 Ves. 171; *Bird* v. *Wood*, 2 S. & S. 400; *Goldring* v. *Inwood*, 3 Giff. 139, 143.

Clear words of gift to a devisee for his own benefit, free from control, will not be cut down by subsequent words, which may operate as an expression of desire, without disturbing the previous devise: *Meredith* v. *Heneage*, 10 Price, 306; 1 Sim. 588; Sugd. Prop. 391. See, also, *Brook* v. *Brook*, 3 Sm. & Giff. 280.

In *White* v. *Briggs*, 15 Sim. 33, the testator gave his consumable articles, linen, china, &c., entirely to his wife's use, and added, that the same, together with all his jewels, trinkets, clocks, watches, and ornaments, *might be finally appropriated as she pleased, with the sum of* 4000*l. in money, but which sum he recommended her to divide in shares*, which he specified, amongst persons whom he named. Sir *L. Shadwell*, V. C., said, that, in *Heneage* v. *Meredith*, the objects of the recommendation were uncertain; but here, both the objects and the subjects were certain, and he therefore thought a trust was created. However, Lord *Lyndhurst* reversed the decree, upon the ground that the words, "to be finally appropriated as she pleased," applied to the 4000*l.* as well as to the jewels, &c., and therefore the case was to be governed by *Meredith* v. *Heneage:* Sudg. Prop. 400.

Where there is an absolute gift by will, followed by words sounding like a power, with a gift over if it be not exercised, there the Court gives effect to the absolute gift as such, and the gift over is held inconsistent with that absolute gift, and is therefore void. *Per* Sir *W. Page Wood*, V. C., *In re Mortlock's Trust*, 3 K. & J. 456, 457. And see *In re Yalden*, 1 De G. Mac. & G. 53; *Brook* v. *Brook*, 3 Sm. & G. 280; *Howorth* v. *Dewell*, 29 Beav. 18; *Scott* v. *Key*, 35 Beav. 291; *Lambe* v. *Eames*, 10 L. R. Eq. 267, 6 L. R. Ch. App. 596.

Secondly, *The subject matter of the recommendation or wish must be certain.*—Thus, in *Buggins* v. *Yates*, 9 Mod. 122, where a tes-

tator, who, having devised real property to his wife, to be sold for payment of his debts and legacies, in aid of his personal estate, declared, that he *did not doubt but his wife would be kind to his children*, it was insisted, that this constituted a trust of the personal estate; "but the Court was of opinion, that these words gave a right to no child in particular, nor a right to any particular part of the estate, but that the clause was void for uncertainty."

In *Sale* v. *Moore*, 1 Sim. 534, the testator gave and bequeathed to his wife all his worldly substance of what kind or nature soever, or wheresoever, upon trust for the following purposes:—1st, for payment of debts and funeral expenses, and of 100*l.* to a charitable institution, and 50*l.* a year to his sister for life. He then adds, "My brother being in affluent circumstances, and my eldest sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them anything in this my will, as I could not do it without taking from my wife's property, who is more in need of it. The remainder of what I shall die possessed of, after the payment of the aforesaid debts and legacies, I leave to my dear wife, *not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her.*" It was held by Sir *Anthony Hart*, V. C., that there was no trust for the next of kin, but that the wife took the residue absolutely. "Supposing," said his Honor, "that the words in this case would create a trust, those words are coupled with some degree of uncertainty. Who are the objects of the trust? Did the testator mean relations at his own death or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death? Various other considerations might be introduced to show that the objects are uncertain. There is no ground for taking away from the widow what the testator has not taken from her but vested in her absolutely. The case of *Dawson* v. *Clark* (15 Ves. 409) is a strong authority to show that the Court ought not to take away an absolute gift. He gives to her 'all his worldly substance of what nature or kind soever and wheresoever, upon trust for the following purposes.' He must, therefore, be intended to have all the purposes in his contemplation. He then says, 'My brother being in affluent circumstances, and my eldest sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them anything in this my will.' Is not this a conclusive indication, that, in the preceding part of the will, he

had pointed out every trust that he intended should fix upon the property? He then proceeds: 'As I could not do it without taking from my wife's property, who is more in need of it.' Why does he not take it from her? He might have made her a tenant for life only. But he says, that he takes nothing from her. Where, then, is the ground upon which a trust could attach? He goes on: 'The remainder of what I shall die possessed of,' &c. Now, the word 'consider' is a relative term. How is she to consider them as he would have done? How is the Court to find out how he would have considered his relations?" And see *Hoy* v. *Master*, 6 Sim. 568.

So, in an absolute devise or bequest to a person, "well knowing that he will remember" certain objects (*Bardswell* v. *Bardswell*, 9 Sim. 319), "do justice to," or "deal justly and properly to and by them" (*Le Maitre* v. *Bannister*, Prec. Ch. by Finch, 200, n. 1; *Pope* v. *Pope*, 10 Sim. 1), will not be construed as a trust, because no particular property is pointed out as the object of it. And see *Flint* v. *Hughes*, 6 Beav. 342; *Macnab* v. *Whitbread*, 17 Beav. 299; *Winch* v. *Brutton*, 14 Sim. 379; *Reeves* v. *Baker*, 18 Beav. 372; *Fox* v. *Fox*, 27 Beav. 301; *Greene* v. *Greene*, 3 I. R. Eq. 629.

Although there are words of recommendation in a will, they will not be construed as imperative, if an intention appear in any part of the will to give to the devisee a right or power to spend the property; for the Court, in its acuteness to extract the meaning, conceives it to be inconsistent with the intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure and by using that privilege to any extent, leave nothing, or more or less, to remain the subject of the trust: *Meredith* v. *Heneage*, 1 Sim. 556; and see *Curtis* v. *Ripon*, 5 Madd. 434. There the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear of God and love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." Sir *J. Leach*, V. C., held the wife absolutely entitled to the property, there being no ascertained part of it provided for the children, and the wife being at liberty at her pleasure to diminish the capital, either for the Church or the poor; and that the plain intention of the testator was to leave the children dependent on the wife. See also *Eaton* v. *Watts*, 4 L. R. Eq. 151.

So, where there is an absolute gift of property to a person, and a recommendation to give to a cer-

tain object, "what shall be left" at his death, or "what he shall die seised or possessed of" (*Wynne* v. *Hawkins*, 1 Bro. C. C. 179; *Sprange* v. *Barnard*, 2 Bro. C. C. 585; *Bland* v. *Bland*, 2 Cox, 349; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Attorney-General* v. *Hall*, Fitzg. 314; *Lechmere* v. *Lavie*, 2 My. & K. 197; *Pope* v. *Pope*, 10 Sim. 1; *Green* v. *Marsden*, 1 Drew. 646, 651); or what "he may have saved" out of an estate given for life (*Cowman* v. *Harrison*, 10 Hare, 234), or "the bulk of his said residuary estate" (*Palmer* v. *Simmonds*, 2 Drew. 221); "under no restriction to any stated property, but quite at liberty to give and distribute what and to whom she may please" (*In re Bond, Cole* v. *Hawes*, 4 Ch. D. 238); the subject will be considered as uncertain. See and consider *Constable* v. *Bull*, 3 De G. & Sm. 411.

In the case of *Re Pedrotti's Will*, 27 Beav. 583, a testator bequeathed the income of his residue to his widow for life, but desired "that in case anything should occur that her income was not sufficient, she shall be at liberty to go to the principal," and he gave the residue to his brothers. The residue only produced 30*l.* a year, and the widow claimed the whole capital. It was held by Sir *John Romilly*, M. R., that she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life.

In *Eade* v. *Eade* (5 Madd. 118), the testator bequeathed the residue of his personal property to his wife, requesting that she would at her death leave 200*l.* to each of the Miss Nortons, and leave the remainder of *her* property to his nephews George and William Eade, in such proportions as she thought proper. It was held by Sir *John Leach*, V. C., that the Miss Nortons were entitled to the 200*l.* each, but that no trust was created for the nephews. "A request or recommendation," observed his Honor, "will raise a trust, if the objects and the property are described with such certainty that the Court can execute it. The defendants, the Miss Nortons, are plainly entitled to the legacies of 200*l.* each; and if the testator had requested his wife at her death to leave the remainder of *his* property to George and William Eade, there would have been a clear trust in their favour, because the remainder of the testator's property could have been ascertained. I cannot say, that, by the remainder of *her* property at her death, he meant the remainder of *his* property. It must be understood to mean such property as she happened to possess at her death, from whatever source derived. This testator having therefore, in effect, left his wife at liberty to deal with the remainder of *his* estate as she

pleased, his request as to the *uncertain* property of which she might be possessed at her death, cannot create a trust."

In *Finden* v. *Stephens* (2 Ph. 142), the testator expressed it as his wish and desire that a certain person should be employed as agent, receiver, and manager of his estates whenever his trustees should have occasion for the services of a person in that capacity; it was held by Lord *Cottenham*, C., that no trust was created which such person could enforce. Amongst other objections to the bill filed by him, his Lordship remarked, there was the following:—"The plaintiff has not, and does not pretend to have, any present interest, but claims only to be employed as and when the trustees may have occasion for an agent, manager, or receiver; but *words of recommendation are never construed as trust, unless the subject be certain.*" See, also, *Shaw* v. *Lawless*, 5 C. & F. 129; but see *Williams* v. *Corbett*, 8 Sim. 349.

But it may be implied, from other parts of the will, controlling a recommendation to leave merely what property under the will the legatee was possessed of at his death, that the whole property at the testator's death was intended; and, in that case, the subject will be certain. Thus, in *Horwood* v. *West*, 1 S. & S. 387, the testator gave to his wife all his personal estate, *relying* that if she should marry again, she would secure *whatever she should possess under his will* for her separate use; and he *recommended* her to give, by her will, *what she should die possessed of* under his will to certain persons whom he named; it was held by Sir *John Leach*, V. C., that the wife's executor was a trustee of the whole of the property possessed by her under the will, for the persons named. "It is true," said his Honor, "that, in terms, his recommendation is, that she shall, by her last will and testament, give and bequeath what she shall die possessed of under and by virtue of that his will, in manner therein stated; and if these words were uncontrolled by any other part of the will, it would be to be implied that he had in his view only what she should happen to have left at her death, and not all that he had given to her. But in a prior part of the will he directs, that, upon a second marriage, whenever that may happen, the whole of the property which he gives to her, and not such part only as may have been then undisposed of by her, shall be secured to her separate use. A second marriage was at all times possible until her death; and whenever a second marriage happened, the whole of his property was to be secured; and a power to dispose of any part of the property absolutely, at any time during her life, is not to be reconciled to that provision, when he recommends her to give, in the manner stated, what she should

die possessed of under his will. I must, therefore, consider that he had in view the whole property which she should possess under his will; and that the expression is equivalent to a recommendation to give the whole property which she should so possess."

Thirdly, *The objects or persons intended to have the benefit of the recommendation or wish must be certain.*—In *Reid* v. *Atkinson*, 5 I. R. Eq. 373, a testator left his real and personal property to his wife for her life, with power to dispose of all the property, both real and personal, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were. It was held by the Court of Appeal in Ireland, reversing the decision of the Vice-Chancellor (reported, 5 I. R. Eq. 162), that the wife took the real and personal property absolutely, inasmuch as the terms of the gift did not amount to a precatory trust, and even if it had done so, there were no objects of the trust mentioned in the will. In *Harland* v. *Trigg* (1 Bro. C. C. 141), where a testator gave leaseholds to his "brother for ever, *hoping* he will continue them in the *family*," Lord *Thurlow*, C., held that no trust was created. "I take," said his Lordship, "the rule of law to be this, that two things must concur to constitute these devises,—the terms and the object. *Hoping* is in contradistinction to a direct devise; but whenever there are annexed to such words precise and direct objects, the law has connected the whole together, and held the words sufficient to raise a trust;—but then the *objects must be distinct;*—where there is a choice it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee, or if he had given them to any one part of the family, the others could have no remedy."

In a subsequent and much discussed case, the question arose, what was to be the construction of the word "family" where *freeholds* were devised to a person and her heirs for ever, in the *fullest confidence* that after her decease she would devise the property to the testator's *family;* but it was unnecessary to decide whether a trust was created, and for whom. See *Wright* v. *Atkins*, 17 Ves. 255; 1 V. & B. 313; 19 Ves. 299; G. Coop. 111, 125; T. & R. 162. With reference to this case, Sir *Edward Sugden* observes, "It was treated as clear, that the words

were sufficient to raise a trust if the objects were clearly ascertained. The result of the investigation seems to show that it will be difficult to maintain that the will clearly points out objects in whose favour the trust can be enforced. At all events, it cannot now be held, consistently with the opinions already expressed and acted upon by the House, that the trust was for the testator's heir-at-law at his death, and that the widow was a bare trustee, and had no power of appointment or of selection:" Sugd. Prop. 388. See also and consider *Green* v. *Marsden*, 1 Drew. 646; *Williams* v. *Williams*, 1 Sim. N. S. 358; *Gregory* v. *Smith*, 9 Hare, 708; *In re Terry's Will*, 19 Beav. 580; *Bernard* v. *Minshull*, Johns. 276.

In *Meredith* v. *Heneage* (1 Sim. 542), where the testator gave real and personal estates to his wife, in full confidence she would distinguish *the heirs* of his late father by devising the whole of his estate, together and entire, to such of his father's *heirs* as she might think best deserved her preference, the Lord Chief Baron, though his opinion was formed mainly upon another point, thought the objects were not certain,—whether the testator had pointed out the heirs-at-law of his father, as the objects to take the personal as well as the real estate, or the heirs and next of kin, or the next of kin only.

In *Sale* v. *Moore* (1 Sim. 534), where a testator bequeathed the residue of his property to his wife, not doubting that she would consider his *near relations* as he would have done if he had survived her, the Vice-Chancellor held the objects to be uncertain. "Did the testator," he asked, "mean relations at his own death, or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death?"

Where, however, the power is to be exercised by the donee by will, or at his death, or, as in the principal case, "at or before his death," the objects will be considered to be those who answer a particular description at the death of the donee, and there will be no uncertainty: *Pierson* v. *Garnet*, 2 Bro. C. C. 38, 226; *Atkyns* v. *Wright*, 17 Ves. 255; 19 Ves. 299; G. Coop, 111; 1 T. & R. 162; *Meredith* v. *Heneage*, 1 Sim. 558; *Knight* v. *Knight*, 3 Beav. 173; 11 C. & F. 513.

In *Griffiths* v. *Evan* (5 Beav. 241), A. devised an estate to B. in tail: and for want of issue of her body, "he empowered and authorised" her to settle and dispose of the estate to such person as she thought fit, by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family." B. appointed to her husband for life, with remainders over. It was held by Lord *Langdale*, M. R., that the appointment was void, the expres-

sion, "nearest family" being equivalent to heirs, and that the coheirs of the testator were entitled.

Where a trust has been created in favour of certain objects, by words of recommendation, such part of the property as is not wanted for the purposes of the trust will belong to the person upon whom the property has been conferred, subject to the trust, no resulting trust arising for the next of kin or heir-at-law; see *Wood* v. *Cox*, 2 My. & Cr. 684, overruling the judgment of Lord *Langdale*, M. R., reported 1 Kee. 317.

The case of *Irvine* v. *Sullivan*, 8 L. R. Eq. 673, proceeds on the same principle. There the testator after a devise of all his property to three trustees (whom he afterwards appointed executors) upon trust to sell, directed that, "the moneys arising from the said sale, and otherwise forming or representing my estate and effects, after payment of my just debts and funeral and testamentary expenses, and the expenses of carrying out the trusts of this my will, shall be paid by my said trustees, and I hereby give and bequeath the same to E. D. Irvine, widow, absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted. The testator had shortly before the date of his will, expressed to E. D. Irvine, to whom he had been for some time engaged to be married, his wish that she would, out of the property he should leave her, make gifts to certain persons. E. D. Irvine, after leaving the testator, wrote down his wishes, but the paper was not submitted to or signed by him. It was held by Sir *W. M. James*, V. C., that E. D. Irvine took the testator's estate beneficially, subject only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at 4*l.* per cent. from the expiration of one year from the testator's death: see also *Shelley* v. *Shelley*, 6 L. R. Eq. 540.

It is most important to observe that, although vagueness in the object will unquestionably furnish reasons for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual, and it is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Thus, in *Briggs* v. *Penny*, 3 Mac. & G. 546, the testatrix after giving among other legacies a sum of 3000*l.* to Sarah Penny, and a like sum of 3000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the

said Sarah Penny, "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed Sarah Penny sole executrix of her will. It was held by Lord *Truro*, C., affirming the decision of Sir *J. L. Knight Bruce*, V. C. (reported 3 De G. & Sm. 525), that Sarah Penny did not take the residue for her own benefit. "There is nothing," said his Lordship, "on the face of the words which necessarily implies what is vague or indefinite, as in those cases where the Court has held that the uncertainty of the object has afforded evidence that no trust was intended. . . . I agree with the Vice-Chancellor in interpreting 'views and wishes' to mean 'designs and desires.' And the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix's designs or desires, or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or in other words, to the same import, upon trust. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared; but still in such case it is clear a trust was intended, and that is sufficient to exclude the legatee from a beneficial interest. Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt or clear. In this case, however, we are not left to spell out a trust from the residuary clause alone: the fact that, besides a legacy of 3000*l.*, another legacy is expressly given to Miss Penny, 'in addition, for the trouble she will have in acting as executrix,' clearly shows that she was not intended to take the residue beneficially; because, if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief, which the fact warranted, that her estate was abundantly sufficient to satisfy all the bequests, there could be no object in taking out of that residue, of which she was to have the whole, 3000*l.* for her trouble: the fact of the legacy not only strongly confirms, but is only consistent with the hypothesis,

that the whole residue was not to be taken beneficially. It cannot be referable to the trouble she would have in the execution of the bequests in the will itself, or the proved codicils, for though the bequests are numerous, not one of them involves any amount of trouble; whereas, the views and wishes of the testatrix to which she alluded, might be such that the carrying them into effect might involve the executrix in very difficult trusts." See *Langley* v. *Thomas*, 6 De G. Mac. & G. 645: *Bernard* v. *Minshull*, Johns. 276.

Some doubt has recently been thrown upon the correctness of the decision in *Briggs* v. *Penny* (3 Mac. & G. 546), and it seems questionable whether words of so vague a character will ever again be held to create a trust. See *Stead* v. *Mellor*, 5 Ch. D. 225. There a testatrix gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces, A. and B., as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." A. and B. both survived the testatrix. It was held by Sir *G. Jessel*, M. R., that they both took the residue for their own benefit. "Beyond general principles," said his Lordship, "I find nothing in *Briggs* v. *Penny* to guide me to a conclusion in the present case. It was a decision on the particular words of a will. It has never been followed as far as I know; at any rate I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The words were 'well knowing that she' the legatee 'will make a good use and dispose of it in a manner in accordance with my' the testatrix's 'views and wishes,' Lord *Truro* appears to have been of opinion that the words 'well knowing' were equivalent to, if not synonymous with the expression 'in the fullest confidence,' and that they were used in such a manner as to exclude all option or discretion. With all deference to his Lordship, that is a most unsatisfactory reason. Why should the words 'well knowing' bear any other than their natural meaning? No reason is given why they should. However, that is the decision. Whether the case of *Briggs* v. *Penny* was rightly or wrongly decided (and I must not forget that it affirmed the decision of a very learned judge, the Vice-Chancellor *Knight Bruce*) it is distinguishable from the present case, and as the words are not the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean, and unless I find in the will something equivalent to a declaration that the residuary

legatees take as trustees, I must hold that they take a beneficial interest. The testatrix gives all her personal estate, except what she otherwise bequeathed by her will or any codicil thereto, to trustees upon trust to convert the same into money. It is clear that she knew how to create a trust. And then, after payment of her personal and testamentary expenses, and debts and legacies, she directs her trustees to hold the residue of her money upon trust for her two nieces, her desire being that they shall distribute such residue, not 'in accordance with my views and wishes,' as in the case before Lord *Truro*, or 'as they know will be most agreeable to my wishes,' but 'as they think will be most agreeable to my wishes.' What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal? But for the case of *Briggs* v. *Penny*, this case would not have been arguable."

Powers in the nature of Trusts—when executed by the Court.]—Hitherto, those cases arising upon words of recommendation have been considered, by which a trust simply has been held to be created. There is, however, another class of cases within which the principal case falls, and is a leading authority, of a similar nature, where powers are given to persons, accompanied with such words of recommendation in favour of certain objects, as to render them powers in the nature of trusts; so that the failure of the donees to exercise such powers in favour of the objects will not turn to their prejudice, since the Court will, to a certain extent, take upon itself the duties of the donees. See *Gower* v. *Mainwaring*, 2 Ves. 87; *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Reid* v. *Reid*, 25 Beav. 469; *Izod* v. *Izod*, 32 Beav. 242; *Re Caplin's Will*, 34 L. J. N. S. (Ch.) 578.

It is perfectly clear that where there is a mere power of disposing, and that power is not executed, the Court cannot execute it. Per Lord *Eldon* in *Brown* v. *Higgs*, 8 Ves. 570.

It is equally clear, that, whereever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. Per Lord *Eldon*, in *Brown* v. *Higgs*, 8 Ves. 570; and see *Attorney-General* v. *Lady Downing*, Wilm. 7, 1 Amb. 550; *Attorney-General* v. *Hickman*, 2 Eq. Ca. Ab. 193; *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194; *Mosely* v. *Mosely*, Rep. t. Finch. 53; *Wainwright* v. *Waterman*, 1 Ves. jun. 311; *Gude* v. *Worthington*, 3 De G. & Sm. 389.

But there is not only a mere trust and a mere power, but there is also known to the Court a power which the party to whom it is

given is intrusted and required to execute; and with regard to that species of power the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place. Upon that principle, the case of *Harding* v. *Glyn* (1 Atk. 469) proceeded. Per Lord *Eldon*, 8 Ves. 570.

The doctrine laid down in the principal case was approved of and acted upon in the leading case of *Brown* v. *Higgs*, which was twice heard before Lord *Alvanley*, as reported in 4 Ves. 708, and 5 Ves. 495, and before Lord *Eldon*, upon appeal, as reported in 8 Ves. 561, and affirmed in the House of Lords (see 5 My. & Cr. 92). In that case, the testator bequeathed a leasehold estate to John Brown, upon trust, subject to certain charges, to employ the remainder of the rent to such children of his nephew, Samuel Brown, as John Brown shall think most deserving, and that will make the best use of it, or to the children of his nephew, William Augustus Brown, if any such there are or shall be. John Brown died in the lifetime of the testator, and William Augustus Brown had no children. It was held by Lord *Alvanley*, that the children of Samuel Brown were entitled, in equal shares, to the leasehold estate. "The question," said his Lordship, upon the re-hearing (5 Ves. 500), "is, whether this sentence in the will, upon which the question arises, is to be considered as merely giving John Brown a power, if he thinks fit, to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether, upon the true construction, it is anything more or less than a mere trust in him, with a power to single out any he might think more deserving, but a gift to him in trust for those children, at all events; and I am of the same opinion, upon very full consideration, and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown; and that his non-exercise of that power, or the circumstance of his being incapable of exercising it, will not prevent the objects of the testator's bounty from taking in some manner, though the power of distribution, on account of the death of the testator, cannot be exercised." See *Meller* v. *Stanley*, 2 De G. Jo. & Sm. 183, 191; *Carthew* v. *Enraght*, 26 L. T. Rep. N. S. 834; *Re Jeffery's Trusts*, 14 L. R. Eq. 136; *In re Hargrove's Trusts*, 8 I. R. Eq. 256, and the cases there cited.

The case of *The Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. 61, is certainly very difficult to reconcile with *Harding* v. *Glyn*, or with *Brown* v. *Higgs*. "But the

question," Lord *Eldon* has observed, "is not whether one case is to be reconciled with others, but whether all the cases have gone upon a principle which professes to save whole *Harding* v. *Glyn*. Lord *Hardwicke*, in *The Duke of Marlborough* v. *Lord Godolphin*, does not say that, where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case this Court would not act; but he collected, from the scope and object of the disposition in that case, taken altogether, the opinion, that it was a case in which the person having a power to dispose of the sum of 30,000*l*. had a mere power, not clothed with any duty requiring her to execute it; and, therefore, as to what was not disposed of, the Court could not interfere:" *Brown* v. *Higgs*, 8 Ves. 576.

In *Burrough* v. *Philcox*, 5 My. & Cr. 72, a testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed;" and after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared, that, in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned: that is to say, the survivor of his two children should have power to dispose by will of his real and personal estate "amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper." It was held by Lord *Cottenham*, that a trust was created in favour of the testator's nephews and nieces, and their children, subject to a power of selection and distribution in his surviving child. "When there appears," observes his Lordship, "a general intention in favour of a class, and a particular intention in favour of individuals of a class, to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises, as stated by Lord *Eldon*, in *Brown* v. *Higgs* (8 Ves. 574), of the power being so given as to make it the duty of the donee to execute it; and, in such case, the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit. . . . In this case, the intention is not to be found only in the power given to select and distribute; for the testator has directed his trustees to hold the property until the contingency has happened, and, as to the land, that it shall not be alienated in the meantime; and has himself declared, that, in the events which have happened, the property should be disposed of as

after mentioned. This is imperative, and is conclusive as to the intention that the subsequent gift should take effect; but the only disposition after mentioned is the provision for the nephews and nieces, and their children, subject to the selection and distribution of the survivor of his son and daughter.

"Much argument was urged at the bar, upon the ground that the donee of the power had no estate in the property under the will beyond a life interest. In my view of the case this is quite immaterial. It is not, certainly, one of those cases in which property is given, with expressions added as to the disposal of it, which are held to fix a trust upon the gift, but the whole is given to trustees; and the question is, whether there be found in the will a sufficient declaration of who, in the events which have happened, are to be the cestuis que trust; and if that be sufficiently expressed, it is immaterial whether the donee of the power be also a trustee, or whether the trust be vested in others.

"In *Birch* v. *Wade* (3 V. & B. 198), the property was given in trust, and the donee of the power was only tenant for life.

"In this case, upon the authority of *Brown* v. *Higgs*, I think myself justified in giving effect to the intention, which appears to me to be sufficiently apparent upon the will, of giving the property to the nephews and nieces, and their children, subject to the selection and distribution of the survivor of the son and daughter, and that they all constitute the class to take all the property as to which no such selection and distribution has been made."

The mode in which the Court will execute a power in the nature of a trust, depends upon terms of the instrument by which the property is settled.

If in such instrument a rule is laid down for the guidance of the trustees which they have not acted upon, then the Court will act upon it, exercising the same judgment as the trustees might have done. Thus, in *Gower* v. *Mainwaring*, 2 Ves. 87, J. Mainwaring executed a trust deed, by which the trustees were to give the residue of his real and personal estate among his "friends and relations," where they should see most necessity, and as they should see most equitable and just. Two of the trustees being dead, and the third refusing to act, Lord *Hardwicke*, C., held that the word "friends," meant "relations," within the Statute of Distributions, and it was referred to the Master to inquire and consider how it might be most equitably and justly divided. "What differs this," said Lord *Hardwicke*, "from the cases mentioned, is this, that here is a rule laid down for the trust. Wherever there is a trust or power (for this is a mixture of both), whether

arising on a legal estate, or reserved to be exercised by trustees barely according to their discretion, I do not know the Court can put themselves in the place of those trustees to exercise that discretion. Where trustees have power to distribute *generally, without any object pointed out or rule laid down*, the Court interposes not, unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down* (and the word 'friends' is synonymous to 'relations,' otherwise it is absurd). *The trustees are to judge on the necessity and occasion of the family, the Court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees, and* when informed by evidence of the necessity can judge what is equitable and just on this necessity:" and see *Hewett* v. *Hewett*, 2 Eden, 332; *Anon.* 1 P. Wms. 327; *Widmore* v. *Woodroffe*, Amb. 636; *Brunsden* v. *Woolredge*, Amb. 507; *Attorney-General* v. *Buckland*, 1 Ves. 231, Amb. 71, cited; *Green* v. *Howard*, 1 Bro. C. C. 33; *Mahon* v. *Savage*, 1 Scho. & Lef. 111; *Maberley* v. *Turton*, 14 Ves. 499; *Liley* v. *Hey*, 1 Hare, 580; *In re Phene's Trusts*, 5 L. R. Eq. 347; *Butler* v. *Gray*, 5 L. R. Ch. App. 26, 31.

Where, however, no rule has been laid down in the instrument creating the power as to the mode in which it is to be executed, the Court, acting upon the maxim that equality is equity, will make an equal division among the persons who are objects of the power in the nature of a trust. Thus, in *Doyley* v. *The Attorney-General*, 2 Eq. Ca. Ab. 194; 4 Vin. Ab. 485, 486, the testator gave property in trust for certain purposes, and subject thereto the trustees and the survivor of them, and the heirs and executors of such survivor, were to dispose of it to such of his relations on his mother's side who were most deserving, and in such manner as they should think *fit, and* for such charitable uses and purposes as they should also think most proper and convenient. The power having devolved on the Court, Sir *Joseph Jekyll*, M. R., directed that one half of the property should go to the testator's relations on the mother's side, and the other half to charitable uses. He said the known rule that equality is equity was the best measure to go by. That he had no rule of judging of the merits of the testator's relations, and could not enter into spirits, and therefore could not prefer one to the other, but that all should come in without distinction.

In *Salusbury* v. *Denton*, 3 K. & J. 529, a testator by will gave a fund to be at the disposal of his widow by her will, "therewith to apply a part" for a charity, "the remainder to be at her disposal among

my relations, in such proportions as she may be pleased to direct." The widow died without exercising the power of determining the proportions in which each were to take. It was held by Sir *W. Page Wood*, V. C., that the bequest was not void for uncertainty, but that the Court would divide the fund in equal moieties, and give one of such moieties to charitable purposes, and the other moiety to such of the testator's relatives as were capable of taking within the Statute of Distributions. See also *Gough* v. *Bult*, 16 Sim. 45, 231; *Longmore* v. *Broom*, 7 Ves. 124; *Penny* v. *Turner*, 2 Phill. 493; *Fordyce* v. *Bridges*, Ib., 497; *Re White's Trusts*, Johns. 656; *Little* v. *Neil*, 10 W. R. (V. C. K.) 592; *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. Rep. 332; *Gray* v. *Gray*, 13 Ir. Ch. Rep. 404; *Izod* v. *Izod*, 32 Beav. 242; but see *Down* v. *Worrall*, 1 My. & K. 561, and the remarks thereon of Sir *W. Page Wood*, V. C., in *Salusbury* v. *Denton*, 3 K. & J. 538.

A distinction may be here noticed between two classes of cases —the first where there is a gift to a class with a subsequent power of appointment amongst the class; the second, where there is no gift to the class except in or by means of the power. With regard to the first class of cases the general principle seems to be this: If the instrument itself gives the property to a class, but gives power to the donee to appoint in what shares, and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment. Thus, in *Lambert* v. *Thwaites*, 2 L. R. Eq. 151, by a post nuptial settlement, certain freehold property was conveyed to trustees upon trust to pay the rent to W. and his wife during their lives, and after the decease of the survivor upon trust to sell and divide the proceeds amongst all and every the children of W. in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before W., who died without executing the appointment. It was held by Sir *R. T. Kindersley*, V. C., that the property was vested in all the children liable to be divested by the execution of the power; and the power not having been executed, the representatives of the deceased child were entitled to his share. See also *Davy* v. *Hooper*, 2 Vern. 665; *Madoc* v. *Jackson*, 2 Bro. C. C. 588; *Hockley* v. *Mawbey*, 1 Ves. jun. 143; *Jones* v. *Torin*, 6 Sim. 255; *Falkner* v. *Lord Wynford*, 9 Jur. 1006; *Fenwick* v. *Greenwell*, 10 Beav. 412.

If in such a case the power had been exercised in favour of the surviving children, they only would have taken. This was decided in *Woodcock* v. *Rennock*, 4

Beav. 190; 1 Ph. 72; but Lord *Langdale*, M. R., in that case seems erroneously to have expressed an opinion that where a power in such a case is to be exercised by will, those of the class only who are living at the death of the donee of the power are entitled to take in default of appointment. See also *Winn* v. *Fenwick*, 11 Beav. 438. But see the remarks upon these cases in *Lambert* v. *Thwaites*, 2 L. R. Eq. 158; *Freeland* v. *Pearson*, 3 L. R. Eq. 658.

With regard to the second class of cases before alluded to, it may be laid down that if the instrument does not contain a gift of the property to any class, but only a power to the donee to give it as he may think fit, among members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it. Thus, in *Walsh* v. *Wallinger*, 2 Russ. & My. 78, a testator bequeathed the residue of his estate to his wife for her own use and benefit, "*trusting that she would at her decease give and bequeath* the same to the children in such manner as she should appoint." Now, in this case, there was no gift in express terms to the children by the testator, nor was there any direction that they were to take in default of appointment; and, therefore, it could only be inferred from the power itself who were to take in default of appointment; and inasmuch as the power was only to be exercised *by will*, and, therefore, could only be exercised in favour of those children who should be living at the testator's death, the conclusion almost necessarily was that the intention of the testator was that those only who survived the wife should take, and so it was decided. See also *Kennedy* v. *Kingston*, 2 J. & W. 431.

With regard to the mode in which the Court of Chancery will execute a power in favour of "relations," the result of the decisions is that the Court, as a convenient rule of construction, will adopt the Statute of Distributions as the means of determining who are comprehended under the term "relations," but although this is the case, it is clear that a donee with a power of *selection*, may go beyond the rule adopted by the Court, and exercise it in favour of relations of the donor, who are not within the degree of next of kin: *Supple* v. *Lowson*, Amb. 729; *Spring* v. *Biles*, 1 T. Rep. 435, n.; *Crawys* v. *Colman*, 9 Ves. 324; *Mahon* v. *Savage*, 1 S. & L. 111; *Forbes* v. *Ball*, 3 Mer. 437; *Grant* v. *Lynam*, 4 Russ. 292, overruling *Brunsden* v. *Woolredge*, Amb. 507; 1 Dick. 380; *Salusbury* v. *Denton*, 3 K. & J. 529.

The same rule has been applied

with respect to personal estate, where the words "relations" or "friends" (*Re Caplin's Will*, 34 L. J. N. S. Ch. 578, 2 Dr. & Sm. 527), or where the word "family" has been used in place of "relations:" *Cruwys* v. *Colman*, 9 Ves. 319; *Grant* v. *Lynam*, 4 Russ. 297.

Where, however, the donee has merely a power of *distribution*, and not a power of *selection*,—if, for instance, he has a power to appoint among relations, and not amongst such of them as he thinks fit, or words of that effect, an appointment to relations not being next of kin would be void: *Pope* v. *Whitcombe*, 3 Mer. 689; and see *Clapton* v. *Bulmer*, 10 Sim. 426; 5 My. & Cr. 108; *Lawler* v. *Henderson*, 10 I. R. E. 150.

And if the power of selection is confined to a particular class, the donee cannot go beyond it. Thus, a gift to the testator's "nearest relations," as A. may appoint, will only authorise an appointment to next of kin under the Statute of Distributions: *Goodinge* v. *Goodinge*, 1 Ves. 231; *Edge* v. *Salisbury*, Amb. 70.

In cases of charities in favour of "poor relations" (*White* v. *White*, 7 Ves. 423; *Attorney-General* v. *Price*, 17 Ves. 371; *Mahon* v. *Savage*, 1 S. & L. 111), or where the testator has himself furnished some test by which relations extending beyond the Statute of Distributions may be discovered (*Bennett* v. *Honywood*, Amb. 708), the Court of Chancery will not confine itself, as in ordinary cases, to relations within the Statute of Distributions.

On the death of the donee of a power imperative as a trust, without having made an appointment, the question arises, at what period the classes to be ascertained in whose favour will the Court execute the power,—whether in favour of persons composing a certain class at the death of the donor, or at the death of the donee of the power. It seems, however, to be clear, that when, as in the principal case, the donee of such a power has a *life* interest in the subject of the power, which he might execute in favour of "relations," on his death, without having done so, the Court will execute it, not in favour of those who are next of kin at the death of the donor, but of those composing that class at the death of the donee; see *Doyley* v. *Attorney-General*, 2 Eq. Ca. Ab. 194, pl. 15; *Witts* v. *Bodington*, 3 Bro. C. C. 95; *Cruwys* v. *Colman*, 9 Ves. 319, 325; *Birch* v. *Wade*, 3 V. & B. 95; *Winn* v. *Fenwick*, 11 Beav. 438; *Tiffin* v. *Longman*, 15 Beav. 275; *Finch* v. *Hollingsworth*, 21 Beav. 112; *Re Caplin's Will*, 34 L. J. N. S. Ch. 578; 2 Dr. & Sm. 527; sed vide *Hands* v. *Hands*, 1 T. R. 437, n. cited; *Grieveson* v. *Kirsopp*, 2 Keen, 653; *Re White's Trusts*, Johns. 656.

But where the distribution or selection is not suspended by the existence of any preceding estate for life, those who are to take are such as answered the description of next of kin of the testator at his death: (*Cole* v. *Wade*, 16 Ves. 27. And see *Brown* v. *Higgs*, 4 Ves. 708; *Longmore* v. *Broome*, 7 Ves. 124;) and the same persons will take when the donee of the power having a life interest dies in the lifetime of the testator: *Penny* v. *Turner*, 2 Ph. 493; *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. Rep. 332.

Another question may arise in the exercise of such a power by the Court, viz., what share persons who, by representation under the statute, would only be entitled per stirpes, will take? It seems, that they will take per capita; upon this principle, that the Court merely adopts the statute for the sake of convenience, in finding out the persons intended by a term which would otherwise be void for uncertainty; and when found out, they take, not under the statute, but under the will as joint tenants; see *Walter* v. *Maunde*, 19 Ves. 427, 428; and see *Pope* v. *Whitcombe*, 3 Mer. 689; *Hinckley* v. *Maclarens*, 1 M. & K. 27; *Withy* v. *Mangles*, 4 Beav. 358; 10 C. & F. 215; *Re White's Trusts*, Johns. 656; *Halton* v. *Foster*, 3 L. R. Ch. App. 507.

Although the subject be not capable of division, or one object out of a class is to be selected by the trustee, the Court will, if possible, execute the power, on the default of the trustee: *Richardson* v. *Chapman*, 7 Bro. P. C. 318, Toml. edit.; *Moseley* v. *Moseley*, Rep. t. Finch, 53; *Brown* v. *Higgs*, 5 Ves. 504.

In *Cruwys* v. *Colman*, 9 Ves. 319, the testatrix bequeathed to her sister B., for life, declaring that it was her *absolute desire* that she bequeathed to those of her own family what she has power to dispose of, *provided they behaved well to her, with decency and affection.* B., by her will, declared she meant to make no disposition of her sister's property. Sir *William Grant*, M. R., held that, as all that B. said was, that she did not intend to execute the power, the trust remained unexecuted, and was consequently to be executed by the Court in favour of the next of kin of B. But his Honor said, that a difficulty might have arisen if B. had declared her own relations had behaved ill to her, and therefore she had resolved not to give them any part of the property. The question then would have been, whether she was not constituted sole judge of the propriety of the behaviour of her family, and whether it was not an intestacy in the testatrix, the condition failing.

It may here be remarked, that, although a devisee may be bound to devise an estate according to the confidence reposed in him, or in default of appointment it will

go to the object designated by the testator, yet, in respect of enjoyment, all the rights and incidents of property, for instance, the right of felling timber, will remain in the devisee during his life to the extent of the estate vested in him. Thus, in *Wright* v. *Atkyns* (17 Ves. 255), a testator gave all his leasehold, freehold, and copyhold estates, of whatever tenure or tenures, unto his mother, Charlotte Atkyns, and her heirs for ever, *in the fullest confidence, that, after her decease, she would devise the property to his family;* and he charged the premises with the payment of his debts, and gave to her all his personal estate, and appointed her his executrix. The testator, who died possessed of no leaseholds, left his nephew his heir-at-law. Sir *William Grant*, M. R., held that there was no uncertainty, but that it was a trust for the testator's heir, and that therefore Mrs. Atkyns was to be considered as tenant for life of the estate. Lord *Eldon* afterwards granted an injunction restraining her from cutting down trees, or committing waste: 1 V. & B. 313; 19 Ves. 299; G. Coop. 111, 125. Upon an appeal to the House of Lords, the decree was reversed, so far as it declared Mrs. Atkyns only tenant for life, without prejudice to any question which might arise touching the construction of the testator's will, on the death of Charlotte Atkyns; and the order for the injunction, so far as it was founded on the declaration that Mrs. Atkyns was only tenant for life, was reversed, and Mrs. Atkyns, was to apply to the Court of Chancery, as she might be advised, touching such injunction, or any other ground. There being no remaining incumbrance on the estate, Lord *Eldon* dissolved the injunction, upon the application of Mrs. Atkyns: Sugd. Prop. 382. The person who was the testator's heir at his death, having died, a bill was filed by his devisees and the heiress-at-law of the original testator, not praying any declaration of rights, but praying an account of timber sold, and an injunction. Lord *Eldon* gave Mrs. Atkyns, power to cut timber in a husbandlike manner, giving an account, and paying the money into Court. See T. & R. 143. This order being considered to be in opposition to the principle upon which the House of Lords reversed the decree, a second appeal was made to the House in the same session, and the decision of Lord *Eldon* was reversed, the judgment of the House of Lords declaring that, according to the true construction of the testator's will, the intention of the testator must be taken to have been to give to the appellant a right to cut the timber for her own use. See Sugd. Prop. 384.

Control of the Court over the Exercise of Powers.]—A Court of equity has not in general, in the

absence of *mala fides* on the part of the donee, any jurisdiction to interfere with, or compel him to execute a mere discretionary power: *Brown* v. *Higgs*, 5 Ves. 501; 8 Ves. 570; *Pink* v. *De Thuisey*, 2 Madd. 157; *French* v. *Davidson*, 3 Madd. 396; *Walker* v. *Walker*, 5 Madd. 424; *Down* v. *Worrall*, 1 My. & K. 561; *Meredith* v. *Heneage*, 1 Sim. 554; *Costabadie* v. *Costabadie*, 6 Hare, 410; *Kekewich* v. *Marker*, 3 Mac. & G. 311; *In re Wilkes's Charity*, Ib. 440; *White* v. *Grane*, 18 Beav. 571; *Hart* v. *Tribe*, 19 Beav. 149; 32 Beav. 279; *Bonser* v. *Kinnear*, 2 Giff. 195.

Where a testator proposes to recommend any person to the favourable regard of another, whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favour of such person, or to express a wish without conferring a right. In the former case a clear and definite trust should be created, and in the latter, words negativing such a construction of the testator's words should be used. Equivocal language in these cases has given rise to much litigation: 2 Jarm. on Wills, App. 686, 2nd Ed.

REES *v.* BERRINGTON.

April 28, 1795.

[REPORTED 2 VES. JUN. 540.]

RELEASE OF SURETY BY THE CREDITOR GIVING TIME TO DEBTOR.]—*Obligee in a bond with a surety, without communication with the surety, takes notes from the principal, and gives farther time; the surety is discharged.*

THOMAS, Daniel, and Richard Blachford, carried on business as lacemen, in partnership, till the death of Thomas.

On taking the accounts, a balance of 2972*l.* 3*s.* 5*d.* appeared to be due from the partnership to Robert Pope Blachford, as administrator of Thomas; to secure which sum, and 466*l.* 13*s.* 4*d.* (agreed to be secured to Robert Pope Blachford, as Thomas's share of the debts due to the partnership), a joint and several bond, dated September 30th, 1787, was executed by the surviving partners, and by James Rees as surety, with condition to be void on payment of the said sums with interest, by instalments, upon the 31st of December, 1789, and the 31st of December, 1790.

In the beginning of September, 1790, Robert Pope Blachford died.

Upon the 27th of September, 1790, the whole of the money and interest secured by the bond remaining unpaid, James M'Kenzie, under the authority and on behalf of the executors of Robert Pope Blachford, came to an arrangement with Daniel and Richard Blachford, concerning the money due on the bond and the interest, and, for the first instalment due on the bond, took their promissory notes, payable on the 21st of April, 21st of July,

and 21st of October, 1791, and the 21st of January and 21st of April, 1792; and, for the second instalment to become due upon the bond, took three other promissory notes, payable on the 21st of July and 21st of October, 1792, and the 21st of January, 1793.

Daniel and Richard Blachford, at different times on and before the 18th of October, 1792, paid to the executors of Robert Pope Blachford, or to M'Kenzie, on their behalf, the first three of the first set of notes, and the interest due upon them; and about the 20th of October, 1792, by a new arrangement all the remaining notes were exchanged for four other notes, dated October 22nd, 1792, and payable on the 25th of May, 25th of June, 25th of September, and 25th of December, 1793.

About the 7th of December, 1792, a commission of bankruptcy issued against Daniel and Richard Blachford; and the executors of Robert Pope Blachford proved, under that commission, a debt of 2327*l.* 14*s.* 11*d.*, by virtue of the bond and the four notes dated October 22nd, 1792.

Rees was captain of an East India ship, and left England in April, 1788; returned in August, 1789; sailed again in April, 1791, and returned in July, 1792. In August, 1792, he had in his hands the sum of 3000*l.*, received by him in India for Daniel and Richard Blachford; and no communication having taken place between him and the executors of Robert Pope Blachford, respecting their transactions with Daniel and Richard, he, in November, 1792, paid over that sum to the Blachfords.

After the bankruptcy the executors brought an action against Rees for 2400*l.*, as remaining due on the bond; upon which he filed a bill for an injunction.

Solicitor-General and Mr. *Hollist*, for the plaintiff.—*Skip* v. *Huey*, 3 Atk. 91; *Nisbet* v. *Smith*, 2 Bro. C. C. 579, and many early cases, support this bill. This plaintiff could have indemnified himself by the money he had in his hands in 1792. A surety is bound as such for the

debt and risk described in the instrument, in case the principal does not pay. The creditor has no right to increase the risk without consent of the surety, and therefore cannot vary the original contract, for that varies the risk. If the holder of a bill of exchange gives time to the acceptor, the indorser is discharged, because he is simply a surety. The principle is the same upon policies of insurance, in cases of deviation, however slight: Wescot upon Insurance, 178.

(*a*) Afterwards Earl of Rosslyn. Variation from policy of insurance, though perfectly immaterial, discharges the insurer.

Lord Chancellor Loughborough (*a*).—It is perfectly settled: and even where it is demonstrable that the alteration was perfectly immaterial, as in the case of an African ship that was to sail from Lancaster with so many men; in fact, she took part of her men at Beaumaris.

Mr. *Graham*, for the defendants.—It is not received as a general principle, that the obligee in a bond is bound to call for the money on the very day; it seldom happens that the obligor thinks of paying at the day, or that the obligee puts the bond directly in suit. The rule, as to the indorser of a bill of exchange, arises from the course of trade, which requires it. A surety has a right, if the bond is not put in suit, to call upon the holder of it to enforce payment. The circumstance of his remedy in this Court marks the difference between the cases. Still more different is the case of insurance from the general course of trade, that, undertaking to indemnify against any loss in one particular voyage, must be strictly adhered to. Here is nothing like a fraudulent intention to throw the burthen on the plaintiff. It is too much to say he is to be discharged, because they did suspend the action a short time; and it is not too much to assume, either that the indulgence was with his concurrence, or that he was guilty of negligence, as he was in England a considerable part of the time, and might have called on them to put the bond in suit; and then he would have discovered that they had bound themselves not to do so. In *Nisbet* v. *Smith* (*b*), no ulterior time was given against the express directions of the surety; upon which Lord *Thurlow* relied.

(*b*) 2 Bro. C. C. 579.

Heath v. *Percival*, 1 P. Wms. 682, is a stronger case. There Percival might be considered only as surety in a bond, and the time of payment was varied.

Lord Chancellor Loughborough.—Percival never could be a surety, whether that case is right or wrong. He should have taken up his bond if he went out of the trade.

The form of the security forces these cases into equity; but, take it out of that form, and suppose, in this instance, that the plaintiff was a surety by a proper bond at law as surety, what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety; but if he could establish that at law, the principle at law is, that he has an interest in the condition; and if the period is extended, that totally defeats the condition, and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months, with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear principals, but establish the fact that he is surety; he is surety to a definite, not an indefinite engagement.

Here, upon the second instalment, the defendants have extended the time before that instalment became due; if the time is extended after it becomes due, that makes a difference at law, for then the bond has been once forfeited.

It is perfectly plain, from the nature of the engagement, that the plaintiff became security that the debt should be paid at two periods; one has elapsed. The obligee thinks fit totally to change the nature of the security and the credit; he takes notes, gives a farther time for payment, and repeats the same thing at the second instalment, which was not then due; and, doing this, he does this material injury to the surety; he has a right the day

after the bond is due, to come here and insist upon its being put in suit; the obligee has suspended that till the time contained in the notes runs out; therefore, he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it. The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires. It is a breach of the obligation in conscience and honesty; and, it is not too much to say, of that obligation in point of law.

I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built; but it is plain here, if the plaintiff had been informed of these transactions and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security. I do not ground much upon it, for the case would be the same if those circumstances had not come out clearly in evidence.

This produces no inconvenience to any one; for it only amounts to this, that *there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement.*

The authorities fully warrant me in this, though I should have granted the injunction, even without that strong authority before Lord *Thurlow* (*a*) which is rather less favourable for the surety. There, the creditor being called upon, did put the bond in suit. If he had

(*a*) *Nisbet* v. *Smith*, 2 Bro. C. C. 579.

Creditor sues

proceeded, the consequence would have been only that he would have had the person in custody; it would have been no payment, thinking, that, by leaving the debtor at large, and taking a judgment against him which affected all his property, he pursued a better mode; using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit and holding him in prison; but he did it without consulting the surety, and, therefore, Lord *Thurlow* held, and very rightly, that the surety was discharged.

the principal by direction of the surety, but, without his privity, agrees to stay execution: the surety is discharged.

The transaction in this case was much more mischievous; after circumstances of communication that shewed great embarrassment, great difficulty, and great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who, in the interval, had given up the fund, which, probably, was the inducement to him to be the security.

Without entering into a review of those cases in which a surety may be discharged from his liability by the appropriation of payments made by the principal to the creditor, or by the creditor, or which would be made by the law, it is proposed in this note to consider the subject discussed in the principal case, viz., what acts, on the part of the creditor, will have the effect of discharging a person from his liability as surety.

In doing so, it is proposed to notice:—I. Where the contract of suretyship is invalidated in its inception by fraud as misrepresentation or concealment. II. Discharge of the surety by a departure from the terms of the contract. III. Discharge of the surety by the creditor giving time to the principal debtor. IV. Discharge of surety by the creditor agreeing with the principal debtor to give time to the surety himself. V. How far a release or composition given or entered into by the creditor to or with the debtor releases the surety. VI. When a surety is discharged by the creditor taking another security from the debtor. VII. How far a release or discharge of one surety by the creditor will operate as a discharge of another. VIII. Discharge of surety by the

creditor not making a proper use of the securities. IX. Different views formerly taken as to the liabilities of sureties by law and equity.

I. *Where the contract of suretyship is invalidated in its inception by fraud, as misrepresentation or concealment.*]—In examining the cases upon this subject, it must be kept in mind that the intimate nature of the relation between the parties to the contract of suretyship, requires that perfect good faith should be adhered to by them. Wherever, therefore, with the knowledge or assent of the creditor, there is any misrepresentation to, or even concealment from, the surety, with regard to any material fact, which, had he been aware of, he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities. Suppose, for instance, with the assent or knowledge of the creditor, there is a misrepresentation to a person who becomes surety on a promissory note, for say the sum of 2600*l.*, that 800*l.* due by the debtor on a former account had been paid, whereas it was deducted from the 2600*l.*, so that the debtor only got 1800*l.*, the surety will be released from his liability on the promissory note. *Stone* v. *Compton*, 5 Bing. (N. C.) 142; 6 Scott, 846. Again, suppose that a servant had committed defalcations in his master's service, and had agreed to repay them at the rate of 3*l.* a month, and that the master had concealed this fact from a person who afterwards gave him a continuing guarantee for the honesty of the servant, this would amount to a fraud on the surety, which would relieve him from all liability on the contract: *Phillips* v. *Foxall*, 7 L. R. Q. B. 666. And see *Smith* v. *The Bank of Scotland*, 1 Dow, 274.

Upon the same principle, where it was agreed between the vendors and vendee of goods that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors, and the payment of the goods was guaranteed by a third person as surety, but the bargain between the parties was not communicated to him, it was held that the transaction was a fraud on the surety, and that the guarantee was consequently void; *Pidcock* v. *Bishop*, 3 B. & C. 605. So a concealment by the creditor that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount of which the surety was ignorant, has been held to be evidence to go to the jury of such fraud on the surety as would discharge him from liability: *Lee* v. *Jones*, 14 C. B. N. S. 386; 17 C. B. N. S. 507; 13 W. R. (C. P.) 318; 34 L. J. (C. P.) 131. See also, *Allan* v. *Houlden*, 6 Beav. 148; *Cecil* v. *Plaistow*, 1 Anst. 202; *Middleton* v. *Lord Onslow*, 1 P. Wms.

768; *Pidcock* v. *Bishop*, 3 B. & C. 605; *S. C.*, 5 Dow. & Ry. 505; *Peel* v. *Tatlock*, 1 Bos. & P. 419; *Jackson* v. *Duchaire*, 3 T. R. 551; *Smith* v. *Bank of Scotland*, 1 Dow, 272; *Fishmongers' Company* v. *Maltby*, 1 Dow, 294, cited; *Espey* v. *Lake*, 10 Hare, 260; *Willis* v. *Willis*, 17 Sim. 218; *Squire* v. *Whitton*, 1 H. L. Cas. 333; *Owen* v. *Homan*, 3 Mac. & G. 378; 4 H. L. Cas. 997. See and consider *Walker* v. *Hardman*, 4 C. & F. 258; *Railton* v. *Matthews*, 10 C. & F. 934; *Hamilton* v. *Watson*, 12 C. & F. 109; *North British Insurance Company* v. *Lloyd*, 10 Exch. 523; *Pledge* v. *Buss*, Johns. 663.

It depends on the nature of the transaction in each case, whether the fact not disclosed is such that it is impliedly represented not to exist: *Lee* v. *Jones*, 13 W. R. (C. P.) 318; 34 L. J. (C. P.) 131; *Phillips* v. *Foxall*, 7 L. R. Q. B. 666.

The creditor, however, is not, it seems, bound, without any inquiry on the part of the surety, to acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case: *Wythes* v. *Labouchere*, 3 De G. & Jo. 592; and see *Hamilton* v. *Watson*, 12 C. & F. 118; *North British Insurance Co.* v. *Lloyd*, 10 Exch. 523; *Lee* v. *Jones*, 14 C. B. N. S. 322, 386; 13 W. R. (Exch. C.) 313; 17 C. B. N. S. 482.

A surety also will be discharged where there has been a failure of the consideration for which the guarantee was given: *Cooper* v. *Joel*, 1 De G. F. & J. 240; and see and consider *Ex parte Agra Bank*, 9 L. R. Eq. 725.

II. *Discharge of surety by a departure from the terms of the contract.*]—If in the contract, between the principal debtor and the creditor, there is a departure from that which the surety stipulated for and contemplated when he entered into the obligation, the surety will be released. Thus, in *Bonser* v. *Cox*, 4 Beav. 379, John Cox agreed to become a surety for Richard Cox in a *joint and several bond* to the firm of Cox & Morrell, upon having a counter-bond from the firm of Cox & Davies, to indemnify him. The bond to Cox & Morrell, however, was executed by John Cox only, Cox & Morrell having neglected to obtain the signature of Richard Cox. The counter-bond, however, was given by Cox & Davies to John Cox. It was held by Lord *Langdale*, M. R., that John Cox the surety was released, in consequence of Richard Cox not having executed the bond. "I think it cannot," said his Lordship, "upon any principles on which this Court acts, be doubted that the surety has an interest, and a

most material interest, in the rights and remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties. I do not think that it is material to inquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, 'I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be your surety upon any other terms.' The surety in this case has a right to say, 'The arrangement was, that Mr. Richard Cox, as well as myself, should be held bound by bond to the creditor. That arrangement never was carried into effect.' The circumstance of Mr. Richard Cox being held by bond to the surety, does not appear to be material in this case." This decision, on appeal, was affirmed by Lord *Cottenham*. See 4 Beav. 383. See also *Calvert* v. *London Docks Co.*, 2 Keen, 638; *Warre* v. *Calvert*, 7 Ad. & Ell. 143; *Rice* v. *Gordon*, 11 Beav. 265; 14 Beav. 508; *The General Steam Navigation Company* v. *Rolt*, 6 C. B. N. S. 550; *Watts* v. *Shuttleworth*, 5 H. & N. 235; 7 H. & N. 353; *Blest* v. *Brown*, 3 Giff. 450; 8 Jur. N. S. 187; 10 W. R. L. C. 569; *Montefiore* v. *Lloyd*, 12 W. R. C. P. 83. Sed vide *Cumberlege* v. *Lawson*, 1 C. B. N. S. 709.

Upon the same principle where the creditor had prepared a deed, so as to show on the face of it that it was intended to contain a joint and several covenant by two co-sureties, and had sent it in that form to be executed by one of such sureties, but had not procured the execution of it by the other surety; and had not informed the surety who had executed it of this fact; but on the contrary, had afterwards written to him as "one of two sureties," the principal debtor having become insolvent; it was held by Sir *W. Page Wood*, V. C., that the surety who had executed the deed was entitled in equity to be relieved from all liability on the covenant: *Evans* v. *Bremridge*, 2 K. & J. 174, affirmed on appeal; 8 De G. Mac. & G. 101.

So, where a person gave a promissory note as a surety, upon an agreement that the amount should be advanced to the principal debtor by *draft at three months' date*, and the creditor, without the concurrence of the surety, *paid the amount at once*, instead of giving the draft, it was held by Lord *Langdale*, M. R., that the agreement had been varied; and the surety was therefore discharged.

His Lordship, referring to *Bacon* v. *Chesney*, 1 Stark. 192, observed, "that a man may have reason to believe that a person in pecuniary difficulty may effectually redeem his affairs if allowed time, and may be willing, on the assurance of the required time being allowed, to become surety for the payment of a particular debt at the end of that time, and yet would not become surety unless such time were fully assured to the principal debtor. These are circumstances which a person advancing money on the security, and claiming the benefit of the suretyship, has not any right to alter. It is not enough that he voluntarily forbears to demand payment during the time for which the surety had stipulated; the surety did not intend to rely on his forbearance; but rested on an agreement or condition, that the principal debtor should have the time assured to him, and should thereby have an assured and not a precarious freedom during that time. His conduct for his own protection might be materially affected by the difference. And if that stipulated time be not given, and no arrangement of the surety to waive it is shown, the situation of the surety is improperly altered, and he is released: *Bonser* v. *Cox*, 6 Beav. 110. This case, on appeal, was affirmed by Lord *Cottenham*; see 6 Beav. 118. And see *S. C.*, 4 Beav. 383.

Where, however, a surety has executed a bond in the belief derived from the form of the bond that it would be executed by the principal debtor also, he will not be released from his obligation on the ground that the principal debtor has never executed it, if the principal debtor has executed an instrument on which the surety may sue him and become a specialty creditor of his. See *Cooper* v. *Evans*, 4 L. R. Eq. 45: there the defendants, Messrs. Evans, were coal-owners, and in March, 1864, one J. C. Partington became their agent for the sale of coal, and entered *into an agreement under seal with them for the faithful discharge of his duties*. On the 15th of March, 1864, the agent of the defendants called upon Cooper to execute a bond of 1000*l.* as co-surety with C. H. Partington for the due fulfilment of the agreement by J. C. Partington. Cooper executed the bond, which was in the form of a joint and several bond by J. C. Partington and two sureties, upon the belief (derived from the form of the bond which was prepared by the defendants) that J. C. Partington would also execute it. He did not do so, but Cooper's co-surety did. J. C. Partington having committed a breach of his agreement, the Messrs. Evans having obtained a verdict in an action against Cooper, he thereupon filed a bill to restrain execution on the judgment. It was held, however, by Lord *Romilly*, M. R., that he

was not entitled to any relief in equity. "The plaintiff," said his Lordship, "relies on *Bonser* v. *Cox* (4 Beav. 379; 8 Jur. 387), and *Evans* v. *Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 100; but I think both these cases are distinguishable. In both there were to be sureties; it was agreed that both the sureties should execute the security, and one of them did not. Thereupon the other said, 'I intended to rely on my ability to sue my co-surety for one-half of the debt, but instead of that I have been made liable for the whole;' and it was held both by Lord *Langdale* and Sir *W. Page Wood* that this discharged the surety. But that is not the case here, for both the sureties have executed; but one of them says, that, in addition, it was intended that J. C. Partington should execute the bond, whereas he has not executed it, and it is alleged that the plaintiff is thus prevented from becoming a specialty creditor of J. C. Partington. But J. C. Partington has entered into an agreement *under seal* with the Messrs. Evans, and upon properly indemnifying them, the plaintiff will be able, in their names, to sue J. C. Partington upon this agreement, and to become a specialty creditor of his just as much as if he had executed this bond. But besides this, it is laid down in a long series of cases, that the doctrines relating to principal and surety are the same at law as in equity. That was so laid down by the Vice-Chancellor in *Mackintosh* v. *Wyatt* (3 Hare, 562), and there is a clear distinction between the cases which were cited to me on behalf of the plaintiff and the present. Here the very case which the plaintiff now sets up in equity has been raised at law, and it has been held that the plaintiff is properly liable.

Upon the same principle where the creditor enters into any new arrangement with the debtor, without the concurrence of the surety, which will have the effect of materially altering the situation of the surety, he will be discharged. Thus, in *Eyre* v. *Bartrop*, 3 Madd. 221, the plaintiff joined with his brother in the grant of a redeemable annuity, *as a surety* for the payment of the same quarterly. The annuity was secured by the demise of real property of the plaintiff's brother, and by a bond and judgment of the plaintiff and his brother. The brother afterwards, by deeds, to which the plaintiff was not a party, and without his concurrence, entered into a new arrangement with the assignees of the annuity, whereby it was agreed that he should not sue for the annuity for five years from the date of the deed, or until the death of the grantor's father (which should first happen), and that the annuity should be redeemable on different terms. Sir *J. Leach* held that the surety was wholly discharged, and

was not entitled merely to be exonerated from liability to the arrears of the annuity during the five years, and refused a motion to dissolve an injunction restraining the assignee of the annuity from proceeding to execution upon the judgment. His Honor observed, that it could not be denied, that if, by any arrangement between the creditor and the debtor, the situation of the surety was altered, that he was thereby discharged; but it was said, that the situation of the surety was only partially altered during the five years, and that, in respect of the subsequent payments, it remained the same. He was, however, of opinion, that the deeds executed without the concurrence of the plaintiff, and the change in the terms of the redemption, had either directly, or by their own consequences, wholly altered the situation of the surety, and that he was thereby wholly discharged.

In *Calvert* v. *The London Dock Company*, 2 Kee. 638, Streather, a contractor, undertook to perform certain works for a Company; and it was agreed that three-fourths of the work, as finished, should be paid for, every two months, and the remaining one-fourth upon the completion of the whole work. It was held by Lord *Langdale*, M. R., that the sureties for the due performance of the contract were released from their liability by reason of payments exceeding three-fourths of the work done, having, without the consent of the surety, been made by the Company to the contractor before the completion of the whole work. "The effect," said his Lordship, "of the stipulation was at the same time to urge Streather to perform the work, and to leave in the hands of the Company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties. What the Company did was, perhaps, calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which, by the contract, was intended to be applied to him. And the Company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered, that the sureties must be considered to be discharged from their suretyship." *Ex parte Rushforth*, 10 Ves. 409; *Paley* v. *Field*, 2 Ves. 435; see also *Archer* v. *Hudson*, 7 Beav. 551; *Campbell* v. *French*, 6 T. R. 200; overruling *French* v. *Campbell*, 2 H. Black. 163; *Archer* v. *Hall*, 4 Bing. 464; *Evans* v. *Whyle*, 5 Bing. 485; *S. C.*, Moo. & M. 468; *Whitcher* v. *Hall*, 5 B. & C. 269; *S. C.*, 8 D. & R. 22;

Bacon v. *Chesney*, 1 Stark. 192; *Wright* v. *Sandars*, 3 Jur. N. S. 504; *Small* v. *Currie*, 2 Drew. 102; 5 De G. Mac. & G. 141; *Sanderson* v. *Aston*, 8 L. R. Ex. 73.

Upon the same principle, where a surety by the contract of suretyship has a right to have book-debts due to the principal debtor appropriated to the reduction of the debt for which he has made himself liable, if he has been deprived of that right by the act of the creditor in releasing the book-debts to the principal debtor to enable him to apply them for a different purpose, the surety will be discharged from payment of the whole debt, although the book-debts may be of less value: *Polak* v. *Everett*, 1 Q. B. D. 669, 675, where *Blackburn*, J., observes, "Once concede the rule that where the creditor wilfully interferes with the rights of the surety, and alters the equitable rights which he had acquired, alters them, even though it may be for the surety's benefit, without the surety's assent, the surety is discharged, and it seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt."

But where a surety enters into a bond for the performance by another of two things which are separate and distinct, a subsequent alteration of the principals contract as to one of them, without the surety's consent has been held not to release the surety from his contract of suretyship as to the other. See *Harrison* v. *Seymour*, 1 L. R. C. P. 526; *Skillett* v. *Fletcher*, 1 L. R. C. P. 217; 2 L. R. C. P. 469.

It seems that a surety who becomes aware that the creditor is going to give time, or to do something else, which, if done without his assent, might discharge him, is not bound to warn the creditor against doing it: *Polak* v. *Everett*, 1 Q. B. D. 673.

Upon the principles laid down in *Rees* v. *Berrington*, where there is a bond of suretyship for the fidelity of an officer, and by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond will be avoided: *Bonar* v. *Macdonald*, 3 H. L. Cas. 226; *Pybus* v. *Gibb*, 6 Ell. & B. 902; and see *North Western Railway Company* v. *Whinray*, 10 Exch. 77; *Kitson* v. *Julian*, 4 Ell. & Bl. 854; *Bartlett* v. *The Attorney-General*, Parker, 277. And see *Lord Arlington* v. *Merricke*, 2 Saund. 403; *Bank of Scotland* v. *Christie*, 8 C. & F. 214; *The Guardians of the Portsea Island Union* v. *Whillier*, 6 Jur. N. S. 887; *The Guardians of the Malling Union* v. *Graham*, 5 L. R. C. P. 201. Where, however, a variation in

the original contract is not material: (*Stewart* v. *M'Kean*, 10 Exch. 675); and in the case of a guarantee for the fidelity of an officer (*Sanderson* v. *Aston*, 8 L R. Ex. 73), where neither the office nor its duties are substantially altered (*Skillett* v. *Fletcher*, 1 L. R. C. P. 217; 2 L. R. C. P. 469); or there has been a mere alteration in the salary or mode of remuneration (*Frank* v. *Edwards*, 8 Ex. 214; 22 L. J. (Ex.) 42), the sureties will not be discharged. See also *Davey* v. *Phelps*, 2 M. & Gr. 300.

The bond, however, by which the sureties are bound may be drawn in language sufficiently extensive to continue their liability, notwithstanding there may be a material alteration of the duties of the person for whom they have become sureties. See *Oswald* v. *Mayor of Berwick-upon-Tweed*, 5 H. L. Cas. 856; 3 Ell. & Bl. 653; 1 Ell. & B. 295; *Mayor of Dartmouth* v. *Silly*, 7 Ell. & Bl. 97; and see *Mayor of Berwick-upon-Tweed* v. *Murray*, 7 De G. Mac. & G. 497.

Where, however, the creditor, dealing with the principal debtor, has the concurrence of the surety, the latter cannot claim to be discharged upon the ground that his position is altered by such dealing: *Woodcock* v. *Oxford and Worcester Railway Comp.*, 1 Drew. 521, 530.

A guarantee for a possible pecuniary liability, such as for discounting bills, whether continuing or given for a particular period, although not revoked by the death of the surety (*Bradbury* v. *Morgan*, 1 H. & C. 249), is revocable by him at any time before a liability has been incurred by the person whom he agreed to guarantee: *Offord* v. *Davies*, 12 C. B. (N. S.) 748, and has been treated by a Court of Equity, as revoked when it was the duty of the representatives of the guarantor with the knowledge of the creditors to whom the guarantee was given to have given notice to determine the same. See *Harriss* v. *Fawcett*, 8 L. R. Ch. App. 866; there a guarantee was determinable by six months' notice; the guarantor died, leaving as his executor the debtor, on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee. It was held by the Lords Justices affirming the decision of Lord *Romilly*, M. R., (reported 15 L. R. Eq. 311) that the creditors were not entitled to the benefit of the guarantee for their advances after the death. "It appears to me," said *James*, L. J., "that this case ought to be determined upon equitable considerations, which very plainly arise upon the facts of the case as they are now disclosed to us. . . . It appears to me that the creditors must have known that it

was the plain duty of the executor to have given notice to determine the guarantee. They must have known it was either through a breach of trust, or through inadvertence, or neglect, on the part of the executor that the liability of the real estate was continued, and they advanced the moneys to him with full knowledge that the real estate belonged to the beneficiaries under the will." And his Lordship, after adding that he thought what really occurred between the parties, proceeded upon the footing that in substance and in truth the guarantee was at an end, added, "It would, I think, be inequitable to allow the bank to recover against the real estate those advances which they continued to make to the executor of the guarantor after the death of the father."

A person, however, who by a continuing guarantee becomes surety for the honesty of a servant cannot ordinarily, during the continuance of the service, discharge himself either at law or in equity, by merely giving notice that he will no longer be liable: *Calvert* v. *Gordon*, 3 M. & R. 124; *Gordon* v. *Calvert*, 4 Russ. 581; *Hassall* v. *Long*, 2 M. & S. 363, 370.

Where, however, such a guarantee is given, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once, and without notice, he chooses to continue in his employ a dishonest servant without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. See *Phillips* v. *Foxhall*, 7 L R. Q. B. 666; there the defendant by a guarantee, undertook to be responsible up to 50*l.* for the honesty of J. S. during his continuance in the plaintiff's employment. During the employment J. S. made defalcations, which the plaintiff discovered on the 20th November, but without notice to the defendant condoned the offence, and continued J. S. in his employment; J. S. having again made defalcations, it was held by the Court of Queen's Bench, on demurrer to an equitable plea to a declaration on the guarantee, that the defendant was discharged from liability for the defalcations subsequent to the 20th of November. "If," said Quain, J., "it is correct, as we think it is, on the authorities to say that such concealment as is here pleaded, if it had been practised at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guarantee a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety,

unless his assent has been obtained after knowledge of the dishonesty that his guarantee should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligation is, that it is only reasonable to suppose that such a fact, if known to him, must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guarantee should continue to apply to his future conduct, when the master chose for his own purposes to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the same representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination. If the guarantee at its inception was founded, as suggested by Lord *Eldon*, in *Smith* v. *The Bank of Scotland* (1 Dow, 272), on the trustworthiness of the servant, so far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master, the whole foundation for the continuance of the contract as regards the surety fails; and it seems to us in accordance with the plainest principles of equity and fair dealing, that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself stand the risk of loss arising from any future dishonesty. 'It is the clearest and most evident equity,' says Lord *Loughborough*, in *Rees* v. *Berrington*, 2 Ves. jun. 540, 'not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement.' Thus in the present case the conduct of the master in retaining the servant in his employ when he might have discharged him for dishonesty, seems, in the words of Lord *Loughborough*, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged in cases of this kind will vary according to the circumstances of each

case; but we intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service after he became aware of his dishonesty, and without the assent or knowledge of the surety." See *Peel* v. *Tatlock*, Bos. & P. 419; *Smith* v. *The Bank of Scotland*, 1 Dow, 287; *Montague* v. *Tidcombe*, 2 Vern. 518, post 1009; *Sanderson* v. *Aston*, 8 L. R. Ex. 73.

A fortiori will the surety be discharged from future liability, if on discovering the dishonesty of the person for whose good conduct he has bound himself, he revokes his guarantee. See *Burgess* v. *Eve*, 13 L. R. Eq. 457, 458, where Sir *R. Malins*, V. C., says, "If there is misconduct on the part of the person whose fidelity is guaranteed,—for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money,—reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying 'I now withdraw the guarantee I gave you: I give you full notice not to trust him any more.' . . . If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this Court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be cancelled." See *Phillips* v. *Foxall*, 7 L. R. Q. B. 677.

A guarantee of this kind will, however, be irrevocable whilst there is no misconduct on the part of the servant or clerk. "When," observes *Malins*, V. C., in a recent case, "a guarantee is of the fidelity or good conduct of a servant or clerk, or person in a confidential position, it may be considered as a contract by the employer and employed, and the surety on his behalf; therefore, if a father guarantees the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of the son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If arbitrarily and without the fullest justification he desires to withdraw that which he has deliberately entered into, I am of opinion under such circumstances as those, that he would have no right to withdraw:" *Burgess* v. *Eve*, 13 L. R. Eq. 457.

If, however, as is laid down by *Quain*, J., in *Phillips* v. *Foxhall*, 20 W. R. (Q. B.) 902, the surety,

after having obtained knowledge of the dishonesty of the person for whose fidelity he gave a guarantee, should agree or assent that it should hold good during the subsequent service, his liability will continue. See *Shepherd* v. *Beecher*, 2 P. Wms. 288, and the comments thereon in *Phillips* v. *Foxall*, 7 L. R. Q. B. 677.

The principle, however, laid down in *Phillips* v. *Foxall* has, in a recent case in Ireland, been held not to apply, where the person suing the sureties on their bond is a public officer, as a county treasurer, and who had no power to appoint or dismiss the person whose fidelity was guaranteed, *Lawder* v. *Lawder*, 7 I. R. C. L. 57.

III. *Discharge of surety by creditor giving time to the principal debtor.*]—Mere passiveness by the creditor, in not taking proceedings against the debtor, will not, in the absence of a binding stipulation in the contract of suretyship, rendering activity on his part necessary, release the surety. See *Eyre* v. *Everett*, 2 Russ. 381, where, although the creditor had neglected to sue the obligor on a bond for five years, Lord *Eldon* held, that the surety was not released. "The surety," said his Lordship, "has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give him the surety the means of suing." See also *Shepherd* v. *Beecher*, 2 P. Wms. 288; *Wright* v. *Simpson*, 6 Ves. 734; *Lysaght* v. *Walker*, 5 Bligh. N. S. 1; *Brickwood* v. *Anniss*, 5 Taunt. 614; 1 Marsh. 250; *Perfect* v. *Musgrave*, 6 Price, 111; *Orme* v. *Young*, Holt, N. P. C. 84; *Langdale* v. *Parry*, 1 Dowl. & Ry. 337; *Price* v. *Kirkham*, 3 Hurlst. & Colt. 437.

But passiveness may discharge a surety, if there be a stipulation that the creditor is, on default, to sue the debtor without delay: *The Bank of Ireland* v. *Beresford*, 6 Dow, 233; *Hall* v. *Hadley*, 2 A. & E. 758. In *Montague* v. *Tidcombe*, 2 Vern. 518, a man put out his son an apprentice, giving a bond to his master for his fidelity, taking, at the same time a covenant from his master that he would, at least once a month, see his apprentice make up his cash. Upon the apprentice embezzling cash, and the master bringing an action on the bond, it was held, on a bill being filed by the father to be relieved against it, that the bond and covenant ought to be taken as one agreement; that the father would be liable, provided the accounts were taken monthly, but for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began.

Although passiveness, or mere delay in not suing the debtor, when the debt becomes due will not discharge the surety, if the creditor, as in the principal case, enters into any *binding* contract, the effect of which will be *to give further time* to the debtor, without consulting the surety, the surety will be thereupon discharged, and it is immaterial that the further time is given in consequence of the inability of the debtor to pay, or that no injury could thereby accrue to the surety. This is clearly laid down by Lord *Loughborough* in the principal case, and by Lord *Eldon* in the important case of *Samuell* v. *Howarth*, 3 Mer. 272. There, A. guaranteed the payment of any goods to be supplied by B. to C. between the 2nd of April, 1814, and the 2nd of April, 1815. C. having accepted bills for the amount of the goods delivered, B. permitted him to renew them when payable, without any communication to A. on the subject of such renewal. It was held by Lord *Eldon*, that, although no period of credit was specified, it could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and that A. was discharged from his guarantee by virtue of the rule, that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety. "The rule," observed Lord *Eldon*, is this, "that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of *positive contract* between the creditor and the principal,—not where the creditor is merely inactive. And in the case put, the surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy, against the principal, or not, and because he, in fact, cannot have the *same* remedy against the principal as he would have had under the original contract. . . . . It has been truly stated, that the renewal of these bills might have been for the benefit of the surety; but the law has said, that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right —it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." See also *Skip* v. *Huey*, 9 Mod. 438; 3 Atk. 91; *Nisbet* v. *Smith*, 2 Bro. C. C. 579; *Clarke* v. *Henty*, 3 Y. & C. Exch. Ca. 187; *Oakeley* v. *Pasheller*, 10 Bligh. N. S. 548; 4 C. & F. 207; *English* v. *Darley* 2 Bos. & P. 61; *S. C.*, 3 Esp. 44; *Eyre* v. *Bartrop*, 3 Madd. 221; *Cross* v. *Sprigg*, 6 Hare, 233; 2

Hall & T. 233 ; 2 Mac. & G. 113 ; and see *Hawkshaw* v. *Parkins*, 2 Swanst. 539 ; *Richard Burke's case*, cited 2 Bos. & P. 62 ; *Davies* v. *Stainbank*, 6 De G. Mac. & G. 679 ; *Pooley* v. *Harradine*, 7 Ell. & B. 431 ; *Bailey* v. *Edwards*, 4 B. & Sm. 761 ; *Greenhough* v. *M'Clelland*, 2 Ell. & Ell. 424, 429 ; *Oakeley* v. *Pasheller*, 4 C. & F. 207 ; 10 Bligh. 548 ; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, 7 L. R. Ch. App. 142, affirmed Dom. Proc. nom. *The Liquidators of Overend, Gurney, & Co., Limited*, v. *The Liquidators of the Oriental and Financial Corporation, Limited*, 7 L. R. Ho. Lo. 348 ; *Wilson* v. *Lloyd*, 16 L. R. Eq. 60.

So where the holders of bills, at the *request* of the drawees, refrain from presenting the bills, and thus give them time, the drawer will be released : *Latham* v. *Chartered Bank of India* 17 L. R. Eq. 205.

Where a contract is divisible, as for instance, where successive payments are to be made at fixed periods, if the creditor gives time as to one of such payments, he will release the surety with regard to that payment only, but not with regard to subsequent payments. See *Croydon Gas Co.* v. *Dickinson*, 2 C. P. D. 46. There Dickinson contracted with the plaintiffs—a gas company—to take from them tar and ammoniacal liquor and to pay for each month's supply within the first fourteen days of the ensuing month after the account rendered, "unless the company should by writing, signed by their secretary, allow a longer time for payment." The defendant Pollard became surety for the performance of the contract by Dickinson. On the 3rd of August an account was delivered for the July supply, and after the fourteen days had expired, viz., on the 21st, the secretary of the company, without the knowledge of the surety, sent Dickinson a letter inclosing a promissory note at a month for the amount, with a request that he would sign and return it. Dickinson signed the promissory note and returned it to the secretary, who kept it. It was held by the Court of Appeal, reversing the decision of the Court of Common Pleas (reported 1 C. P. D. 707), that although the surety was released from the payment in respect of July supply, by the time given to the debtor, he was not released in respect of subsequent payments. "It has been contended," said *Kelly* C. B., "that there was but one contract, and that therefore if time was given in respect of one performance under it, that operated as a discharge of the whole contract. But although in one sense it was one contract, yet in effect it was as much three several contracts as if it had been created by three separate instruments. In each month the account was made out, and the debtor failed to pay. The

surety has been sued, and he refuses to pay. It has been argued that the position of the surety has been changed; I cannot see in what particular that is so. He might, at the expiration of the fourteen days, as he may now, himself pay the creditor, and thus bring an action against the principal debtor for money paid. In neither of these latter months has anything occurred to alter the position of the surety."

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract, and although after notice of the retirement the retiring partner is in a sense a surety, he will not be discharged from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract. Thus, in *Oakford* v. *The European and American Steam Shipping Company* (*Limited*), 1 Hem. & Mill. 182, continuing partners under a contract which among other things gave the firm the power of appointing an arbitrator in case of dispute, entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract. It was held by Sir *W. Page Wood*, V. C., that this was not such a variation of the original contract as to discharge the retired partner.

With regard to the question, how far the custom of a trade will justify further indulgence, when the guarantee is not expressly limited in point of time, see *Combe* v. *Wolfe*, 8 Bing. 156; *Holl* v. *Hadley*, 5 Bing. 54; *Allan* v. *Kenning*, 9 Bing. 618; *Howell* v. *Jones*, 1 Cr. M. & R. 97. And see *Simpson* v. *Manley*, 2 C. & J. 12; *Holland* v. *Teed*, 7 Hare, 50.

Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, that will in effect be giving time to the debtor, and will discharge the surety; since a Court of equity would restrain proceedings on the bond until the expiration of time for which the creditor had received interest on the bond: *White* v. *Blake*, 1 Y. & C. Exch. Ca. 420.

An agreement with the debtor to give him further time, in order to discharge a surety must be one that is binding upon the creditor. A mere voluntary promise to give further time, not acted upon, and which cannot be enforced, as it makes no alteration in the rights or position of the parties, will not have that effect (*Philpot* v. *Briant*, 4 Bing. 717; *S. C.*, 1 M. & P. 754; *Brickwood* v. *Anniss*, 5 Taunt. 614; *S. C.*, 1 Marsh. 250; *Tucker* v. *Laing*, 2 K. & J. 745; and see *Clarke* v. *Wilson*, 3 M. & W.

208; *Heath* v. *Key*, 1 Y. & J. 434; and the remarks of Lord *Lyndhurst* in *Blake* v. *White*, 1 Y. & C. Exch. Ca. 420; *Moss* v. *Hall*, 5 Exch. 46; *Strong* v. *Foster*, 17 C. B. 201; *Bell* v. *Banks*, 3 M. & G. 258; 3 Scott, N. R. 497); and although the creditor enter into a *binding* contract to give further time to the debtor, yet if it be with a stranger, and not with the debtor, the surety will not be thereby discharged: *Frazer* v. *Jordan*, 8 Ell. & Bl. 303.

Nor will an agreement to give time have that effect, if it is conditional upon the performance of an act which the debtor neglects to perform: *Badnal* v. *Samuell*, 3 Price, 521; *Vernon* v. *Turley*, 1 M. & W. 316; *Price* v. *Edmunds*, 10 B. & C. 578.

The reason why giving further time to a debtor releases the surety, is this, that the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the *same* remedy against the principal as he would have had under the original contract: *Samuell* v. *Howarth*, 3 Mer. 278, per Lord *Eldon*, C.; and see *The Bank of Ireland* v. *Beresford*, 6 Dow, 238; *Bailey* v. *Edwards*, 4 B. & S. 771.

And upon the principle, that the creditor having taken out execution against the debtor, is a trustee of it for all parties interested, if, without the knowledge of the sureties, he withdraws the execution, he thereby discharges the sureties: *Mayhew* v. *Crickett*, 2 Swanst. 185, 190. And see *Smith* v. *Knox*, 3 Esp. 47; *Williams* v. *Price*, 1 S. & S. 581; *English* v. *Darley*, 2 Bos. & P. 61; 3 Esp. 49. So where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce upon a notice by the surety, it was held that the surety was thereby discharged: *Watson* v. *Allcock*, 1 Sim. & Giff. 319; 4 De G. Mac. & G. 272.

A surety will not be discharged by the creditor giving time, if the remedies of the surety are not diminished or affected, and especially if they are accelerated. Thus, in *Hulme* v. *Coles*, 2 Sim. 12, where a creditor took from the debtor a cognovit in an action he had brought against him, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course, Sir *A. Hart*, V. C., held, that the surety was not thereby discharged, observing that the principle of discharging a surety by the giving of time by the creditor, was a refinement of a Court of equity, and he would not refine upon it; that, by the arrangement complained of, this was not given, but the remedy was ac-

celerated. And see *Prendergast* v. *Devey*, 6 Madd. 124; *Stevenson* v. *Roche*, 9 B. & C. 707; *Price* v. *Edmunds*, 10 B. & C. 578; *Whitfield* v. *Hodges*, 1 M. & W. 679; *Jay* v. *Warren*, 1 C. & P. 532.

Upon the same principle, the acceptance of money from the debtor by the creditor, who thought at the time he accepted the same it was a good and valid payment, will not upon its turning out afterwards to be invalid, discharge the surety. See *Petty* v. *Cooke*, 6 L. R. (Q. B.) 790. There the payee of a promissory note, made by principal and surety, accepted the amount thereof from the principal, in good faith, and without notice that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors. The trustees under the deed avoided the payment as a fraudulent preference, and the payee handed over the amount to the trustees. In an action by the payee against the surety, it was held by the Court of Queen's Bench that the payment did not operate as a satisfaction of the debt; and that the acceptance of the money from the principal by the payee was not an act done against the faith of the contract with the surety so as to discharge the surety. "I think it impossible," said *Blackburn*, J., "to read the principle laid down by Lord *Eldon* in *Samuell* v. *Howarth* (3 Mer. 272, ante, p. 1010), without thinking that it is based upon highly technical reasoning, however accurate it may be. It is clear, that a creditor who gives time to the principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by Courts of Equity. The ground, however, on which this doctrine is based, is that by giving time to the principal debtor, the creditor does an act which is against good faith, and injurious to the surety; that doctrine cannot apply to the present case, for the creditor accepted the money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety; he therefore did no act injurious to the surety, and the surety is not discharged. I think *Pritchard* v. *Hitchcock* (6 M. & G. 151) is precisely in point." See, also, *Newington* v. *Levy*, 5 L. R. C. P. 607, 612.

The surety will not be discharged, if time be given to the principal debtor by his consent or subsequent approval: *Tyson* v. *Cox*, T. & R. 395; *Mayhew* v. *Crickett*, 2 Swanst. 185; *Clark* v. *Devlin*, 3 Bos. & P. 363; *Cowper* v. *Smith*, 4 M. & W. 519; *Duffy* v. *Orr*, 5 Bligh, N. S. 620; *The Union Bank of Manchester* (*Li-*

mited) v. *Beech*, 13 W. R. (Ex.) 922.

It seems, however, where the creditor has obtained a decree against the surety, that no subsequent dealings giving time to the debtor, will have the effect of releasing the surety. See *Jenkins* v. *Robertson*, 2 Drew. 351. In that case there was a direction by a decree in a suit to administer the estate of the surety, for payment of a bond debt to the creditor. *After the decree* the creditor brought an action against the principal debtor, and took a judgment, for payment by instalments without the assent of, or communication with, the representatives of the surety. It was held by Sir *R. T. Kindersley*, V. C., that the estate of the surety was not thereby discharged. "I do not," said his Honor, "in any degree doubt that, as a general rule, the creditor, by giving time to the principal debtor, discharges the surety; but that is not this case. This is a case in which there is a creditor, who has by the decree in the suit, established his right against the surety. If he had brought an action against the principal debtor *before the decree* and taken, as has been done here, a judgment by arrangement, giving time, no doubt the surety would be discharged. But the creditor, having by the decree established his right against the estate of the surety, has a right to proceed under it; and all that follows is in the nature of execution of the decree, and the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is *no longer as surety*, but under the decree."

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, *reserve* his right to proceed against the surety; because, as Lord *Eldon* has observed, "the principal cannot raise the objection upon his right to time as against the surety, as there is the contract of the principal, arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him shall not be deprived of the benefit of the contract as against the principal" (18 Ves. 26. And see *Ex parte Glendinning*, Buck, 517; *Smith* v. *Winter*, 4 M. & W. 545; *Ex parte Carstairs*, Buck, 560; *Ex parte Gifford*, 6 Ves. 805; *Duffy* v. *Orr*, 5 Bligh, N. S. 620; *Owen* v. *Homan*, 4 H. L. Cas. 997, 1038); and the question whether or not the surety has been informed of the arrangement is immaterial: *Webb* v. *Hewitt*, 3 K. & J. 438; *Boaler* v. *Mayor*, 13 W. R. (C. P.) 775.

A necessary consequence of a reservation of a creditor's remedies against a surety, is a continuance of the surety's right to be indemnified by the principal debtor, and this right will not be abandoned, unless a contract to abandon it

be proved: *Close* v. *Close*, 4 De G. Mac. & G. 176.

Parol evidence is, it seems, admissible to prove a reservation of the creditor's rights against the surety. See *Wyke* v. *Rogers*, 1 De G. Mac. & G. 408. There the plaintiff entered into a bond as a surety for S. Evans. Subsequently the defendant Rogers the creditor took from S. Evans a promissory note for the amount due, payable in two months, but was unable to recover anything on a judgment obtained against S. Evans, in consequence of his insolvency. Rogers having commenced an action against the plaintiff on the bond, he thereupon filed a bill to restrain proceedings in the action on the ground that he was discharged from liability by the giving of the promissory note; the defendant, by his answer, stated that at the time the promissory note was given, it was distinctly understood and agreed that it was not to be considered as payment of the balance due on the bond, and as substituted for the bond, but that the bond was to be considered as a security. On the hearing, an inquiry was directed in respect of the circumstances under which the promissory note had been given. The Master reported that, though there was not any written or distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond. It was held by Lord *St. Leonards*, C., affirming the decision of Sir *J. L. K. Bruce*, V. C., that there was no ground for the interference of a Court of Equity. "All the cases," said his Lordship, "prove that where an instrument is taken, which might otherwise operate as a discharge of the surety, there will be no discharge if the remedies against the surety are preserved. In the present case an action was brought on the bond, to which the defendant (the plaintiff here) had no defence; he therefore comes into equity for relief. This Court, however, cannot interfere against a legal obligation, unless an equitable case is made out; and it must therefore be shown that the transaction in question released the plaintiff from the obligation. No such case has been attempted to be made out, and I give no opinion upon it, because it is perfectly clear in law that an agreement, that a transaction which would of itself operate to release the surety shall not have that effect, may be proved by parol evidence. It was said at one time, in the course of the argument, that parol evidence could not be admitted to impeach the promissory note. This, however, was not the purpose for which the evidence was sought to be introduced; it was only to prevent the collateral operation of that note by showing that it *was not intended* to prevent proceeding on the bond, and thus release the

surety. . . . The finding of the Master is plain ; it is in effect that there was a general dealing and a general understanding (which in point of law amounts to a stipulation) that prevented the promissory note in equity from having the effect of discharging the surety. What, then, a judge of this Court has to decide is, whether or not there was in truth such an agreement as the defendant contends for: the evidence shows that there was; and the Master's report appears to me to be right."

But if time be given by deed, the reservation of the right to go against the surety should appear there also, as parol evidence is not admissible to prove it, since the effect of it would be to vary a written instrument (*Ex parte Glendinning*, Buck, 517); and, moreover, the reservation must be made in clear and unambiguous terms : *Boultbee* v. *Stubbs*, 18 Ves. 20. But see *Ex parte Harvey, In re Blakeley*, 1 De G. Mac. & G. (Bank.) 359, 377, 378; *Atkins* v. *Revell*, 1 De G. & Jo. 360.

A subsequent promise by a surety to pay the debt, after he is aware that the principal creditor has given further time to the principal debtor, will revive the liability from which he was discharged by the act of the principal creditor : *Mayhew* v. *Crickett*, 2 Swanst. 185; and see Id. p. 192, and cases cited in the note.

The principle upon which the surety is discharged by certain acts of the creditor, without his concurrence, is well stated by Lord *Loughborough* in the principal case, "It amounts," he observes, "to this, that there shall be no transaction with the principal debtor, without acquainting the person who has the greatest interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence, contrary to the nature of his engagement."

IV. *Discharge of surety by the creditor agreeing with the principal debtor to give time to the surety himself.*]—It has been laid down in a recent case by Lord *Hatherley*, L. C., that the holder of a security who agrees with the principal debtor to give time to the *surety*, by so doing discharges the surety. See *Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, 7 L. R. Ch. App. 142; 41 L. T. (L. C.) 332. "If," said his Lordship, "the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by

implication an agreement not to sue the surety. The position of the surety is changed, because, it is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal."

V. *How far a release or composition, entered into by the creditor by or with the debtor, releases the surety.*] —Where the creditor releases or compounds with the debtor, without the concurrence of the surety, although it may be done by mistake, or for the benefit of the surety, unless there be a stipulation to the contrary (*Davidson* v. *McGregor*, 8 M. & W. 755; *Kearsley* v. *Cole*, 16 M. & W. 128; *Bateson* v. *Gosling*, 7 L. R. C. P. 9; *The Union Bank of Manchester, Limited*, v. *Beech*, 13 W. R. Ex. 922), he will thereby discharge the surety (*Ex parte Smith*, 3 Bro. C. C. 1; *Ex parte Wilson*, 11 Ves. 410; *Ex parte Glendinning*, Buck, 517; *Ex parte Carstairs*, Buck, 560; *English* v. *Darley*, 2 Bos. & P. 61; *Lewis* v. *Jones*, 4 B. & C. 506; *Cragoe* v. *Jones*, 8 L. R. Ex. 81); and it seems, that one partner in a firm may release or compound with the creditor, so as to bind the firm, and consequently discharge the surety: *Hawkshaw* v. *Parkins*, 2 Swanst. 539.

If the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety for the remainder of the debt: *Hall* v. *Hutchons*, 3 My. & K. 428, per Sir *J. Leach*, M. R.

A creditor, if he has given an absolute release for the debt, cannot reserve his right to proceed against the sureties, whether the release be legal (*Nicholson* v. *Revill*, 4 Add. & Ell. 675; and the remarks in *Kearsley* v. *Cole*, 16 Mees. & W. 136) or equitable. See *Webb* v. *Hewitt*, 3 K. & J. 438. There the plaintiff became surety in a bond to the defendant for one Field. Afterwards Field and the defendant entered into an agreement that the defendant should take all Field's property, and should pay his other creditors five shillings in the pound. Upon the death of Field, the defendant having put the bond in suit against the plaintiff, Sir *W. Page Wood*, V. C., granted a perpetual injunction, and ordered the bond to be cancelled. "As to giving time," said his Honor, "the authorities, which are almost innumerable, have settled that upon *any giving of time* to a principal debtor, if

there be a reservation of rights against the surety, the surety is not discharged. . . . . A release, however, stands upon an entirely different footing. The case of *Nicholson* v. *Revill*, 4 Add. & Ell. 675, which is recognised in *Kearsley* v. *Cole* (16 Mees. & W. 128), has decided that, when an actual release is given, no right can be reserved, for the debt is gone at law. In *Nicholson* v. *Revill*, the Court commented on the observations of Lord *Eldon* in *Ex parte Giffard* (6 Ves. 805), saying, that if those observations were meant to extend to this, that the principal debtor could be *entirely released*, so that the debt should be extinguished and yet the right reserved against the surety, they thought the dicta went too far. . . . . In the case before me, there is clearly no discharge at law by accord and satisfaction, because the instrument by which the accord and satisfaction is alleged to have been made is not under seal. . . . . The only question is, what is its effect in equity? There can be no doubt that the agreement was an equitable discharge, which would of course release the surety. . . . . What I rest my judgment on principally is, the result of this transaction upon the face of it. There is nothing in evidence that shakes any portion of the agreement. The utmost that the evidence amounts to is, that there was an intention with this agreement, such as it is, to assert a reservation of right against the surety. I hold, that if such a reservation of right had been put in, it would have been a nullity. If a man, in consideration of the debt due from his principal debtor, agrees to buy the whole of the debtor's property, he has been paid; and if he has been paid, he cannot reserve his rights."

Where however a release, in order to carry out the intention of the parties, can be construed as a covenant not to sue, an unqualified reservation of remedies against the surety is to be construed as allowing the surety to retain all his remedies over against the principal debtor, the covenant not to sue being allowed to operate only so far as the rights of the surety may not be affected: *Bailey* v. *Edwards*, 4 B. & S. 774; and see *Price* v. *Barker*, 4 Ell. & Bl. 780; *Keyes* v. *Elkins*, 5 B. & Sm. 240.

In *Green* v. *Wynn*, 4 L. R. Ch. App. 204, by a mortgage deed the debtor covenanted to pay the principal sum of 1000*l.* and interest at 10*l.* per cent., and a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or

remedy which any creditor might have against any other person in respect of any debt due by the debtor. It was held by Lord Chancellor *Hatherley*, affirming the decision of Sir *G. M. Giffard*, V. C. (reported 7 L. R. Eq. 28), that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor, and recover the amount from the debtor. "The right," said his Lordship, "reserved against the surety is any right or remedy which the creditor may have against any other person or persons in respect of any debt due by the debtor. The debt due is 1000*l.*, and the right of the creditor against the other person is, that as long as the debt remains unpaid, that other person may be called upon to pay 100*l.* a year. Then comes the release, and if the debt is extinguished by the release, of course the interest is extinguished. But the authorities say that if, on the one hand, the debtor is released, and, on the other hand, all demands against other persons are reserved, then it is inconsistent with the frame and object of the deed to hold that the release is intended to be complete and absolute, as that would make the two parts of the deed utterly inconsistent. The release cannot be construed to be absolute, because then no rights would be reserved in any case, and the Courts have therefore held that such a release is *not to be construed as absolute, but only as a covenant not to sue.* That being so, the remedy is gone as between the debtor and creditor, inasmuch as the creditor cannot sue the debtor; but as against all other persons the rights of the creditor are reserved. A surety for the whole debt of course would have to pay it; he is in the position of a person against whom a right is reserved on account of that debt. As against the debtor, the debt is gone, as under a covenant not to sue; yet as against any other person the debt is not gone, but is still existent.

"It is true the surety at the time of the execution of the deed owed nothing, because no interest was due upon the debt, and that he was only called upon to pay whenever interest remained unpaid; but still the creditor's right is reserved, and, according to all the cases, I must hold that as to the surety the debt is not gone. There was one argument by which I was pressed, that if this be so, the surety cannot get rid of the liability, and therefore must have to pay 100*l.* a year for ever; but where there is a mortgage, of course any person under a liability to pay the interest would be at liberty to redeem. I entertain no doubt that the surety might call upon the debtor to pay the debt, and in default might himself pay the debt and charge the debtor

with the amount so paid. If this could not be done, it would form a strong argument for construing this deed as an absolute release of the debt. But I think that this case comes within the authorities that such a release is not absolute, and is quite distinguishable from *Webb* v. *Hewitt*, 3 K. & J. 438, where a man took the whole of the assets, agreeing to pay five shillings in the pound to the creditors. This is an absolute assignment, as in bankruptcy, and I have no doubt that when the creditors were satisfied, there would be a resulting trust of the surplus for the debtor."

So also in *Bateson* v. *Gosling*, 7 L. R. C. P. 9, a deed of arrangement under the Bankruptcy Acts 1861 and 1869 contained a release of the debtor, subject to a proviso reserving the rights of creditors holding securities. It was held by the Court of Common Pleas that this operated as a covenant not to sue, and not as an extinguishment of the debt, so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property and effects to the trustees, and also provisions for enabling them to carry on the trade for the benefit of the estate. See also *Hooper* v. *Marshall*, 5 L. R. C. P. 48; *Muir* v. *Crawford*, 2 L. R. Ho. Lo. Sco. App. 456.

But a surety who, though innocent himself, obtains a release from the creditor by the fraud of another, will not, if there be no consideration moving from him, be able to avail himself of it. See *Scholefield* v. *Templer*, 4 De G. & Jo. 429. There, a debtor and his surety pursuaded the creditor to accept from the debtor a transfer of a mortgage, which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterwards the creditor, at the request of the surety, who suggested to him that he was secured by the mortgage, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew they had refused to do, unless the release was given. It was held by the Court of Appeal in Chancery, affirming the decision of Sir *W. Page Wood*, V. C. (1 Johns. 155), that the creditor was entitled to be restored to his rights against the surety. It was also held by the Vice Chancellor, that the creditor was entitled to such relief only upon the terms of repaying the surety's friends the sums lent by them, with the right of standing in their places against the surety; but on appeal, the provisions in their favour were struck out, and the decree made simply without prejudice to their rights.

A deed under the Bankruptcy Act, 1861, sect. 192, is not invalid,

although it has no clause reserving rights against sureties, unless it is shown that there are creditors secured by sureties. *Johnson* v. *Barratt*, 1 L. R. Ex. 65; *Poole* v. *Willats*, 4 L. R. Q. B. 630.

A surety may, by further contract with the creditor, convert himself, in relation to the debt for which he was surety, into a principal debtor; and thus, upon a release being given to the party who was in the first instance the principal, lose the benefit of the doctrine, that a release of the principal releases the surety: *Reade* v. *Lowndes*, 23 Beav. 361; *Defries* v. *Smith*, 10 W. R. (V. C. S.) 189.

So, likewise, one of two principal debtors, who, by arrangement with his co-debtor only, has become merely a surety for the debt, will not be released from his liability by the creditor giving time to his co-debtor, because as regards the creditor they both remain principal debtors, and a creditor by giving time to one of two co-debtors does not thereby release the other. See *Swire* v. *Redman*, 1 Q. B. D. 536, and the remarks therein upon *Oakeley* v. *Pasheller*, 4 C. & F. 207; 10 Bli. (N. S.) 548; *Wilson* v. *Lloyd*, 16 L. R. Eq. 60, 70; *Maingay* v. *Lewis*, 3 I. R. C. L. 495; 5 I. R. C. L. 229.

A surety has been held not to be discharged by the creditor signing the certificate of the bankrupt debtor after he had proved the debt under the commission, although the surety had given him notice not to sign it: *Browne* v. *Carr*, 7 Bing. 508, 514, 515. In delivering judgment, *Tindal*, C. J., says, "The ground upon which it has been contended that this proceeding amounts to a release, is the general acknowledged principle that wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged." And he gives as an instance the case of a creditor, without the surety's consent, agreeing to postpone the day for paying the debt, and also another illustration. He then proceeds: "In those and in all similar cases, however, the act done by the creditor is his own act, over which the surety has no control, and the injury which the surety would receive is one which he has no mode of preventing. But in the present case neither of these circumstances occur. The legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor where the creditor has proved, or may prove the debt himself where the creditor shall not have proved under the commission. It is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing of the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an

act done by the creditor, which altered the surety's right without his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time and prevented the creditor from proving, and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be assumed to have assented to the act."

So, likewise, where a principal debtor is discharged by a resolution, to which the creditors are parties, in proceedings by way of liquidation under the 125th section of the Bankruptcy Act, 1869, his surety remains liable in the same manner as in an ordinary bankruptcy, although the resolution contains no reservation of rights against sureties, because in this case as in an ordinary bankruptcy the surety might have paid the debt and proved under the liquidation: *Ellis* v. *Wilmot*, 10 L. R. Ex. 10, 15.

Whether a resolution passed under the 126th section of the Bankruptcy Act, 1869, accepting a composition, would have the same effect, see *Megrath* v. *Gray*, 9 L. R. C. P. 216; *Ellis* v. *Wilmot*, 10 L. R. Ex. 10, 15; *Ex parte Jacobs*, 10 L. R. (Ch. App.) 211, overruling *Wilson* v. *Lloyd*, 16 L. R. Eq. 60.

The distinction between a deed or agreement, by which a creditor agrees to accept a composition from a debtor, and a discharge of a debtor under either a liquidation or composition, must always be borne in mind—by the former being voluntary and the creditor's own act alone the surety will be discharged, by the latter as the discharge of the debtor takes place really by operation of law; and whether the creditor attends and votes at a meeting or not, the surety will not be discharged. See *Ex parte Jacobs, In re Jacobs*, 10 L. R. Ch. App. 211, 214.

But the surety will be released if the principal creditor releases the estate of the bankrupt upon a bargain without proof of his debt against it and without notice to the surety: *Pledge* v. *Buss*, Johns. 663, 667.

VI. *Surety when discharged by the creditor taking another security from the debtor.*]—Where the creditor takes a second security in satisfaction of the first, the surety will be discharged: *Clarke* v. *Henty*, 3 Y. & C. Exch. Ca. 187. See also *Boaler* v. *Mayor*, 19 C. B. (N. S.) 76.

But the taking of further security from the debtor, if it be not in lieu of the original security, will not have the effect of discharging the surety. Thus, in *Gordon* v. *Calvert*, 4 Russ. 581, B. being hired as a clerk to A. & Co., but not for any definite period, C. and D. joined with him in a bond to secure his duly accounting for his receipts. C.

died, and his executrix gave a written notice to A. & Co. that she would no longer remain surety. A. & Co. communicated this notice to B., and required and obtained from him the bond of another surety. D. died, and also the new surety, and, four years and a half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice. It was held by Lord *Lyndhurst*, that, as there was nothing to show that the obligees acquiesced in the wish of the executrix to be released, and there was no ground on which the Court could say, that, when the second bond was executed, there was an intention to give up the first; and, as it was reasonable to require a further security, as the executrix of C. would be answerable only to the extent of the assets, the executrix of C. had no equity to restrain A. & Co. from proceeding at law on the bond. See *S. C.*, 2 Sim. 253; *Calvert* v. *Gordon*, 7 B. & C. 809; and see *Eyre* v. *Everett*, 2 Russ. 381; *Bank of Ireland* v. *Beresford*, 6 Dow, 233; *Hodgson* v. *Nugent*, 5 T. R. 277; *Melvill* v. *Glendinning*, 7 Taunt. 126; *Twopenny* v. *Young*, 3 B. & C. 208.

VII. *How far a release or discharge of one surety by the creditor will operate as a discharge of another.*]—It seems to be settled at law, that a release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others: *Cheetham* v. *Ward*, 1 B. & P. 633; *Nicholson* v. *Revill*, 4 A. & E. 675; *S. C.*, 6 N. & M. 200; *Rex* v. *Bayley*, 1 C. & P. 435; *Cocks* v. *Nash*, 4 M. & Sc. 162.

It has, however, been held in equity that a *mere composition* with one of the sureties would not have that effect. Thus, in *Ex parte Gifford*, 6 Ves. 805, Marshall and Haig, creditors of Bedford, upon a promissory note, requiring a further security, Bedford, Niblock, Burgess, and Baylis joined in a promissory note as a collateral security. Bedford, Niblock, and Burgess, became bankrupts. Marshall and Haig proved the whole debt under each commission, and afterwards brought an action against Baylis, who *entered into a composition* with his creditors, under which Marshall and Haig received a dividend of 4*s.* in the pound, and gave Baylis a receipt in full for the said debt, and all other demands from him. The dividend paid by the estate of Bedford was 4*s.* in the pound, and that by the estate of Niblock and Burgess, 5*s.* A petition was presented, praying that proof against the estate of Niblock and Burgess might be expunged. Lord *Eldon* dismissed the petition. "The principal," observed his Lordship, "is to discharge all the obligations of all the sureties; but they stand, with regard to each other, in a relation which gives rise to this

right, among others, that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which, in all events, he is to pay. The party has a right to say for himself, he will not consider the relation, but will take 6*s.*, though the surety is liable to pay 10s. He may say, he will be passive as to the other 4*s.*; or he will discharge the whole debt, and at his own risk, as to the remedy against the other surety; or *he may reserve the remedy against the co-surety expressly.* It depends upon the effect and terms of the bargain actually entered into. It might be prudent in this very case, for Baylis, Bedford's son-in-law, to say he would pay 4*s.* in the pound, recollecting that Niblock and Burgess must pay more than 10*s.* in the pound before any demand could be made by them against Baylis, and recollecting the remedies against Bedford. The question, therefore, is, under the circumstances, what did they mean? As to the receipt, the creditor contends there is no difference whether there is an express reservation of the remedies against the co-sureties. But that distinction has been taken. At the time of Mr. *Richard Burke's Case*, Lord *Thurlow* admitted, that, if there is a reserve of the remedies against the others, there is consent of the party with whom the composition is made; and if, out of that, a demand arises against him, it is a demand which began to exist with his consent, expressed in the terms of the contract, and, under some circumstances, wisely and prudently given; for the party would not have entered into the contract unless he was allowed to contract for that remedy over against the co-sureties. If Niblock and Burgess should not pay more than their moiety, the contract would be a beneficial contract for Baylis: for, though paying more than Baylis, they would not pay enough to bring an assumpsit against him. That would not, therefore, be an imprudent bargain for Baylis to make. It may, however, never be necessary to decide this, as it depends upon what dividends the estates of Bedford and of Niblock and Burgess pay. But I have a strong opinion that under the circumstances, the other persons liable upon this note are not discharged, because Baylis was contented to make a bargain, the effect of which leaves him to his chance as to his ultimate liability between him and his co-surety; and, therefore, that relief cannot be given even to the extent to which it is now modified."

The principle upon which this case appears to be decided is this, that, since a creditor, who has given a discharge to one surety for the proportion which he was liable to contribute towards the payment of the general debt, has no right to proceed against the other sureties for more than

their proportion of it, no injury is done to them by the discharge of their co-surety. In *Stirling* v. *Forrester*, 3 Bligh, 591, Lord *Redesdale* says, "If the creditor discharges one of the co-parceners, he cannot proceed for the whole debt against the others: at the most they are only bound for their proportions." The principle as to co-sureties is the same. The doctrine, however, of Lord *Eldon* is treated by Sir *W. Page Wood*, V. C., in *Evans* v. *Bremridge*, 2 K. & J. 183; as expressly overruled by *Nicholson* v. *Revill*, 4 A. & E. 675; 6 N. & M. 192, 211.

Certainly some of the remarks made by Lord *Denman* in the case of *Nicholson* v. *Revill* (4 Ad. & Ell. 675), on the doctrine of Lord *Eldon*, in *Ex parte Gifford*, throw doubt on its correctness, on the supposition that Lord *Eldon* had held that a creditor could *release* one joint and several debtor, and hold another liable by a reserve of remedies. Lord *Eldon*, however, meant only to apply the doctrine to cases where there was *no release*, but a composition or giving time, not amounting to a *release*: *Kearsley* v. *Cole*, 16 M. & W. 136, per *Parke*, B.

A *release*, however, of one surety may be so qualified by the reservation of remedies against the co-sureties that it *will be* construed as a covenant not to sue, and it will thus be prevented from operating as a discharge of a co-surety. *Thompson* v. *Lack*, 3 C. B. 540, 552; *Price* v. *Barker*, 4 Ell. & B. 760; and see *Solly* v. *Forbes*, 2 Brod. & B. 38; *Payler* v. *Homersham*, 4 M. & S. 423; *North* v. *Wakefield*, 13 Q. B. 536; *Bailey* v. *Edwards*, 4 B. & Sm. 761; *Ewin* v. *Lancaster*, 13 W. R. Q. B. 857; *Keyes* v. *Elkins*, 5 B. & Sm. 240.

VIII. *Surety discharged by the creditor either losing or not making a proper use of securities.*]—As a surety on payment of the debt is entitled to all the securities in the hands of the creditor, whether he is aware of their existence or not (*ante*, Vol. 1, pp. 115, 116) even though they were given after the contract of suretyship (*Pearl* v. *Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Lake* v. *Brutton*, 18 Beav. 134; 8 De G. Mac. & G. 440; *Pledge* v. *Buss*, Johns. 663, 668, overruling *Newton* v. *Chorlton*, 10 Hare, 646, 2 Drew. 333: *Bechervaise* v. *Lewis*, 7 L. R. C. P. 372, 20 W. R. (C. P.) 726), if the creditor, who has had, or ought to have had, them in his full possession or power, loses them, or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice (*Strange* v. *Fooks*, 4 Giff. 408), the surety to the extent of such security will be discharged: *Capel* v. *Butler*, 2 S. &. S. 457; *Ex parte Mure*, 2 Cox, 63; *Law* v. *The East India Company*, 4 Ves. 824; *Williams* v. *Price*, 1 S. & S. 581; *Philips*

v. *Astling*, 2 Taunt. 206; *Wulff* v. *Jay*, 7 L. R. Q. B. 756, 27 L. T. Rep. (N. S.) 118, 120.

A surety, moreover, will be released if the creditor by reason of what he has done cannot, on payment by his surety, give him the securities, in exactly the same condition as they formerly stood in his hands. Thus, in *Pledge* v. *Bass*, Johns. 663, a creditor holding a mortgage for a debt for which the plaintiff was surety, after the bankruptcy of the principal debtor, without notice to the surety, released the assignees and the bankrupt's estate in consideration of the conveyance to him of the equity of redemption, it was held by Sir *W. P. Wood*, V. C., that the surety was discharged, and that it was not enough for the creditor to allow in account the dividends released, and to give a new charge on the mortgaged premises. "The law," said his Honor, "is now well established, that a person having a mortgage for a guaranteed debt, is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt which he has guaranteed, to take the security in its original condition unimpaired. In this case the principal debtor having become bankrupt, the creditor, instead of going in under the bankruptcy as he might have done, and applying to have the security realised and to be admitted to prove for the balance, in effect purchased the equity of redemption (no doubt on advantageous terms), the price being the surrender of his right of proof. The consequences of this were two-fold: in the first place, the surety could not get the security with the same title under which the creditor held it, which dated from 1850. This might be a matter of no small importance, having regard to the possibility of intervening judgments or other charges. All that the creditor can now give to the surety is a security taking priority from the present time. The right of the surety was to have the same security in exactly the same plight and condition in which it stood in the creditor's hands."

If the creditor appropriates any security for the debt to another purpose, the surety will, to the extent of the value of the security, be discharged. Thus in *Pearl* v. *Deacon*, 24 Beav. 186, the plaintiff was surety upon a promissory note to the defendants for a sum lent by them to their tenant, and the defendants also took a mortgage of the tenant's furniture for the same debt. They afterwards, under a distress, took the same furniture for arrears of rent. It was held by Sir *John Romilly*, M. R., that as regarded the plaintiff (the surety) the produce of the furniture was first applicable to the payment of the promissory note, and that the landlords could not, as against the surety, apply it

in payment of the rent. "If," said his Honor, "the creditor makes available any of his securities, the surety is entitled to the benefit of it." This decision was on appeal affirmed by the Lords Justices, 1 De G. & Jo. 461.

Where, however, the debtor becomes bankrupt, a surrender of a policy of assurance to the office in consideration of a sum of money to the personal representatives of the creditor who proved for the rest of the debt, has been held not to discharge a surety. See *Coates* v. *Coates*, 33 Beav. 249; there, the debtor, John Green, had deposited a policy on his life as security for a debt. He afterwards became bankrupt. The executrixes of the creditor proved and received a dividend upon the debt, and surrendered the policy in consideration of a sum of money without the consent of a surety for the debt. It was held by Sir *John Romilly*, M. R., that the surrender of the policy could not be treated as a discharge of the surety. "John Green," said his Honor, "was a bankrupt, and it was not probable that he would keep up the policy, from which he could derive no benefit, and the executrixes were not bound to do so. To keep it up would have been a mere speculation on their part, which might or might not have turned out beneficial, and if it had turned out unfavourably might have been complained of by the surety. They realised what they could by surrendering it to the office, and whether the policy was surrendered before or after proof in the bankruptcy, I think it did not release the surety. It was the duty of the creditor to sell and realise the security; by so doing he could alone make the estate of the principal debtor available for the payment of a dividend on the debt for which the surety was liable, and consequently the benefit of which dividend is obtained by the surety in further discharge of his debt."

So, also where a creditor has a security upon the equitable interests of his debtor, and of a surety in a trust fund, and transfers the debt with the securities for the same, the assignee will not lose his right against the interest assigned by the surety, in consequence of his not giving to the surety notice of the transfer. Thus in *Wheatley* v. *Bastow*, 7 De G. Mac. & G. 261, a brother and sister entitled in moieties to a reversionary interest in a fund in court, mortgaged it to secure a debt of the brother, the sister joining, and being described in the security as a surety for the brother. The mortgagee obtained a stop order, and afterwards on his marriage assigned the mortgage debt to trustees, who however neither obtained a stop order nor gave notice to the sister of the settlement. On a petition of the brother stating that the tenant for life had assigned to him her

life interest in his share of the fund, and that he had paid a portion of the mortgage debt, and praying for a transfer of his share of the fund, a solicitor who had acted for the sister and for the mortgagee upon the occasion of the mortgage, took upon himself without authority to instruct counsel to appear for the sister and her husband, and also for the mortgagee, who was abroad, and to consent to or not oppose the petition. Upon the hearing of the petition the fund was ordered to be, and was transferred out of Court. It was held by the Lords Justices, reversing the decision of Sir *John Stuart*, V. C., that neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but that it continued subject to the payment of the mortgage debt. See, however, the remarks upon this case in *Strange* v. *Fooks*, 4 Giff. 408.

A surety, however, will not be discharged where a security becomes worthless, unless it became so by the act of the creditor: *Hardwick* v. *Wright*, 35 Beav. 133.

With regard to a security given by co-sureties, it seems that there is an equity that it must not be wasted (*Margretts* v. *Gregory*, 10 W. R. (Ex.) 630, per *Bramwell*, B.), but a fair dealing by the creditor with the surety's security under which the creditor sets off the surety's share of the debt due to him against the proceeds of the security does not preclude a resort to the other securities for their respective shares of the debt: *Margretts* v. *Gregory*, 10 W. R. (Ex.) 630.

IX. *Different views formerly taken as to the liabilities of sureties of law and in equity.*]—The liabilities of sureties were governed by the same principles at law as in equity. And, although different doctrines formerly prevailed at law, it was afterwards firmly established, that the same principles which had been held to discharge a surety in equity, would operate to discharge him also at law. However, although the same relief might be obtained in both, a Court of equity would not have sent a party who was suing there to a Court of law for the discharge to which he was equally entitled in equity: *Samuell* v. *Howarth*, 3 Mer. 278; *Mayhew* v. *Crickett*, 2 Swanst. 185; *Hawkshaw* v. *Parkins*, 2 Swanst. 539, 546; *Eyre* v. *Everett*, 2 Russ. 382; *Mackintosh* v. *Wyatt*, 3 Hare, 567. See also *Moore* v. *Bowmaker*, 6 Taunt. 379; *S. C.*, 2 Marsh. 81; *Melvill* v. *Glendinning*, 7 Taunt. 126; *Philpot* v. *Briant*, 4 Bing. 717.

Relief, however, might sometimes have been had in equity, where it could not formerly have been obtained at law. Thus, where it did not appear upon the face of the instrument that a person was a surety; if, for instance, in a bond, the principal

debtor and surety were bound jointly and severally, the surety, as is laid down in the principal case, could not, *at law*, aver by pleading that he was bound only as surety (*Lewis* v. *Jones*, 4 B. & C. 506), and the remarks of Lord *Abinger*, in *Ashbee* v. *Pidduck*, 1 Mee. & W. 564; sed vide *Laxton* v. *Peat*, 2 Camp. 185; *Hall* v. *Wilcox*, 1 M. & Rob. 58); but *in equity*, although they both appeared as principals, parol evidence was always admissible to show that one was only a surety. The consequence was that, upon the creditor giving further time to the principal debtor, knowing him to be such, the surety, upon proving that fact, might have relief in equity, although he would formerly still be held bound at law, as he would appear there only as a principal: *Craythorne* v. *Swinburne*, 4 Ves. 160, 170; *Clinton* v. *Hooper*, 1 Ves. jun. 173; 3 Bro. C. C. 201; *Clarke* v. *Henty*, 3 Y. & C. Exch. Ca. 187; *Ashby* v. *Pidduck*, 1 Mee. & W. 564; *Oakley* v. *Pashaller*, 4 C. & F. 207; *Oriental and Financial Corporation* v. *Overend, Gurney and Co.*, 7 L. R. Ch. App. 142, affirmed Dom. Proc. nom. *Liquidators of Overend, Gurney, and Co.* v. *Liquidators of Oriental Financial Corporation*, 7 L. R. Ho. Lo. 348; *Wilson* v. *Lloyd*, 16 L. R. Eq. 60.

But since equitable pleas were used at common law, it might be shown that a person appearing on the face of an instrument as a principal was only a surety (*Davies* v. *Stainbank*, 6 De G. Mac. & G. 679; *Pooley* v. *Harradine*, 7 Ell. & Bl. 431; *Manley* v. *Boycott*, 2 Ell. & Bl. 46; *Wake* v. *Harrop*, 1 H. & C. 202; *Greenhough* v. *M'Clelland*, 2 Ell. & Ell. 424; *Re Mutual Loan Fund Association* v. *Sudlow*, 5 C. B. N. S. 449; *Taylor* v. *Burgess*, 5 H. & N. 1; *Lawrence* v. *Walmsley*, 12 C. B. N. S. 799; *Bailey* v. *Edwards*, 4 B. & S. 761; *Ewin* v. *Lancaster*, 13 W. R. (Q.B.) 857, and it seems that in order that a surety might be discharged by a creditor giving further time, it was sufficient that the true relationship between the parties should, although after the original contract, be known to him at or before the extension of time. See *The Oriental Financial Corporation* v. *Overend, Gurney, and Co.*, 7 L. R. Ch. App. 142; 20 W. R. (L. C.) 253, disapproving of *Ex parte Graham*, 1 De G. Mac. & G. (Bank.) 396. See also *Strong* v. *Foster*, 17 C. B. 201.

Again, as, in general, an obligation created by an instrument could, *at law*, only be dissolved by one of equal force, time given by mere parol agreement, although for valuable consideration, would not at law discharge a surety by an instrument under seal, as a bond (*Davey* v. *Prendergrass*, 5 B. & Ald. 187; *Woosnan* v. *Price*, 1 Cr. & Mee. 352; *Ashby* v. *Pidduck*, 1 Mee & W. 564); or by matter of record, as a recognisance (*Balteel* v. *Jarrold*, 8 Price, 467).

In *equity*, however, the rule of law was disregarded, and, as what was agreed to be done by a binding agreement is looked upon as done, relief would be given: *Bowmaker* v. *Moore*, 3 Price, 214; 7 Price, 723; *Blake* v. *White*, 1 Y. & C. Exch. Ca. 420.

A principal creditor might be held at law to have released a surety, where in equity the surety would be held still liable; as, for instance, where the principal creditor had by deed, with the parol consent only of the surety, released the principal debtor: *Brooks* v. *Stuart*, 1 Beav. 512.

Where the debt for which a person was surety became due, he might file a bill in equity to compel the principal to discharge him from his liability. In the words of an old case, where this subject was much discussed,—"Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable, the Court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him;" per Lord Keeper in *Ranelaugh* v. *Hayes*, 1 Vern. 188: and see *Antrobus* v. *Davidson*, 3 Mer. 579; *Lee* v. *Rook*, Mos. 318.

In *Woolridge* v. *Norris*, 6 L. R. Eq. 410, a surety on a bond to secure a money debt, was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the Court. It was held by Sir *G. M. Giffard*, V. C., that the surety, though he had not paid anything, was entitled to maintain a bill against the executors for administration, payment of the debt, and indemnity, and that it was not necessary that the bill should be filed on behalf of all the creditors.

But where the creditor had not a present right to sue, the surety could not come into equity to be discharged from his liability. See *Padwick* v. *Stanley*, 9 Hare, 627, 628, where Sir *George Turner* V. C., said that he considered that the cases in which such a jurisdiction is exercised by the Court, are cases where the creditor has a right to sue the debtor, and refuses to exercise that right.

As by the Judicature Acts, the rules of Equity prevail, any distinctions which may have existed in law and equity will now disappear.

The Roman-Dutch law, and the old French law upon the subject of this note were discussed before the Judicial Committee of the Privy Council in the cases of *Macdonald* v. *Bell*, 3 Moore, P. C. C. 315; *Bellingham* v. *Freer*, 1 Moore, P. C. C. 333.

THE RIGHT HON. GEORGE, EARL OF HUNTINGDON *v.* FRANCES, COUNTESS-DOWAGER OF HUNTINGDON.

January 12, 1702.

[REPORTED 2 BRO. P. C. 1, TOML. EDIT.]

S. C., 2 Vern. 437 ; 1 Eq. Ca. Ab. 62 : Ca. 4 ; 4 Vin. 69 : Ca. 9 ; 10 Vin. 345 : Ca. 17.

MORTGAGE OF WIFE'S ESTATE OF INHERITANCE FOR THE BENEFIT OF HER HUSBAND—WIFE'S ESTATE CONSIDERED ONLY AS A SURETY.]—*A wife joins with her husband in a mortgage of her own inheritance, in order to buy him a place, and the husband covenants to pay the money. He accordingly pays the money, and takes an assignment of the mortgage in trust for himself. The mortgage being for a term of years, the husband devises it for the benefit of his younger children. But it was held, that the eldest son, as heir of the wife, was entitled to have the term assigned as he should direct, discharged from all demands of the younger children.*

BY indenture, dated the 25th November, 1681, and by a fine levied in pursuance thereof, Theophilus, Earl of Huntingdon, and Elizabeth, his then wife settled certain lordships, manors, lands, and hereditaments, in the county of York, which were the estates and inheritance of the Countess, as one of the daughters and co-heirs-at-law of Sir John Lewis, to the use of the said Countess Elizabeth and her assigns, during her natural life, and after her decease, to the use of the appellant her son, and the issue of his body, with other remainders over, but subject to a power reserved to the Earl and Countess, during their joint lives, to revoke and limit new uses.

Some time afterwards, the Earl, being desirous of purchasing the place of Captain of the Band of Gentlemen Pensioners, he prevailed with the Countess to join with

him in mortgaging the settled estate, for raising 4500*l.* to make such purchase, *promising to repay the money out of the profits of the place, or otherwise.*

Accordingly, by a deed dated the 1st of August, 1682, the Earl and Countess revoked all the former uses, and declared, that, in consideration of 4500*l.* paid to the Earl by one Cropper, the premises should remain and be to the use of the said Cropper for a term of 1000 years, subject to redemption on payment of the 4500*l.* and interest; and after the expiration, or other sooner determination of the said term, to the use of the said Countess Elizabeth and her assigns, during her natural life, with remainder to the appellant and the issue of his body, and such other remainders over as were limited by the first settlement. And by this deed the Earl covenanted *that he would pay off the mortgage-money.*

On the 2nd of January, 1683, Cropper, together with the Earl and Countess, assigned over this mortgage to one Mr. Newport and Sir William Cooper, subject to a proviso or agreement, that, if the Earl and Countess, *or either of them,* should pay the 4500*l.* and interest, the term of 1000 years should be assigned to the said Earl and Countess, or to one of them, or as *they or either of them should appoint.*

The Earl having afterwards paid off this mortgage, procured the term to be assigned by deed, dated the 11th of February, 1687, to Sir John Foach and the respondent Sir Philip Meadows, in trust for the said Earl, his executors, administrators, or assigns; but the Countess did not join in, or was privy to this assignment.

On the 24th of December, 1688, the Countess died, and the Earl continued in possession of the estate till his death, applying part of the profits towards the maintenance of the appellant, who was the reversioner, and the residue towards satisfying the debt secured by the said mortgage.

The Earl having six younger children by his second wife, to be provided for out of his personal estate, of which he considered this mortgage-money to be part,

made his will on the 11th of April, 1698, and thereby devised the said mortgage, and all other his personal estate, to the respondent Dr. Gery, his executor, in trust for his said six younger children.

In 1701 the Earl died; and in Michaelmas Term in that year, the appellant exhibited his bill in the Court of Chancery against the respondent, praying an account of the rents and profits of the estate from the death of his mother; and that the defendant Sir Philip Meadows, as the surviving trustee of the 1000 years' term, might surrender or assign the same, to attend the inheritance, free from incumbrances.

The cause being at issue, was heard before the Lord Keeper *Wright*, on the 12th of May, 1702 (*a*); when his Lordship decreed an account to be taken of what rents and profits had been received by the late Earl out of the mortgaged premises since the death of the Countess Elizabeth; and that the same, after a reasonable allowance to be thereout made for the plaintiff's maintenance and education, and other just allowances, should be applied towards the discharge of the said mortgage; and, on payment of what should appear to be remaining due thereon, to the defendant Dr. Gery, in trust for the defendants the infants, the mortgage was to be assigned to the plaintiff, or as he should appoint.

(*a*) 2 Vern. 437.

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From this decree the plaintiff appealed; insisting that he was thereby, in effect, decreed to pay the mortgage debt, which was wholly a debt of the late Earl, created to serve his particular occasions, and never was in any shape the debt of the late Countess, nor did any part of the money come to her use; besides, the Earl covenanted in the mortgage deed to pay and satisfy the mortgage-money and interest; and this covenant being in fact performed, the term ought not any longer to have been kept on foot, unless to protect and defend the inheritance, but not to charge it. That the appellant's mother being, at the time of making this mortgage, tenant for life, with remainder to the appellant in tail, and the premises being her own

inheritance, the same ought not to be charged further or otherwise than she agreed or consented: and it could not be imagined that she agreed to charge her land any otherwise than to stand as a security for the money which her husband had occasion for, and was thereby enabled to borrow, and to be exonerated when he, the principal debtor, should pay off the debt; but she never meant to make any absolute gift of so much money to her husband, or that her estate should stand mortgaged to him, or in any trust for him, for that or any other sum. That it appeared by proof in the cause, that the Earl, in order to gain the Countess's consent to the mortgage, had promised that he would pay off the money and discharge the land; but, if the Earl had made no such promise, yet he ought not in conscience to be deemed a mortgagee or incumbrancer upon the estate, for having discharged his own debt, which he alone was liable to pay, and to be sued for, by virtue of his covenant; and it was not agreeable, either to reason or experience, that a principal debtor, merely by paying the debt he owes, should become a creditor, and charge his own surety with the payment of the debt, by any means or contrivance whatever.

On the other side, it was contended that the late Earl was compellable to discharge the land of this debt; nor did the Countess, when she agreed to mortgage the premises for raising the 4500*l.*, desire or insist on any covenant or agreement for that purpose; but on the contrary, by the assignment of the mortgage in January, 1683, it was expressly agreed, that, on payment of the 4500*l.*, the term should be assigned to the Earl and Countess, or as they or *either of them* should direct. That the Earl was so far from intending to exonerate the land by his paying off the mortgage-money, that he not only took care to have the mortgage assigned and kept on foot; but also, considering himself as a creditor for the money so advanced, he constantly, after the death of the Countess, kept regular and exact accounts of his receipts and payments relating to the mortgaged premises. That it was certainly as lawful for

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the Earl to lay down the money, and take an assignment of the mortgage, as it would have been for any other person to have done; and therefore, it was but reasonable that he should have the like benefit thereof, to reimburse what he paid of such assignment, as a stranger might have had; and since the Earl had thought fit to leave his money due on the mortgage as a provision for his six younger children, who had very slender fortunes, and a narrow subsistence, it was hoped that there would appear no ground or reason to reverse or alter his decree.

Decree reversed; Journ., Vol. 17, p. 266.

But after hearing counsel on this appeal, it was ordered and adjudged, that so much of the decree as was complained of should be reversed, and that the premises in question should be discharged from any demands which the respondents, the Countess of Huntingdon, or her children, or their trustees, or either of them, pretended to have, in respect of the 4500*l.* and interest; and that the term should be assigned as the appellant should direct or appoint; and that the profits of the estate in question, which grew due and were received by the late Earl after the death of the late Countess, or by his executors since his death, should be accounted for to the appellant, without being discounted out of the money pretended due on the mortgage; but the Master to whom the account stood referred was to make the respondents all such allowances for the appellant's maintenance and education, and for all moneys laid out and expended in or about the management and preservation of the said estate, and all other just allowances as in the decree were directed.

It is a well-established general rule, that whenever husband and wife mortgage the estate of inheritance of the wife for the benefit of the husband, the wife or her heir will be entitled, after the death of the husband, to have it exonerated out of the real and personal estate of the husband, her estate being considered only as a surety for his debt. Even a creditor of the wife's, upon the refusal of her representatives to take proceedings, may file a bill

to obtain exoneration: *Lancaster* v. *Evors*, 10 Beav. 154, 266. And see *Stamford, Spalding, and Boston Railway Company* v. *Ball*, 31 L. J. N. S. Ch. 143.

The principal case is usually referred to, as the earliest and leading authority on the subject. In *Pocock* v. *Lee*, 2 Vern. 604, A. and his wife mortgaged the wife's estate, and A. covenanted to pay the money, but the equity of redemption was reserved to them and their heirs. Upon the death of the husband the question was, whether the mortgage-money should stand charged upon the land, or the land be exonerated out of the husband's personal estate: et per Cur. "The husband, having had the money, is in equity the debtor, and the land is to be considered but as an additional security, and so decreed it according to the judgment in the House of Peers, in *the case of Lord and Lady Huntingdon*." See also *Tate* v. *Austin*, 1 P. Wms. 264. *S. C.* 2 Vern. 689.

And it is now clearly settled, that, as the wife is a surety, she is to be paid her debt out of his estate, with other creditors, according to its degree: 1 Rop. H. & W. 145, note (*b*). See also *Pitt* v. *Pitt*, T. & R. 180, and the remarks of Sir *W. Page Wood*, V. C., in *Hudson* v. *Carmichael*, Kay, 620, 621, 622; *Gee* v. *Smart*, 8 Ell. & Bl. 313; disapproving of the dicta of Lord *Cowper* in *Tate* v. *Austin*, 1 P. Wms. 264, and of Lord *Thurlow* in *Clinton* v. *Hooper*, 3 Bro. C. C. 201, who thought the wife ought to be postponed to the husband's creditors.

A wife paying her husband's mortgage debt by a loan of money out of her separate estate, is equally entitled to stand in the place of the mortgagee as a stranger; and, if she joins with him in charging her estate, she is, in like manner, entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate. Per Lord *Hardwicke*, C., in *Parteriche* v. *Powlet*, 2 Atk. 384. See also *Robinson* v. *Gee*, 1 Ves. 252; *Kinnoul* v. *Money*, 3 Swanst. 217, n.

Upon the same principle, where a wife joined her husband in granting an annuity charged upon her separate estate, and also upon a fund to which the husband was entitled jure mariti, it was held, that she was entitled to have the latter fund applied towards payment of the annuity (in exoneration of her separate estate), not only as against her husband, but as against his assignee, under the Insolvent Debtors' Act, and as against persons in whose favour he had subsequently charged it: *Aguilar* v. *Aguilar*, 5 Madd. 414.

Upon the bankruptcy of the husband, the wife, after she has paid the debt, is entitled to go in as a creditor upon her husband's estate in bankruptcy, and

there, with his other creditors, to receive a dividend. Per Lord *Westbury*, C., 1 De G. Jo. & Sm. 96.

In a recent case a husband and wife mortgaged in fee land of which they were seised in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt, and in a suit by the wife for a settlement of the equity of redemption on herself and her children, and for redemption as against the mortgagee, and for foreclosure against the assignees and the husband, the assignees having disclaimed, it was held by Lord *Westbury*, C., that the wife was entitled to redeem as against the mortgagee, and to have the whole fee settled upon herself and her children, the husband not objecting: *Gleaves* v. *Paine*, 1 De G. Jo. & Sm. 87.

If a wife mortgages her own separate estate to raise money for her husband, as it is clear that in equity she is competent to deal with such property as a *feme sole*, an *assumpsit* would arise just as if she were a stranger, and consequently there would be no pretence for postponing her to other creditors of her husband. Thus in *Hudson* v. *Carmichael*, Kay, 613, where a married woman, entitled to leasehold property for her separate use, concurred with her husband, in raising money upon the mortgage of her separate estate, by a deed which expressed that the money was borrowed by and paid to *herself and her husband*, and which contained a covenant by the husband for payment of the debt, the presumption that the money was received by the husband not being rebutted by extrinsic evidence, it was held by Sir *W. Page Wood*, V. C., that the wife was only a surety for the husband, and was, after his death, entitled, as against his other creditors, to all the rights incident to that relation, and therefore had a right to have the debt paid off as a specialty debt, out of the husband's assets, in priority to the simple contract creditors. After noticing with disapprobation the *dicta* in *Tate* v. *Austin* and *Clinton* v. *Hooper*, according to which the wife would be postponed to the other creditors of the husband, his Honor says, "Whatever should ultimately be held to be the law in this respect,—and I think there will be some difficulty in supporting these *dicta*, although by such eminent judges, —it is clear, that no question as to assumpsit can exist where the estate is settled to the *separate use of a married woman*. That is a case in which the Court recognises her as a feme sole, competent to deal with her property in every respect; and, therefore, an assumpsit would arise just as though she were a mere stranger. A wife effecting a charge upon her separate property in favour of her husband, is precisely in the same

position as though she had lent to him the savings of the income of such property deposited at her bankers, and which there is no doubt that he can lawfully borrow from her. . . . . It must be observed, that it is difficult to see on what other ground, except that of an implied assumpsit, this doctrine of her right as surety ever arose. The wife is not in the mere position of the heir, for the heir cannot assert his right against legatees, but the wife can; and how she can acquire a better position than the heir, except by such an assumpsit, it is not easy to understand. Where the wife has a separate estate, then, as it is laid down in *Parteriche* v. *Powlet* (2 Atk. 383), her separate property being applied to pay off the husband's debts, the wife must be considered as a distinct person, and is equally entitled to stand in the place of the husband's creditors as a stranger; and according to the dictum in *Robinson* v. *Gee* (1 Ves. 252), if her mortgage to secure her husband's debt is paid off out of his assets, the other creditors of the husband have no equity, in case of a deficiency of his assets, to come upon her estate."

And where a married woman is entitled to property for life with a power to appoint by deed or will, a mortgage created by the exercise of that power as a collateral security for the debt of her husband stands for all purposes on the footing of a mortgage of her separate estate: *Ferguson* v. *Gibson*, 14 L. R. Eq. 379, 385.

Where a husband and wife mortgaged their respective estates to secure a debt of the husband's, and both estates were afterwards sold, free from the mortgage, and the debt paid out of the produce of the wife's estate, it was held by Lord *Langdale*, M. R., that the representative of the wife was entitled to have the amount recouped out of the produce of the estate of the husband which was in Court, but that he was not entitled to interest on the amount paid: *Lancaster* v. *Evors*, 10 Beav. 154, 266.

The debt, however, affecting the estate of the wife, must be the debt of the husband, otherwise her claim to exoneration will fail. Thus, if the estate of the wife be mortgaged, in order to pay debts contracted by her before marriage, she cannot claim exoneration out of the estate of her husband, even although he covenants to pay the sum raised: *Lewis* v. *Nangle*, Amb. 150; 1 Cox, 240; *Earl of Kinnoul* v. *Money*, 3 Swanst. 201, n.

Upon the same principle, where the wife's estate was mortgaged before the marriage, and transferred after, and the husband joined in the transfer, and covenanted that he or his wife would pay the money, it was held that his personal estate should not exonerate his wife's estate; because the

debt was not substantially and in effect his, though he covenanted to pay it; but, being a debt existing on the estate before, his covenant was collateral in support of the debt: *Bagot* v. *Oughton*, 1 P. Wms. 347.

Where, moreover, it has been clearly proved that the money borrowed had been paid into the hands of the wife, and that she had been perfect mistress, and had converted it to her own use as her separate money, there can be no reason why the Court should not declare that it was so applied, and consequently could not be deemed the debt of the husband, and the covenant of the husband was merely a necessary covenant for the purpose of confirming the debt. Per Lord *Thurlow* C., in *Clinton* v. *Hooper*, 3 Bro. Cl. 213.

So, where the wife, having the absolute disposal of it, appropriates it to the use of her husband, that fact would reach the original contract, but still resolve itself into the same principle as before, and makes her estate liable: *Ib.*, and see *Thomas* v. *Thomas*, 2 K. & J. 79.

To entitle the wife to have her estate exonerated, it is not incumbent on her to show that the money was borrowed for the *benefit of* the husband; for the general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to show the contrary. But though this is the general rule, that the husband shall *primâ facie* be liable, yet it is but an equity, and may therefore be rebutted by another equity, viz., that the money was borrowed for the benefit of the wife, which may be set up by parol proof: *Earl of Kinnoul* v. *Money*, 3 Swanst. 208, n.; *Clinton* v. *Hooper*, 1 Ves. jun. 173; 3 Bro. C. C. 212, 213; *Hudson* v. *Carmichael*, Kay, 613.

So, also, parol evidence of the declarations of the wife to prove that the money raised by mortgage of her estate was not applied for the husband's use, is admissible, but it will not be admissible to prove the transaction itself different from what it appears by the instruments and other evidence: as, that it was a gift to him: *Clinton* v. *Hooper*, 1 Ves. jun. 173.

After the death of the husband the wife can waive her right to exoneration: and parol evidence of her declaration to the executors of her husband, that she did not intend to make any claim against his estate, has been held admissible: *Clinton* v. *Hooper*, 1 Ves. jun. 188; 3 Bro. C. C. 201.

But the claim of the wife will not be held waived by her borrowing a further sum in addition to the sum advanced for her husband's benefit, and agreeing that her estate should not be redeemed without payment of both

sums: *Lacam* v. *Mertins*, 1 Ves. 312.

If a wife concurs with her husband in mortgaging property over which she has a power, the husband is primarily liable, unless the wife received the money for her separate use: *Thomas* v. *Thomas*, 2 K. & J. 79.

But an estate will not be considered as the wife's, so as to entitle her to claim to be exonerated from a mortgage which was created by a joint power executed by the husband and wife, and which power had precedence over the interests of the wife in the property. See *Scholefield* v. *Lockwood*, 4 De G. Jo. & Sm. 22; 12 W. R. (L. C.) 114; 33 L. J. N. S. Ch. 106. There, by a post-nuptial settlement certain estates of the husband were limited by him for valuable consideration to himself for life, with remainder to such uses as the husband and wife should jointly appoint for the purpose of raising money by mortgage or otherwise, in default of appointment, to a trustee to raise a sum of money to pay off a debt of the husband's, with remainder to the wife for life, with remainder to the husband and wife in equal moieties. The husband and wife, by a joint exercise of the power, mortgaged the estates for a debt of the husband's. It was held by Lord *Westbury*, C., affirming the decision of Sir *J. Romilly*, M. R. (reported 32 Beav. 434), that it was not a mortgage of what could properly be called the wife's estate, and that she was not entitled to exoneration. See also *Heather* v. *O'Neil*, 2 De G. & Jo. 399.

So, where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the *heirs of the husband*, there is a resulting trust for the wife and her heirs, the husband merely having the estate he had before, *jure uxoris*: *Broad* v. *Broad*, 2 Ch. Ca. 161; 1 Vern. 213, nom. *Brend* v. *Brend*; 2 Ch. Ca. 99, nom. *Brond* v. *Brond*.

Upon the same principle, if a wife, joining her husband in a mortgage, releases a rent-charge on the same estate to the mortgagees, and their heirs, to whom at the same time the estates are conveyed, it will, it seems, in the absence of a clear intention to resettle the equity of redemption of the rent-charge, be held that the absolute release of the rent-charge, was to be, like the absolute conveyance of the estate, subject to the same equity of redemption. So that, on a re-conveyance to the husband by the mortgagees of part of the estate, released from the mortgage, the right of the wife to the rent-charge revived. *In re Betton's Trust Estates*, 12 L. R. Eq. 553.

The principle is this, that, in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such case (where fraud is out of the ques-

tion), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage. Thus, in *Ruscombe* v. *Hare*, 6 Dow, 1; 2 Bligh. N. S. 192, a man having mortgaged his estate to secure two sums, the one at $4\frac{1}{2}$*l.* per cent., and the other at $4\frac{1}{4}$*l.* per cent., devised it to his wife in fee, and made her sole executrix, and residuary legatee. The wife, having married again, joined her second husband in another mortgage of the estate to the same mortgagee, consolidating the two former mortgages into one. The mortgage deed, after reciting that the sums were then due, but that all interest had been paid up to that time, it was witnessed, *that, for better securing the said sums, with interest at 5l. per cent.*, the husband and wife conveyed the premises to the mortgagee, discharged of the former proviso for redemption, but subject to another proviso, that, in case the husband should pay the two sums, amounting together to 1250*l.*, and interest at 5*l.* per cent., at a time therein specified, the mortgagee *should re-convey to the husband, his heirs and assigns, for ever.* And the husband and wife covenanted to levy a fine, which was afterwards levied, and the husband executed a bond to the mortgagee as a collateral security for the due payment of the mortgage money. The husband afterwards alone mortgaged the estate to secure some arrears of interest. The wife died, leaving a son by her former marriage her heir-at-law. The husband then sold part of the estate, and paid off the sum due to the mortgagee, who thereupon reconveyed to him the remainder of the estate, in the possession of which he continued until his death, and devised it. It was held by the Court of Exchequer, and the decree was affirmed in the House of Lords, upon the advice of Lord *Eldon*, and with the concurrence of Lord *Redesdale*, that the equity of redemption belonged to the wife, and at her death descended to her heir-at-law, and did not vest in the second husband, under the reservation in the mortgage deed; and that his covenants and bond could not be deemed a purchase of her equity of redemption; and that the purchaser from the second husband could not be deemed a purchaser without notice, inasmuch as the equity appeared upon the deed; and the decree was that the heir-at-law might redeem. In moving the judgment of the House, Lord *Eldon* made the following important remarks:— "If," said his Lordship, "it clearly appears to have been the intention of the wife that he should have the equity of redemption, he must have it. But still, the question is what Courts of equity have agreed to consider as evidence of that intention, manifested on the face of the instrument,

from which you are to draw your conclusion. I perfectly recollect what fell from the lips of Lord *Thurlow*, though it is a quarter of a century ago, upon that point: that where the equity of redemption is in these cases reserved to the husband, if there is no other evidence of the intention, and if the recital shows that the instrument is framed for other purposes, the husband is seised of the estate which he before had; with this difference, that if he before had the legal estate jure uxoris, he afterwards had the equity of redemption, but still jure uxoris; or if the estate which he before had jure uxoris was equitable, so it remained equitable, but still jure uxoris; and that equity throws this protection round the wife, that the deed shall operate no further than its particular purpose, unless there is some recital of intention that the husband should take the benefit. But there may be complex cases, such as some of those which have been cited, very different from the case of a simple reservation of the equity of redemption to the husband, where the estate belonged to the wife. And yet it appears that, even in these complicated cases, the rule of law prevailed."

In *Whitbread* v. *Smith*, 3 De G. Mac. & G. 727, an estate was by deed, dated July, 1817, settled to such uses as A. and his wife should jointly appoint, and in default of appointment to A. for life, remainder to his wife for life, remainder to his son in fee. A. and his wife made several mortgages, all except one limiting the equity of redemption upon, or consistently with the uses of the deed of July, 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to A. and his wife, "their heirs or assigns, or to such other persons as they should direct," and by a deed of even date certain terms were assigned to attend the inheritance, according to the uses of the mortgage deed of even date. The husband, after the death of his wife, sold as if he were seised in fee. On a bill for redemption being filed by the son against the purchaser, it was held by the full Court of Appeal, reversing the decision of Sir *R. T. Kindersley*, V. C. (reported 1 Drew. 531), that the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee to the son in the deed of July, 1817. See also *Wood* v. *Wood*, 7 Beav. 183; *Clark* v. *Burgh*, 2 Col. 221; *Hipkin* v. *Wilson*, 3 De G. & Sm. 738; and see *Plowden* v. *Hyde*, 2 De G. Mac. & G. 684, reversing *S. C.* 2 Sim. N. S. 171; *Stansfield* v. *Hallam*, 29 L. J. (Ch.) 173; 8 W. R. (M. R.) 34; *Gleaves* v. *Paine*, 1 De G. Jo. & Sm. 87; *Smith* v. *Etches*, 1 Hem. & Mill. 558, 12 W. R. (V. C. W.) 192; *Lord*

Hastings v. *Astley*, 30 Beav. 260. *M'Callagh* v. *Littledale*, 9 I. R. Eq. 465. See however *Walker* v. *Armstrong*, 25 L. J. (Ch.) N. S. 406.

Where it appears to have been the intention of the wife to alter limitation of the equity of redemption, effect will be given to the intention; and it is not necessary, as Lord *Eldon* erroneously supposed, that the intention should appear in the recitals. Thus, in *Jackson* v. *Innes* (1 Bligh, 104), the lands of the wife upon her marriage were settled to the use of the husband and wife successively for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and appointment of new uses, and she joined with her husband in a mortgage, and by the deed, to lead the uses of the fine which the husband and wife afterwards levied according to covenant, the lands, after the determination of the term created to secure the repayment of the money borrowed, were limited to the husband and wife, and the survivor for their lives and the life of the survivor, and from the decease of the survivor to the use of the heirs of their two bodies, and for default of such issue, to the use of the right heirs of the survivor of the husband and wife for ever. The wife having died without issue, leaving the husband survivor, it was held by the House of Lords, reversing the decision of Lord *Eldon* (reported 16 Ves. 351), that this was more than a mere mortgage transaction; that there was evidence of an intention to effect a change in the beneficial interest; and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; and consequently, that the husband and his heirs, and not the heirs of the wife, were entitled to the equity of redemption. Lord *Redesdale*, in moving the judgment of the House of Lords, entered into an elaborate examination of the authorities; and after admitting the rule laid down in *Broad* v. *Broad*, and *Ruscomb* v. *Hare*, added: "But it is an exception to that rule, where other circumstances occur affording evidence of an intended alteration of rights."

Lord *Eldon*, adopting the opinion of Lord *Redesdale*, observed that, "the circumstances of the case were certainly, in point of fact, much better understood than they were, and much greater research had been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case, as it now appeared. The judgment of the House would remove a difficulty which he knew was floating in the minds of many persons. He conceived it to have been the opinion of Lord *Thurlow*, that, in order to dispose of the equity of redemption of the wife

in an estate, it was absolutely necessary there should be, in the recitals of the instrument, some expression that the parties meant it so; that it was not enough to collect the intention from the limitations, but that there must be something more upon the face of the deed to lead the wife to understand what the limitations were. It did, however, occur to him, on looking into the cases which had been referred to, that such a proposition could not be supported, and therefore he was of opinion that the decree must be reversed."

In *Reeve* v. *Hicks* (2 S. & S. 403), a husband and wife mortgaged the wife's freeholds for 1000 years, to secure the repayment of a sum of money lent to the husband; the deed contained a reservation of a peppercorn rent during the term, to the husband and wife and the heirs and assigns of the wife, and also a covenant on the part of the husband, that he and his wife would levy a fine to the use of the mortgagee for the term thereby demised, for better securing the mortgage-money, and subject thereto *to the only use and behoof of the husband, his heirs and assigns for ever, and for no other use, intent, or purpose whatsoever.* The clause for redemption provided that, upon payment of the mortgage-money and interest by the husband and his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, upon the 10th of February, 1771, the term of 1000 years should cease. The husband released the equity of redemption to the mortgagee in fee, who entered into possession. On the death of the husband, it was held by Sir *John Leach*, V. C., that the wife was not entitled to redeem.

"The case," said His Honor, "is not distinguishable in principle from *Innes* v. *Jackson*. The limitation of the uses of the fine to the husband and his heirs has no connection with the purpose of the mortgage, or the proviso of redemption, but *is altogether a new settlement*, which defeats the heir of the wife." See also *Eddlestone* v. *Collins*, 3 De G. Mac. & G. 1; *Heather* v. *O'Neil*, 2 De G. & Jo. 399, reversing the decision of Sir *J. Romilly*, M. R., 6 W. R. 176; *Atkinson* v. *Smith*, 3 De G. & Jo. 186.

THORNBROUGH *v.* BAKER.

Term. Trin. 28 *Car.* 2.

[REPORTED 1 CH. CA. 283.]

S. C., 3 Swanst. 628 : nom. *Thornborough* v. *Baker*, and 2 Freem. 143.

EXECUTOR OF MORTGAGEE IN FEE ENTITLED TO MONEY SECURED ON MORTGAGE.]—*The executor, not the heir of a mortgagee in fee, is entitled to the money secured by the mortgage.*

Reasons of that doctrine.

THE plaintiff's bill being, that Lawrence Clifton, by indentures of lease and release between him and James Baker, bearing date the 20th and 21st of October, 1656, in consideration of 500*l.* paid to him by the said James Baker, did convey to the said James Baker and his heirs several lands in Stoak, in the county of Surrey; and by another indenture, executed at the same time between the same parties, it was agreed between them, that if the said Lawrence Clifton should, during his life, pay to the said James Baker, his heirs, executors, administrators, or assigns, 30*l.* yearly, at Lady-day and Michaelmas, or within thirty days after, by equal portions; and if the heirs of the said Lawrence should, within six months after the death of the said Lawrence, pay to the said James Baker, his heirs, executors, administrators, or assigns, the sum of 500*l.*, with interest since the paying the last 15*l.*, then the lease and release should cease and be void.

About one year after, the said Lawrence Clifton died, leaving the said Jane [the plaintiff's wife] his only daughter and heir. And by another indenture, bearing date the 25th of May, 1658, made between the now plaintiff and the said James Baker, the said James Baker did covenant with the plaintiff, that if they, or either of them,

should pay to the said James Baker, his heirs, executors, administrators, or assigns, the sum of 20*l.* only, on the 20th of October then next following, and the sum of 530*l.* on the 20th of October, 1659, that then the said indenture of lease and release should be void.

The said James Baker died about May, 1659, and the premises being forfeited, they descended to the said defendant John Baker, son and heir to the said James: and the defendant Sarah, the relict of the said James Baker, having administration of his estate granted to her, her husband John Nichols and she do pretend to the said mortgage; and the plaintiff, praying a reconveyance on payment of what was due, the defendant John Baker, by his answer confessing the mortgage and agreement aforesaid, and that the mortgage, being forfeited, descended upon him as heir to his father, and submitted to reconvey the premises on payment of principal, interest, and costs to him; the defendant and John Nichols and his wife confessing the said mortgage, and insisting, that the said Sarah was administratrix to her former husband and thereby entitled to the said mortgage-money and interest, although she hath other assets of her husband's estate, with a considerable overplus.

Sir Harbottle Grimston, M. R., upon the hearing of the cause, the 11th of February, in the twenty-third year of his now Majesty's (*a*) reign, decreed that, *upon payment of principal, interest, and costs*, the defendant John Baker should reconvey the premises; and it was then farther ordered, that the party should attend the Right Honourable the Lord Keeper of the Great Seal of England for his Lordship's directions, whether the principal and interest should be paid to the defendant John Baker, the heir, or to the defendant Sarah, the relict and administratrix of the said James Baker; since which, the said principal and interest having been paid by the plaintiff [and his wife], and a reconveyance made unto them, but the question between the heir and the administratrix being not settled. Lord Keeper

(*a*) Charles 2nd.

(a) *Finch*, afterwards Lord Chancellor and Earl of Nottingham.

Finch (a), upon hearing and full debating of the matter, this present day, by counsel learned, as well for the heir as the administratrix, whether the said principal money and interest doth belong and ought to be paid to the heir or administratrix; and the former precedents being produced, his Lordship, having been attended with the said cause and precedents, and having taken time to consider thereupon, did now declare, that the mortgage ought to go to the other defendant John Nichols and his wife, the administratrix of James Baker, and not to John Baker, son and heir of the said James Baker; because the reason of the common law in these cases ought, as near as may be, to be followed in equity. Now, by the common law, if the conditions or defeasance of a mortgage of inheritance be so penned, that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executrix, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeasance appoints the money to be paid either to heirs or executors disjunctively, there by the common law, if the mortgagor pay the money precisely at the day, he may elect to pay it either to the heirs or executors as he pleaseth; but where the precise day is past, and the mortgage forfeited, all election is gone in law; for in law there is no redemption. Then, when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heirs or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election, for then the mortgagor might defer the payment as long as he pleaseth, and at last, for a composition, by payment of the money to that hand which will use him best; much less can the Court elect or direct the payment where they please; for a power so arbitrary might be attended with much inconvenience throughout. Therefore [we ought] to have a certain rule in these cases, and a better cannot be chosen than to come as near unto the rule and reason of the common law as may be. Now, the law

Equitas sequitur legem.

When the mortgage-money shall be paid to the heir or executor, in law or equity elective.

always gives the money to the executor, where no person is named; and where the election to pay to either heir or executor is gone and forfeited in law, 'tis all one in equity, as if either heir or executor were named, and then equity ought to follow the law, and give it to the executor; for, in natural justice and equity, the principal right of the mortgagee is to the money, and his right of the land is only as a security for the money; wherefore, when the security descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money, the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee. And for this reason, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though it may seem hard that the heir should part [with] the land, and be decreed to make a reconveyance without having the money which comes in lieu of the land, yet it will not seem so to them who consider that the land was never more than a security, and that, after payment of the money, the law keeps a trust for the mortgagor, which the heir of the mortgagee is bound to execute; and his Lordship declared, that the right to a sum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore, his Lordship did not think it material that the administratrix in this case had assets without this money: for assets, or not assets, is not the measure of justice to executor or administrator, but serves only as a pretence to favour the heir, who either ought to have the money, if there be no assets, or not to have it, though there be assets. And for the same reason, his Lordship did not think it material that there wanted circumstances of a personal covenant from the mortgagor to pay the money; for though the case of the administratrix of the mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared, that he had considered the various precedents in this case which had been

Nature of a mortgage.

Mortgage of an inheritance to a citizen of London, part of his personal estate, and to go according to the custom.

Difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey mortgage looked upon as part of the personal estate. See 1 Vern. 271, 412 ; 2 Ch. Ca. 49, 50, 51, 220 ; 2 Vent. 348, 351 ; 1 Ch. Ca. 98 ; 3 Ch. Rep. 187.

urged, whereof not one did come to the very point, there being a great difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey upon repayment of the purchase-money ; the other late precedents which made for the heir, being contrary to the more ancient precedents of this Court, and to some modern precedents also, which seemed to his Lordship of more weight, his Lordship being of opinion that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee in his lifetime, or by his last will, do otherwise declare and dispose of the same. Wherefore, and upon the whole matter, his Lordship, having fully weighed the precedents, and what was said on either side, doth order and decree, that the mortgage-money and interest shall be paid unto the said John Nichols and his wife, and kept by them ; and that, what security hath been given by either of them concerning the disposing of the said monies and interest, or the abiding the order of this Court as to the payment of the said money and interest, be delivered up to them and cancelled.

CASBORNE *v.* SCARFE.

Hilary Vacation, 1737.

[REPORTED 1 ATK. 603.]

NATURE OF EQUITY OF REDEMPTION—IS AN ESTATE IN LAND.]—*A., a feme sole, seised in fee of a freehold estate, mortgages it, and afterwards intermarries with B. A. dies, and the mortgage is not redeemed during the coverture. This is, notwithstanding, such a seisin in the wife as entitles the husband to be tenant by the curtesy of the mortgaged premises; for in a Court of equity the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.*

THE father of the plaintiffs (Elizabeth and Mary Casborne) devised to Anne, his daughter, the plaintiffs' eldest sister, all his estate, freehold and copyhold, in fee, charged with 200*l.* apiece to the plaintiffs. Anne, after her father's death, possessed the several estates, and afterwards intermarried with the defendant Inglis, and soon after died, leaving issue a son, who died an infant and without issue; upon whose death the plaintiffs, as heirs-at-law both to the infant and their sister, became entitled to the real estate. Anne Inglis, before her marriage, mortgaged part of the freehold premises to the defendant Scarfe, for 930*l.* The bill is brought against the mortgagee and the husband for an account, and for the direction of the Court.

The defendant Alexander Inglis insisted that, having had issue by his wife, he was entitled to an estate for life, as tenant by the curtesy, in his late wife's freehold premises, subject to the mortgage of the defendant Scarfe.

On the 5th of May, 1735, Sir *Joseph Jekyll*, M. R., on hearing the cause, was of opinion the defendant Inglis

was not entitled to a tenancy by the curtesy in the estate comprised in the mortgage.

The defendant appealed from this decree to Lord Chancellor *Hardwicke*, and the cause came on before his Lordship on the 28th of January and 4th of March, 1737.

Argument for the plaintiffs.

For the plaintiffs it was insisted, the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage. It was compared to the case of a proviso for a re-entry in a conveyance, and no re-entry ever made, and to a condition broken, and no advantage ever taken thereof; that the wife was never seised in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and was in receipt of the rents and profits; so that the mortgagor had merely a right of action, or a suit in a Court of equity, in order that the estate might be reconveyed to her, upon complying with the terms in the mortgage; that it was the laches of the husband he did not pay off the mortgage-money, which would have re-vested the estate in the wife; but, not having done that, there is no more reason that he should be a tenant by the curtesy here, than that he should have the benefit of a seisin in law in the wife, which he cannot have, for there must be an actual seisin; for the words of Lord Coke, in his comment upon the 35th section of Lyttleton, are—*A man shall not be a tenant by the curtesy of a bare right, title, use, or of a reversion, or a remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.* It was likewise said, if it be considered as an interest, it is merely a contingent one, as it is uncertain whether the mortgagor will ever take back the estate again, for it was entirely at her election; and supposing it to be mortgaged to the value, though she had a right to redeem, yet she was under no obligation to do it; and it does not appear in this case the wife ever intended it; and if the law should cast the estate on the husband, he, by never paying the interest during his life, might

load the inheritance in such a manner that it would never be of any benefit to the heir.

The Attorney-General cited the case of *Penville* v. *Luscombe*, at the Rolls, the 4th of February, 1728, where the Master of the Rolls (*a*) was strongly inclined to think there could be no *possessio fratris* of an equity of redemption. He likewise cited the case of *Reynolds* v. *Messing*, at the Rolls (*b*), the 20th of February, 1732, where it was held a wife was not dowable of an equity of redemption in the case of a mortgage in fee; and in the case of *Robinson* v. *Tongue*, Michaelmas Term, 1730, Lord Chancellor *King* was of the same opinion.

(*a*) Sir *Joseph Jekyll.*

(*b*) Sir *Joseph Jekyll.*

Mr. *Fazakerley*, *e contra*, insisted that the husband's paying off the mortgage would have been buying what the law gives him as a tenant by the curtesy; that, though at law a mortgage in fee is a revocation of a will, yet in a Court of equity it is otherwise; and here a mortgagor is considered as having still the ownership of the estate, which is only a pledge or security for the money of the mortgagee, without making any alteration in the property, for the estate retains all its former qualities as any other not in mortgage.

Argument for the defendants.

That the argument *ab inconvenienti* falls to the ground; for, as a tenant for life, he will be obliged to keep down the interest during life; so that there is no danger of his injuring the inheritance. That there is a difference between a tenant by the curtesy and a tenant in dower, *with regard to a trust;* for there may be a tenancy by the curtesy of a trust, though a woman is not endowable of it; but what were the grounds of this distinction he would not take upon him to say; for as, both by the decrees of this Court and in the House of Lords, it has been so determined without giving any reasons, he would not presume to offer any: 2 Vern. 585 and 680.

That, in the case of *Penville* v. *Luscombe*, nothing was therein determined by the Master of the Rolls, who was very doubtful in the principal point; but Mr. *Fazakerley* said he had a note of a case, with the same names, determined by Lord *Cowper* in 1716, who held directly the

contrary, that there might be a *possessio fratris* of an equity of redemption; and if so, the rule of *equitas sequitur legem*, in cases of property, is certainly the best guide; and if this Court upon niceties should relax this rule, it would be a precedent to dispense with it in other cases. He said it was agreed the principal point had never been determined, though it is at the same time admitted there are many cases, where, after a recovery at law, either of dower or tenancy by the curtesy, a trust term has been laid out of the way for the benefit of dowress, &c.

Mr. *Murray*, of the same side, said the Statute of Uses interposes only between a cestui que trust and his own feoffee, strictly speaking; that, in this Court, the cestui que trust is considered as the owner of the land, and the trustee, like the conusee of a fine, only the mere instrument and no more. That the case of *Lady Radnor* v. *Vandebendy* (*a*) was affirmed in the House of Lords for this reason, because all conveyancers have insisted, that, where there is a trust term it may be safely purchased without any danger of dower, and is one reason for the distinction between a dowress and a tenancy by the curtesy.

(*a*) Show. P. C. 69.

That a mortgage in fee is no more than a charge upon the land; and that, in the case of *Taber* v. *Grover*, 2 Vern. 367, it was held a mortgage in fee (though two descents cast, and though more was due upon it than the value, and though the mortgagor by his answer said he would not redeem) should go to the executor, and not to the heir of the mortgagee, the equity of redemption not being foreclosed or released. The several cases following were likewise cited by the defendant's counsel: *Hall* v. *Dench*, 1 Vern. 329; *Amherst* v. *Dawling*, 2 Vern. 401; *Strode* v. *Lady Russel*, 2 Vern. 621, 625; *Lady Williams* v. *Wray*, 1 P. Wms. 137; Prec. Ch. 151; 8 Co. 96; and *Pawlett and the Attorney-General*, Hard. 467, 469.

After the point had been argued on both sides, the Lord Chancellor declared his surprise that this matter, as it seemed a case which must frequently happen, should never have been brought before the Court till now; and

as it was a question of great consequence and general concern, should take time to give his opinion.

On the 25th of March, 1738, the cause stood for judgment.

LORD CHANCELLOR HARDWICKE.—This question depends on two considerations:

An equity of redemption is considered as an estate in the land, for it may be devised, granted, or entailed; and such entail may be barred by fine and recovery, and the person entitled to it is the owner of the land, and a mortgage in fee is personal assets.

First, what sort of interest an equity of redemption is considered to be in this Court.

Secondly, what is requisite to entitle the husband to be tenant by the curtesy.

First, an equity of redemption has always been considered as an estate in the land; for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

By a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed (*a*); and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

(*a*) *Strode* v. *Russel*, 2 Vern. 625.

The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate, and after makes a mortgage in fee; though that is a total revocation in law, yet in this Court it is a revocation *pro tanto* only.

It is certain the mortgagee is not barely a trustee to the mortgagor; but to some purposes, *videlicet*, with regard to the inheritance, he certainly is, till a foreclosure.

Secondly, at common law, four things are necessary to entitle the husband to the tenancy by the curtesy: *mar-*

riage, issue, death of the wife, seisin in fact. In this case, the three first concur; but it is objected, that here is no seisin whatever of the legal estate in the wife in the consideration of the law. But that is not the present question; the true question is, if there was such a seisin or possession of the equitable estate in the wife, as in this Court is considered as equivalent to an actual seisin of a freehold estate at common law? and I am of opinion there was.

A husband shall be tenant by the curtesy of the equitable estate of the wife.

Actual possession, clothed with the receipt of the rents and profits, is the highest instance of an equitable seisin, both of which there was in this case; and that a husband shall be tenant by the curtesy of the equitable estate of the wife, has been often determined, as in *Sweetapple* v. *Bindon*, 2 Vern. 536, which was a much stronger case than this; for in that case there was neither seisin nor land; and in *Greenhill* v. *Greenhill*, 2 Vern. 680, it was held that lands articled for only, will pass by a will.

The principal objections are two:

First, *laches*, and neglect in the husband by not paying off the mortgage.

Secondly, that the rule ought to be equal between dower and curtesy, and that dower cannot be of a trust estate.

As to the first, it is not similar to the cases of laches in the husband, viz., as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and it holds equally strong in the case of a trust estate; for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is necessarily attended with many delays.

An heir at law can oblige a tenant by curtesy to keep down interest, as much as any other tenant for life.

The second objection proves too much, if anything, and entirely fails by the precedents of this Court. If any innovations were to be made, I am of opinion the nearest way to right would be to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant by the curtesy of it; and there can be no incon-

venience to the heir-at-law, for he would have the same remedy in this Court, to make a tenant by the curtesy keep down the interest, as against any other tenant for life. For these reasons I am of opinion the defendant is entitled to be tenant by the curtesy; and the decree at the Rolls as to this part must be reversed.

HOWARD *v.* HARRIS.

November 6, 1683.

[REPORTED 1 VERN. 190.]

S. C., 1 Eq. Ca. Ab. 312, pl. 11 ; 2 Ch. Ca. 147.

RESTRICTIONS ON REDEMPTION OF MORTGAGE DISCOUNTENANCED IN EQUITY—MORTGAGE CANNOT BE MADE IRREDEEMABLE.]—*No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor or upon failure of issue male of his body.*

MR. HOWARD settles a jointure on plaintiff, his lady, before marriage, which, proving defective, and not of value according to the marriage agreement, he therefore afterwards makes her an additional jointure of other lands; and afterwards, Mr. Howard, in 1673, makes a mortgage to the defendant Harris, for securing 1000*l.*, with interest, in which (amongst others) part of the lands belonging to the additional jointure was comprised; and in the mortgage there is a special clause of redemption; viz., that if Mr. Howard, *or the heirs males of his body*, should, in June, 1686, pay the principal sum of 1000*l.*, and 60*l.* per annum interest in the meantime, then Mr. Howard, or *the heirs males of his body*, might re-enter; and Mr. Howard covenants *that no one but he or the heirs males of his body should be admitted to redeem this mortgage:* and likewise covenants to pay the 1000*l.* on the —— day of ——, in the year 1686, and 60*l.* per annum interest in the meantime, by half yearly payments, from the date of the mortgage.

Mr. Howard dies without issue.

The plaintiff being a jointress of part of the mortgaged lands, and so entitled to redeem the whole, in 1677 exhibits her bill to redeem this mortgage.

The defendant, by answer, insists the lands are now become irredeemable.

This cause was heard before the Lord Chancellor *Nottingham*, and now, upon the defendant's petition, came to be reheard before the Lord Keeper *North* (*a*), and was by them both decreed for the plaintiff.

(*a*) Afterwards Earl of Guildford.

For the plaintiff it was insisted,

Argument for the plaintiff.

1st. That restrictions of redemption in mortgages have been always discountenanced in this Court, and it would be a thing of mischievous consequence should they prevail; for then it would become a common practice and a trade among the scriveners, so to fetter the mortgagors as to make it impracticable for them to redeem according to the precise letter of the agreement; and the plaintiff's counsel insisted, that there was no more in this case against redemption than there was in every mortgage. It is true, here is an express covenant that none but Mr. Howard, or the heirs males of his body, should redeem; and in every mortgage there is a proviso, that, in case the money be not paid by such a day, the mortgagee shall hold the land discharged: and not only so, but there is likewise an express covenant for further assurance; so that, in every mortgage, the agreement of the parties upon the face of the deed seems to be, that a mortgage shall not be redeemable after forfeiture.

Restrictions of redemption in mortgages discountenanced in equity.

2ndly. It was argued, that it was a maxim here, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable, than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and by the same reason, equity will let a man loose from his agreement, and will, against his agreement, admit him to redeem a mortgage.

Maxim in equity that an estate cannot at one time be a mortgage, and at another time cease to be so by the same deed.

3rdly. It is another standing rule, that a mortgage cannot be a mortgage of one side only (*b*). And here it is plain, Mr. Harris may make it a mortgage; for he has a covenant for the repayment of his mortgage-money. And

A mortgage cannot be a mortgage on one side only. (*b*) *Exton* v. *Greaves*, 1 Vern. 159.

for precedents was cited the case of *Kilvington* v. *Gardiner*, who was to redeem at any time in his lifetime, and *Sir Robert Jason's* case (*a*).

(*a*) *Jason* v. *Eyres*, 2 Ch. Ca. 33.

Argument for the defendant.

For the defendant it was insisted, that this express agreement of the parties ought to be pursued; and they pretended the same was made upon good consideration, viz. that the defendant Harris had formerly purchased these very lands from Sir Robert Howard, father of the plaintiff's husband, who pretended himself to be seised in fee; but this land was afterwards evicted, upon pretence that Sir Robert was only tenant for life; and the reason of this special clause of redemption was, that, in case Mr. Howard should have issue male, the estate might remain in the family; but if he had none, it should be left to the defendant as something towards a compensation for the loss in his purchase, and Mr. Harris was to submit to the loss, and not to question Mr. Howard's title. But, as to this, they had not a word of it in proof, saving only, that the defendant had made such a purchase, but not that this was the consideration of the agreement; and it likewise appeared that Mr. Howard claimed by an ancient settlement from the Lord Suffolk, and not by any settlement made by his father, Sir Robert.

One that claims under a voluntary conveyance may redeem a mortgage.

Then it was insisted, that this additional jointure was voluntary, and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered, he was a purchaser for no more than his mortgage-money; and one that comes in by a voluntary conveyance may redeem a mortgage; and if the additional jointure was voluntary, so likewise was the agreement that none but Mr. Howard, or the heirs males of his body should redeem; and that was subsequent to the additional jointure.

And it was further urged, that the mortgaged estate is a reversion after lives only, and is at present but 7*l.* per annum; and that Mr. Harris did actually borrow the mortgage-money to lend on this reversion; and it could not be presumed he would have so done, unless it had been in

consideration that this mortgage had been made in a special manner redeemable.

But it was answered, that, possibly, the defendant might design such a catching bargain of this mortgage; but that was a sort of circumvention, and the worst part of the case.

Lord Keeper North (*a*), after long debate, decreed the mortgage should be redeemed; the rather, that the defendant had a covenant for repayment of his mortgage-moneys (*b*); but said, if the case had been, that a man had borrowed money of his brother, and had agreed to make him a mortgage, and that, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity (*c*).

(*a*) Afterwards Earl of Guildford.

(*b*) The omission of the covenant is immaterial; see 1 P. Wms. 271; 2 Atk. 496; *King* v. *King*, 3 P. Wms. 358.

But then, for the defendant, the mortgagee, it was insisted, that this mortgage having been made ten years since, and of a reversion, where 7*l.* per annum rent was only reserved, that, in this case, the defendant ought to have interest upon interest, otherwise he would be a great loser in this case.

(*c*) That is to say, that it might be supported as a family arrangement. See *Stapilton* v. *Stapilton*, and note, ante, p. 836.

But, as to that, it was answered, that the plaintiff's bill to redeem was filed so long since as 1677, and that the defendant had by answer opposed the redemption: and, therefore, from that time, he had no pretence to an allowance of interest for his damages. And it was never known in this Court that interest upon interest was at any time allowed in any case.

But the Lord Keeper was clear of opinion, that, as to so much interest as was reserved in the body of the deed, that should be reckoned principal (*c*); for, it being ascertained by the deed, an action of debt would lie for it; and therefore, it was reasonable that there should be damages given for the non-payment of that money. And whereas it was urged, that this had never been practised, and that there was not any such precedent in the Court; and that, if this were to be established for a rule, every scrivener would reserve all his interests half-yearly, from time to time, as long as the money should be continued

(*c*) Sed vide *Thornhill* v. *Evans*, 2 Atk. 330.

out upon the security; which would be to change the law and practice in this Court, and make all mortgagors pay interest upon interest.

But the Lord Keeper said, he was clear in that distinction, between debt and damages; and he saw no inconvenience that could ensue: it would serve only to quicken men to pay their just debts; and accordingly decreed, that, after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a year, for which the defendant might have sued at law and recovered damages.

In *Howard* v. *Harris, Casborne* v. *Scarfe,* and *Thornbrough* v. *Baker,* were decided some of the most important points connected with the jurisdiction of equity relative to mortgages, which, by its conformity to justice and common sense, enabled it to prevail over the narrow prejudices and unjust severity of the common law.

At common law, unless the mortgagor or his heirs, by payment of the mortgage-money and interest at the time and place appointed, strictly complied with the condition, upon the fulfilment of which it was stipulated that he should re-enter on his estate, it became, however much it might exceed in value the sum advanced, the absolute property of the mortgagee; nor had the mortgagor any right at law to repossess himself of the estate on payment of the money. Thus, to make use of the instance given by *Littleton,* "If a feoffment be made upon such condition, that, if the feoffor pay to the feoffee, at a certain day, &c., 40*l.* of money, then the feoffor may re-enter; if he doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken away from him for ever, and so dead to him upon condition:" Litt. s. 332.

In equity, however, notwithstanding the opposition of the Judges of the common law, who always strictly adhered to the doctrine of forfeiture on non-performance of the condition, it was, at a very early period, held, that, until foreclosure by decree, the mortgagor, by applying within a reasonable time, and offering to pay principal, interest, and all proper costs, might redeem the estate forfeited at law. See *Langford* v. *Barnard,* Tothill, 134, de-

cided in the 37th year of Queen Elizabeth's reign; *Emmanuel College* v. *Evans*, 1 Ch. Rep. 18, decided in the first year of Charles the First. This right to redeem, because it could be enforced only in Courts of equity, was called the mortgagor's "equity of redemption."

As soon as the right of redemption was established, Courts of equity, in order to prevent its evasion, were obliged to lay down (in contradiction to the well-known maxim, *Modus et conventio vincunt legem*, as a rule never to be transgressed, that a mortgagor could not, by any contract entered into with the mortgagee *at the time of the mortgage*, give up his right of redemption, or fetter it in any manner by confining it to a particular time, or to a particular description of persons. Thus, in the principal case, of *Howard* v. *Harris*, where Howard covenanted that no one but *he, or the heirs males of his body*, should be admitted to redeem, it was contended, upon Howard's death *without issue*, that the land had become irredeemable: the jointress was, however, admitted to redeem; and it was correctly laid down *arguendo*, that it is a maxim in equity, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; that a mortgage can no more be irredeemable, than a distress for a rent charge can be irrepleviable; that the law itself will control that express agreement of the party; and by the same reason, equity will let a man loose from his agreement, and will, against his agreement, admit him to redeem a mortgage. So, it was said by Mr. *Vernon*, in *East India Company* v. *Atkyns*, Com. Rep. 349, that if a man makes a mortgage, and covenants not to bring a bill to redeem, nay, if he goes so far, as in *Stisted's case*, to take an oath that he will not redeem, yet he shall redeem. So, also, in *Kilvington* v. *Gardiner*, cited in the principal case of *Howard* v. *Harris*, where the right of redemption was attempted to be confined to the lifetime of the mortgagor, it was held that it existed after his death. See also *Jason* v. *Eyres*, 2 Ch. Ca. 33; *Spurgeon* v. *Collier*, 1 Eden, 55; *Goodman* v. *Grierson*, 2 Ball & B. 278; and see *Cowdry* v. *Day*, 1 Giff. 316, where it was held that a stipulation by the mortgagor with the mortgagee (who was his solicitor) that the mortgagor should not pay the mortgage money or institute any proceedings in equity for redemption of the estate for twenty years, was invalid, as being contrary to public policy.

No person, moreover, can, under colour of a mortgage, obtain a collateral advantage not strictly belonging to the contract of mortgage. Thus, a stipulation that if interest is not paid at the end of

the year it shall be converted into principal (*Chambers* v. *Goldwin*, 9 Ves. 271), that if the mortgage were paid off the mortgagor would pay to the mortgagee a commission of 5 per cent. upon the sum advanced, and interest upon that commission from the date of the advance (*Chapple* v. *Mahon*, 5 I. R. Eq. 225), that the mortgagee shall be receiver of rents with a commission (*Ib.* And see *Langstaffe* v. *Fenwick*, 10 Ves. 405; *Leeth* v. *Irvine*, 1 My. & K. 277), that the mortgagee while in possession shall receive a certain sum yearly for management (*Comyns* v. *Comyns*, 5 I. R. Eq. 583), *à fortiori*, if he be also solicitor to the mortgagor (*Eyre* v. *Hughes*, 2 Ch. D. 198), or that he shall, as auctioneer, receive a commission upon a sale (*Broad* v. *Selfe*, 11 W. R. (M. R.) 1036; 9 Jur. N. S. 885; *Barrett* v. *Hartley*, 2 L. R. Eq. 795; *Matthison* v. *Clarke*, 3 Drew. 3), is invalid. So likewise in *Jennings* v. *Ward*, 2 Vern. 520, Ward lent money to Neale, and took a mortgage from him to secure 16,000*l.*, with interest at 6*l.* per cent.; and Neale, in another deed, executed *at the same time*, covenanted to convey to Ward, if Ward thought fit, ground rents to the value of 16,000*l.* at the rate of twenty years' purchase. Upon a bill filed to redeem, the defendant insisted on the agreement, but the Master of the Rolls decreed a redemption on payment of principal, interest, and costs, without regard to the agreement. And he observed, "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."

So, if a mortgage be made redeemable upon payment of the mortgage-money at a certain day, but if the money be not then paid, if the mortgagee will pay a further sum to the mortgagor, that then his estate shall be absolute, or that he will make him a further conveyance or anything to that effect, the estate is, notwithstanding, redeemable after the day of payment, and the mortgagee cannot enforce the mortgagor, after default to make him an absolute estate, until he forecloses him. And see *Price* v. *Perrie*, Freem. Ch. Rep. 258; *Willett* v. *Winnell*, 2 Vern. 488; *Bowen* v. *Edwards*, 1 Ch. Rep. 222. Sed vide *Tasburgh* v. *Echlin*, 2 Bro. P. C. 265, Toml. edit.; *Re Edwards' Estate*, 11 Ir. Ch. Rep. 367.

We must, however, distinguish the before-mentioned cases falling within the rule from the case of a mortgagee agreeing with the mortgagor for a preference of preemption in case of sale: for such an agreement will be enforced (*Orby* v. *Trigg*, 2 Eq. Ca. Ab. 599, pl. 24; 9 Mod. 2); but the terms must be strictly complied with (*Dawson* v. *Dawson*, 8 Sim. 346; *Cookson* v. *Cookson*, 8 Sim.

529). And where a mortgagee agrees to take a portion of his debt in lieu of the whole, upon payment on a given day, the Court will not relieve against the effect of its non-payment on that day: *Ford* v. *Chesterfield*, 19 Beav. 428.

The rule must be also further distinguished from that class of cases where the Courts have considered a transaction not to amount to, or to be intended as, a mortgage, but to be an absolute sale of an estate, with a proviso for the vendor to repurchase upon certain terms; for it seems, that unless those terms are strictly complied with, the person making the conveyance cannot insist upon the benefit of his contract: *Barrell* v. *Sabine*, 1 Vern. 268; *Perry* v. *Medowcroft*, 4 Beav. 197; *Alderson* v. *White*, 2 De G. & Jo. 97. So, also, where there is an absolute conveyance with a *subsequent* agreement, that, if the vendor desires it, he may have his estate again upon payment of the money with interest and costs: *Cotterell* v. *Purchase*, Ca. t. Talb. 61; and see *Brooke* v. *Garrod*, 3 K. & J. 608, 2 De G. & Jo. 62; and *Ward* v. *Wolverhampton Waterworks Company*, 13 L. R. Eq. 243.

And there may be a valid sale of the equity of redemption by the mortgagor to the mortgagee, accompanied by a proviso giving the right to repurchase. See *Endsworth* v. *Griffiths*, 15 Vin. Abr. 468, pl. 8; 2 Eq. Ca. Ab. 595, pl. 6; 5 Bro. P. C. 184, Toml. edit., where Lloyd executed a release of the equity of redemption to Griffiths, who at the same time gave Lloyd a note or memorandum, promising that if he should, within a year, pay to him the purchase-money and all charges of repairs for that time, he (Griffiths) would sell and convey to him the premises. Some years after, Lloyd died without having repurchased, and a bill filed by his wife and son, to whom he had devised the estate, for redemption, was dismissed in the Court of Exchequer, and the decision was, upon appeal, affirmed in the House of Lords. *Davis* v. *Thomas*, 1 Russ. & My. 506, is a case similar in its circumstances, and the same principle was acted upon: 5 My. & Cr. 307. And see and consider *Floyer* v. *Lavington*, 1 P. Wms. 268; *Mellor* v. *Lees*, 2 Atk. 494; *Bulwer* v. *Astley*, 1 Ph. 422; *Fee* v. *Cobine*, 11 Ir. Eq. Rep. 406; *Pegg* v. *Wisden*, 16 Beav. 239; *O'Reilly* v. *O'Donohue*, 10 I. Eq. 73; and *Williams* v. *Owen*, 5 My. & Cr. 303, where Lord *Cottenham*, C., very fully examined all the authorities on the subject.

Another exception or qualification of the rule is to be found in that class of cases, where the conveyance of an estate to a person by way of mortgage is intended to be in the nature of a family settlement; for then it seems, if the right of redemption is confined to

the life of the settlor or mortgagor, his heirs will not be allowed to redeem. See *ante*, p. 1061; *Bonham* v. *Newcomb*, 1 Vern. 214, 232, reversing the decision of Lord *Nottingham*, 1 Vern. 7; *S. C.*, 2 Ch. Ca. 58; 2 Vent. 364; *King* v. *Bromley*, 2 Eq. Ca. Ab. 595, pl. 8; *Wolston* v. *Aston*, Hard. 511; and perhaps *Jason* v. *Eyres*, 2 Ch. Ca. 33, ought to have been otherwise decided, as coming within the principle of this exception.

A mortgage may be given to secure the payment of a larger sum than that actually advanced to the mortgagee, as when it is agreed that a certain sum shall be paid to the mortgagee by way of bonus for the risk he undergoes in making the advance: *Potter* v. *Edwards*, 5 W. R. 407; 26 L. J. N. S. (Ch.) 468.

Some difficulty arises occasionally in determining whether a conveyance is intended to be a mortgage or not. Where this is the case, parol evidence will be admitted to show, that, what appears on the face of it to be an absolute conveyance, was intended to be a conveyance by way of mortgage only. Thus, in *Maxwell* v. *Montacute*, Prec. Ch. 526, where a person refused to execute according to agreement a defeasance, after the mortgagor had executed an absolute conveyance, Lord *Nottingham* admitted parol evidence to show the agreement, and decreed against the mortgagee. See also *Walker* v. *Walker*, 2 Atk. 99 *Dixon* v. *Parker*, 2 Ves. 225; *Young* v. *Peachy*, 2 Atk. 257; *Joynes* v. *Statham*, 3 Atk. 388; *Francklyn* v. *Fern*, Barnard. 30; *Cotterell* v. *Purchase*, Ca. t. Talb. 61; *Spurgeon* v. *Collier*, 1 Eden, 55; *Holmes* v. *Matthews*, 9 Moore, P. C. C. 413; *Barnhart* v. *Greenshields*, Ib. 18; *Langton* v. *Horton*, 5 Beav. 9; *Murphy* v. *Taylor*, 1 Ir. Ch. Rep. 92; *Douglas* v. *Culverwell*, 3 Giff. 251.

Where lands were conveyed upon trust, in case a sum and interest should not be paid by a certain day, to sell, and after payment of principal, interest, and costs, to reconvey the lands remaining unsold, or pay over the residue of the money; and there was a covenant not to sell without six months' notice, but the deed contained no proviso for redemption, it was held by Sir *J. Romilly*, M. R., that this was a mere mortgage: *Bell* v. *Carter*, 17 Beav. 11.

As to the nature of an equity of redemption.]—In an early case, it was said, that an equity of redemption was a mere *right;* and that a right to a bill in equity ought not to be entailed, and was not such an inheritance as could be entailed by the statute *De Donis* (*Roscarrick* v. *Barton*, 1 Ch. Ca. 217); and even so late as the time of Lord *Hardwicke*, in the principal case of *Casborne* v. *Scarfe*, where a husband claimed to be tenant by the curtesy of

land of his wife's, mortgaged by her previous to marriage, it was insisted, in opposition to his claim, that the equity of redemption was no actual estate or interest in the wife, but merely a right of action, or a suit in a court of Equity. Lord *Hardwicke*, however, held that an equity of redemption was an *estate* in the land. "For," said his Lordship, "it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an *estate* whereof there may be a seisin." However, previous to 3 & 4 Will. 4, c. 105, women were not dowable of an equity of redemption; but this was because they were not entitled to dower of equitable estates: *Dixon* v. *Saville*, 1 Bro. C. C. 326.

The person entitled to the equity of redemption being considered as the owner of the land, he may not only devise or settle, but in other respects deal with it as land. He may, for instance, mortgage it; but all incumbrancers subsequent to the first, if he have the legal estate, having merely equitable claims, will, according to the maxim *Qui prior est tempore potior est jure*, be entitled to satisfaction out of the estate, according to priority, though, as we have before seen, an equitable incumbrancer, where the legal estate is outstanding, or in a former mortgagee, may, if he advanced his money without notice of a former incumbrance, obtain priority by getting in the legal estate, or taking a conveyance from the legal mortgagee; in which last case he may tack his own to the legal mortgage, and thus obtain priority over all intermediate incumbrances. See *Marsh* v. *Lee*, ante, Vol. 1, 659, and note.

So, likewise, upon the principle, that the person entitled to the equity of redemption is considered as the owner of the land, on his death intestate the descent of the equity of redemption will be governed either by the general law of the land, or the *lex loci*, according to the tenure of the legal estate. Thus, it has been held, where borough English lands were mortgaged, that the equity of redemption descended to the youngest son, to whom the lands would descend, and in a mortgage of gavelkind lands, the equity of redemption would descend in the same manner as the lands would: *Fawcett* v. *Lowther*, 2 Ves. 304.

The mortgagor of an advowson has a right to nominate to the living on a vacancy; and the mortgagee will be obliged to accept of the nominee, even, it seems, although there was a covenant in the mortgage, that the mortgagee should present on every avoidance; *Jory* v. *Cox*, Prec. Ch. 71; *Amhurst* v. *Dawling*, 2 Vern. 401; *Galley* v. *Selby*, Stra. 403; and see *Mackenzie* v.

Robinson, 3 Atk. 559, overruling *Gardiner* v. *Griffith*, 2 P. Wms. 403.

In the principal case, of *Thornbrough* v. *Baker*, Lord *Nottingham* decided a point, ever since firmly established, that, although in the case of a mortgage in fee, the heir must reconvey, on payment of the mortgage-money and interest, the executor, and not the heir, of the mortgagee will be entitled to the money. There is, however, as is there laid down by Lord *Nottingham*, an important distinction, resulting from the difference between a mortgage and an absolute conveyance, with a collateral agreement for a repurchase; as, in the latter case, if the purchaser dies, and the person who conveyed to him exercises his option, to repurchase, on repayment of the purchase-money, the heir, and not the executor, of the purchaser will, it seems, be entitled to the money. See *Saint John* v. *Wareham*, cited 3 Swanst. 631.

Assignments of Mortgages.]—A mortgage may be assigned at any time by the mortgagee alone; but the assignee should always obtain the concurrence of the mortgagor; for, as the assignee stands in the same relation to the mortgagor as the mortgagee, he is bound by the equities subsisting between them. Thus, if the mortgagor do not concur in the assignment, the assignee will take, subject to the account between the mortgagor and the mortgagee. A leading case upon this subject is *Matthews* v. *Wallwyn*, 4 Ves. 118. There Lord *Loughborough*, when the cause came on before him, remarked that a case was referred to, in which it was supposed Lord *Thurlow* had entertained an idea, but had not decided, that a mortgagor having permitted the mortgage-deed, without any indorsement upon it, to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage, to the full extent of it, against the mortgagor, who permitted the mortgagee to deal with and make a security upon it. It was also supposed, that, in practice, there was no occasion to make the mortgagor a party; and in some cases it might not be possible to make him a party to the assignment; and that, to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. That he had got the best information he could, and the result was that persons most conversant in conveyancing held it extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage, without the privity of the mortgagor, as to the sum really due; that, in fact, it did happen, that assignments of mortgages were taken without calling upon the mort-

gagor; but that the most usual case, when that occurred, was where it was the best security that could be got for a debt not otherwise well secured; and it was not in the course of transferring mortgages, but of raising money upon such securities. But *no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due.*

So, where a mortgage is transferred, and the transferree fails to give notice of the transfer to the mortgagor, payments subsequently made by him to the original mortgagee are valid as against the transferree: *Matthews* v. *Wallwyn*, 4 Ves. 126. See also *Earl of Macclesfield* v. *Fitton*, 1 Vern. 169. And see *Williams* v. *Sorrell*, 4 Ves. 389; *Chambers* v. *Goldwin*, 9 Ves. 254; *Bradwell* v. *Catchpole*, 3 Swanst. 79, n.; 1 Ch. Ca. 68; *Ex parte Monro*, Buck, 300; *Stocks* v. *Dobson*, 4 De G. M. & G. 11.

And if the mortgage debt was secured by a bond or covenant, and an action were brought upon the bond in the name of the mortgagee, as it must be, the mortgagor would have to pay to the assignee no more than was really due upon the bond: and if an action of covenant were brought by the covenantee, the account must be settled in that action: *Matthews* v. *Wallwyn*, 4 Ves. 129.

But the mortgagor will not be allowed for payments made to persons not authorised to receive them. Thus, in *Withington* v. *Tate* (4 L. R. Ch. App. 288), Nixon and Thew, who were mortgagees, transferred their mortgage to the plaintiff, who gave no notice to the mortgagors. Afterwards the mortgagors, intending to redeem, paid the amount secured by the mortgage to the solicitors of Nixon and Thew, without ascertaining that they were authorised to receive it: the solicitors misappropriated the money. Nixon and Thew executed a deed prepared by their solicitors, but without perusing the same or knowing its contents, which contained a recital acknowledging the receipt of the money, and purported to convey the property, by the direction of the mortgagors, to their nominees. There was no proper receipt endorsed on the deed. The plaintiff filed a bill of foreclosure against the mortgagors. It was held by Lord Chancellor *Hatherley*, affirming the decision of Lord *Romilly*, M.R., that the plaintiff was entitled to the usual foreclosure decree.

Where a mortgage is assigned without the privity or consent of the mortgagor, the assignee who takes it only upon the same terms as the mortgagor, cannot add to what is due, settle the account, or turn principal into interest: *Earl of Macclesfield* v. *Fitton*, 1 Vern. 169; *Ashenhurst* v. *James*, 3 Atk. 271; *Matthews* v. *Wallwyn*, 4 Ves.

128; but "where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest" (*Ashenhurst* v. *James*, 3 Atk. 271); but interest cannot, even with the consent of the mortgagor, be turned into principal as against subsequent incumbrancers of whom there is notice: *Digby* v. *Craggs*, Amb. 611; 2 Eden, 200; *Montague* v. *Ratcliffe*, Amb. 612, n. Blunt's edit.; and see *Walker* v. *Jones*, 1 L. R. P. C. 50.

Moreover, it is laid down, that, "if a mortgagee *in possession* assigns over his mortgage without the assent of the mortgagor, the mortgagee is bound to answer the profits both before and *after* the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent:" 1 Eq. Ca. Ab. 328, pl. 2. But a quære is added: "If the mortgagor hides, so that he cannot be served with a subpœna to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment."

When the interest of a mortgage has been regularly paid, and the mortgagor has never been called on to discharge the principal, the costs of a transfer of the mortgage, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him. *In re Radcliffe*, 22 Beav. 201.

Where a stranger gets an assignment of a mortgage for less than is due, he will be entitled, at any rate as against the mortgagor and his heirs, to the whole sum due upon the mortgage: *Phillips* v. *Vaughan*, 1 Vern. 336; *Williams* v. *Springfield*, 1 Vern. 476; for, as Lord *Jeffries* observed, in the latter case, "where the mortgagor or his heir comes to redeem, there is no reason that he should have the benefit of a good bargain made by another man, and ought therefore to pay what is really due on the mortgage whatever it be, without respect to what the assignee paid." But in the former of those cases he thought that a purchaser without notice of the incumbrance, might possibly have an equity to redeem the incumbrance for what was really paid for it; and in the latter case he distinctly lays it down, that "where there are subsequent incumbrancers or creditors in the case, a man who buys in a prior incumbrance shall be allowed only what he really paid, though there was in truth a much greater sum due;" see *Long* v. *Clopton*, 1 Vern. 464. This, however, seems to be laid down too generally, and the doctrine has at any rate been much narrowed since, and is now only applicable to purchases of incumbrances

made by persons in some fiduciary position, or the heir-at-law: *Morret* v. *Paske*, 2 Atk. 53, 54.

It is clear, however, that a prior incumbrancer, bonâ fide purchasing a puisne incumbrance, will be entitled to what is due upon it (*Morret* v. *Paske*, 2 Atk. 54; *Darcy* v. *Hall*, 1 Vern. 49; *Bromley* v. *Holland*, 5 Ves. 620; n.); secus, if with notice of an intervening security: *Long* v. *Clopton*, 1 Vern. 464.

But if a person stands in any fiduciary relation towards the owner of the estate, as trustee, agent, or guardian, he will as against another incumbrancer, be allowed only what he paid for it, since any purchase by him of an incumbrance at a lower price than is due upon it, is for the benefit of the estate: *Morret* v. *Paske*, 2 Atk. 54.

An heir-at-law also purchasing in an incumbrance, either as against a purchaser (*Long* v. *Clopton*, 1 Vern. 464) or creditors, even without notice of their debts (*Lancaster* v. *Evors*, 10 Beav. 164, 1 Ph. 354), will only be allowed what he actually gave for the incumbrance; (see also *Darcy* v. *Hall*, 1 Vern. 49; *Braithwaite* v. *Braithwaite*, 1 Vern. 334; *Long* v. *Clopton*, 1 Vern. 464; *Morret* v. *Paske*, 2 Atk. 54;) and it is presumed by Mr. *Lewin*, though there is no decision upon it, that the rule applies equally to a devisee as between him and the creditors of the testator: *Lewin on Trusts*, 247, 6th Ed. But it seems, that if an heir or trustee buys in an incumbrance for the purpose of protecting an incumbrance to which he is himself entitled, he will be allowed what is due on the security: *Darcy* v. *Hall*, 1 Vern. 49.

Arrears of rent will not pass by an ordinary assignment of a mortgage: *Salmon* v. *Dean*, 3 Mac. & G. 344.

Remedies of the Mortgagee.]—After a mortgage had become forfeited at law by non-payment of the principal or interest at the time fixed for payment (*Bonham* v. *Newcomb*, 1 Vern. 232; *Gladwyn* v. *Hitchman*, 2 Vern. 134; *Burrowes* v. *Molloy*, 2 J. & L. 521; *Roddy* v. *Williams*, 3 J. & L. 1), the mortgagee might pursue his remedies in different Courts at the same time; that is to say, he might proceed in a Court of Common Law against the mortgagor *personally*, for the debt, or by ejectment; and also in equity, where his remedy was *in rem* against the mortgaged property, either by seeking foreclosure or sale.

If the mortgagee sued the mortgagor on his covenant to pay, and did not get fully paid, he might still go on and foreclose the mortgage (*Palmer* v. *Hendrie*, 27 Beav. 351), but after he had once been paid in full, under the covenant, he could not touch the estate, and was precluded from all proceedings afterwards. *Ib.*

If the mortgagee so dealt with

the mortgaged estate as to render it impossible for him to restore it on full payment, the Court of Chancery would prevent his suing at law to recover the mortgage money: *Palmer* v. *Hendrie*, 27 Beav. 349.

When the mortgagee commences an action to foreclose the equity of redemption, and if there are prior incumbrancers, he must offer to redeem them (*Inman* v. *Wearing*, 3 De G. & Sm. 729), thereupon directions for an account, payment of principal, interest, and costs, within six months after the chief clerk's certificate will be decreed, or in default, that the mortgagor shall be foreclosed. The chief clerk appoints a day for payment, and upon a default being made, the mortgagor may obtain a final order for foreclosing, which, when signed and enrolled, will foreclose the equity of redemption; that is to say, absolutely transfer the mortgaged estate to the mortgagee.

A sale, even previous to the Chancery Improvement Act (15 & 16 Vict. c. 86), would have been decreed by the Court instead of a foreclosure in certain cases, as in the case of a mortgage of a dry reversion (*How* v. *Vigures*, 1 Ch. Rep. 18; 15 Vin. 475); or if the security were scanty (*Earl of Kinnoul* v. *Money*, 3 Swanst. 208, n.); or if the bill, praying a sale, were taken pro confesso (*Dashwood* v. *Bithazey*, Mos. 196). And in *Lucas* v. *Seale* (2 Atk. 56), Lord *Hardwicke* said, that, where there were several executors, and one of them was indebted to the testator, for which he had given a security upon his estate, if the co-executors were apprehensive that he was insolvent, and that the estate might prove a deficient security, it was improper to bring a bill against him to foreclose, because, the testator having made him an executor, gave him an interest in the mortgage, and the other executors ought to have brought a bill for sale of the estate. And in *Daniel* v. *Skipwith* (2 Bro. C. C. 154), where the same person was the heir and personal representative of the mortgagor, and had, by his answer admitted that the personal estate was small and would be deficient, Lord *Thurlow* held, that a sale of the mortgaged estate might be directed in the first instance; but he observed, that if the heir and personal representative had been different persons, it would have been necessary, first, to have had an account of the personal estate.

In the case of an infant heir or devisee of the mortgagor, there would, with the mortgagee's consent, even previous to the alteration in the law, have been an inquiry which would be more beneficial for the infant, a sale or foreclosure (*Mondey* v. *Mondey*, 1 V. & B. 222, overruling *Goodier* v. *Ashton*, 18 Ves. 83); and an order for sale, without a reference, would be made, if it appeared clearly for

his benefit (*Davis* v. *Dowding*, 2 Kee. 247); and if a decree for sale were obtained subsequently to the infant attaining his majority, he could not, if he omitted, on his attaining his age, to make a new defence, or apply for leave to redeem, object to the decree: *Davis* v. *Dowding*, 2 Kee. 245. See also *Foster* v. *Eddy*, 18 L. J. (Ch.) 151.

It has been said that the right to redeem and the right to foreclose are co-relative (Jarm. by Byth. vol. v. 234), but this is not strictly accurate, for when property is conveyed to trustees for sale, in order to secure a sum of money, although the mortgagor may be entitled to redeem, the mortgagee is not entitled to foreclosure, but to a decree for sale (*Schweitzer* v. *Mayhew*, 31 Beav. 37), and it has been held that mortgagees, in trust, might file a bill for an account and sale, without praying foreclosure, although the mortgage security contained an express power of sale: *Hutton* v. *Sealy*, 27 L. J. (Ch.) N. S. 263.

Where, in a foreclosure suit, questions as to priorities not affecting the plaintiff are raised between co-defendants, a day certain for all will be fixed to redeem or be foreclosed, without prejudice to the rights of the several defendants *inter se*: *Bartlett* v. *Rees*, 12 L. R. Eq. 395; *Edwards* v. *Martin*, 7 W. R. (V. C. K.) 30.

The jurisdiction, however, to direct a sale instead of a foreclosure, has been much enlarged by the 48th section of the Chancery Improvement Act (15 & 16 Vict. c. 86). There it is enacted, "that it shall be lawful for the Court, in any suit for foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct *a sale* of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct; and if the Court shall so think fit without previously determining the priorities of incumbrances, or giving the usual or any time to redeem: Provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request."

Under this Act the Court may, without the concurrence of the mortgagor, direct a sale instead of a foreclosure to take place at once: *Newman* v. *Selfe*, 33 Beav. 522.

The money paid into Court by a second mortgagee, in order to obtain an order for sale, under the Act 15 & 16 Vict. c. 86, s. 48, is applicable to indemnify the first mortgagee for his costs in an abortive attempt to sell: *Corsellis* v. *Patman*, 4 L. R. Eq. 156.

Where, in a foreclosure suit, part of the mortgagor's interest is vested in the Crown, the Court will not decree foreclosure in respect thereof, but will give the plaintiff liberty to apply in Chambers for a sale: *Bartlett* v. *Rees*, 12 L. R. Eq. 395; *Hancock* v. *The Attorney-General*, 33 L. J. (Ch.) 661.

So, where a mortgagor was convicted of felony, and the mortgagee filed a bill to realize his security, the Court decreed a sale, an account, payment of the purchase-money into Court, and payment of the mortgage debt, with liberty to the Attorney-General to apply for payment out of the balance: *Hancock* v. *The Attorney-General*, 12 W. R. (V. C. K.) 569; 33 L. J. Ch. 661. But see now the Act for Abolishing Forfeitures for Treason and Felony, 33 & 34 Vict. c. 23.

As to the principles on which the Court acts in directing a sale of a mortgaged estate, see *Hurst* v. *Hurst*, 16 Beav. 372; *Smith* v. *Robinson*, 1 Sm. & Giff. 140; *Laslett* v. *Cliffe*, 2 Sm. & Giff. 278; *Wickham* v. *Nicholson*, 19 Beav. 38; *Hewitt* v. *Nanson*, 28 L. J. (Ch.) N. S. 49; *Phillips* v. *Gutteridge*, 4 De G. & Jo. 531; *Foster* v. *Harvey*, 11 W. R. (V. C. W.) 899; 12 W. R. (L. J.) 92; Morgan and Chute's Chancery Acts and Orders, 196, 5th Ed.

In a recent case, after a decree for foreclosure, but before it was drawn up, a sale was directed on the application of one of the defendants, a puisne mortgagee, with the consent of the prior mortgagees, in the absence of the mortgagor, against whom the bill had been taken *pro confesso*: *Woodford* v. *Brooking*, 17 L. R. Eq. 425.

As to the rights and remedies of a mortgagee of a share in a colliery partnership, see *Redmayne* v. *Foster*, 35 Beav. 529.

In Ireland, a sale, instead of foreclosure, has always been directed (see 13 Ves. 205; *Hutton* v. *Mayne*, 3 J. & L. 586), but in this country in the case of an equitable mortgage a foreclosure but not a sale is decreed: see Vol. I., p. 748.

But although a foreclosure or sale will be ordered to satisfy the mortgagee, nevertheless indulgence will be shown to the mortgagor, and the time for payment will be enlarged, even after an order absolute of foreclosure has been signed and enrolled (*Thornhill* v. *Manning*, 1 Sim. N. S. 451), if a proper case can be shown, and the security be not deficient: *Cocker* v. *Bevis*, 1 Ch. Ca. 61: *Ismoord* v. *Claypool*, 1 Ch. Rep. 262; *Anon.*, Barnard, 221; *Edwards* v. *Cunliffe*, 1 Madd.

287; *Ford* v. *Wastell*, 6 Hare, 229; 2 Ph. 591; *Holford* v. *Yate*, 1 J. & K. 677. But the order to enlarge the time for payment is by no means of course; and though a strong reason is not required, it will be refused where none is assigned (*Nanny* v. *Edwards*, 4 Russ. 125), or where the security does not appear ample (*Eyre* v. *Hanson*, 2 Beav. 479), and even in the case of infant mortgagors, the time will only be extended upon the terms of the immediate payment of the interest and costs: *Coombe* v. *Stewart*, 13 Beav. 111. In a case before the late Master of the Rolls, the time appointed for redemption was enlarged, pending an appeal to the House of Lords, upon the terms of the mortgagor paying into Court the principal and interest, and the costs of the suit and of the application for enlarging the time, the mortgagee to receive the dividends of the money paid into Court when invested, on his undertaking to repay them should the decree be reversed: *Finch* v. *Shaw*, 20 Beav. 555.

On proceedings for foreclosure, where the mortgagor asks to enlarge the time appointed for payment, the Court will accede to the application only on the terms of his first paying the interest and costs already reported due; and these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid: *Whatton* v. *Craddock*, 1 Kee. 269; *Brewin* v. *Austin*, 2 Kee. 211. And although such interest and costs are generally directed to be paid at the time appointed for the payment of the whole (*Edwards* v. *Cunliffe*, 1 Mad. 212; and see 2 Kee. 212), under particular circumstances a longer time will be allowed, as when the mortgagee has prevented the mortgagor from receiving the rents (*Geldard* v. *Hornby*, 1 Hare, 251; *Ellis* v. *Griffiths*, 7 Beav. 83; *Eyre* v. *Hanson*, 2 Beav. 478); and if payment be not made, time may be enlarged if a reasonable excuse be given: *Jones* v. *Creswicke* (9 Sim. 304), *Nanfan* v. *Perkins*, 9 Sim. 308. And where the mortgagee varied the account, by receiving the rent between the time of the Master's report and the day fixed for payment, the mortgagee was held not to be entitled to an order absolute for foreclosure, but a further reference and account was directed, and a new day appointed for payment: *Garlick* v. *Jackson*, 4 Beav. 154; *Alden* v. *Foster*, 5 Beav. 592; *Ellis* v. *Griffiths*, 7 Beav. 83.

A foreclosure is not complete, so as to deprive a man of his right to redeem, until the final order has been made (*Buchanan* v. *Greenway*, 12 Beav. 355; *Flack* v. *Longmate*, 8 Beav. 420; *Prees* v. *Coke*, 6 L. R. Ch. App. 645); and a final order cannot be obtained if rents have been received by the mortgagee since the account was taken: *Prees* v. *Coke*,

6 L. R. Ch. App. 645; *Nanny* v. *Edwards*, 4 Russ. 124.

A decree for foreclosure has, under peculiar circumstances, been opened after the mortgagee had been in possession sixteen years (*Burgh* v. *Langton*, 5 Bro. P. C. 213, Toml. edit; *S. C.*, 2 Eq. Ca. Ab. 619; 5 Vin. Abr. 476, pl. 2); and for fraud, or collusion in getting the decree (*Loyd* v. *Mansell*, 2 P. Wms. 73; *Gore* v. *Stockpoole*, 1 Dow, 18; *Harvey* v. *Tebbutt*, 1 J. & W. 197); or by the mortgagee's proceeding against the mortgagor upon some collateral security, as a bond or covenant after foreclosure (*Dashwood* v. *Blithway*, 1 Eq. Ca. Ab. 317; 15 Vin. Abr. 476, pl. 3); which he can do as long as he retains the estate in his own hands, though not, it seems according to the more recent authorities, if he has sold the estate, though for less than the amount due after foreclosure. See *Lockhart* v. *Hardy*, 9 Beav. 349.

The mere overvalue of the estate, or a parol agreement or declaration of the mortgagee's to allow redemption (*Whishall* v. *Short*, 2 Eq. Ca. Ab. 177, pl. 1; 7 Vin. Abr. 298, pl. 15, affirmed Dom. Proc. nom. *Wichalse* v. *Short*, 3 Bro. P. C. 558, Toml. edit.); or his filing a bill of revivor and supplement, after a decree (*Birch's Case*, Gilb. Rep. 186); or his devising the estate as money (*Silberschildt* v. *Schiott*, 3 V. & B. 45; *Stuckvile* v. *Dolben*, cited Sel. Ch. Ca. 10; 15 Vin. Abr. 476, pl. 1); or calling it a debt in his will (*Took* v. *Bishop of Ely*, 2 Eq. Ca. Ab. 608, pl. 1; 15 Vin. Abr. 476, pl. 1, n.); or an error in a matter of form after long possession (*Jones* v. *Kenrick*, 5 Bro. P. C. 244, Toml. edit.); will not induce the Court to open a decree of foreclosure. More especially will a decree not be opened after long possession, where the estate has been dealt with in settlements, or alterations have been made in erecting and pulling down buildings: *Took* v. *Bishop of Ely*, 5 Bro. P. C. 181, Toml. edit.; *Lant* v. *Crispe*, 5 Bro. P. C. 200, Toml. edit.

As to the costs of a disclaiming defendant in suits for foreclosure and redemption, see *Ford* v. *The Earl of Chesterfield*, 16 Beav. 516; see also *Buchanan* v. *Greenway*, 11 Beav. 58; *Benbow* v. *Davies*, *Ib.* 369; *Ford* v. *Lord Chesterfield*, 16 Beav. 520; *Davis* v. *Whitmore*, 28 Beav. 617; *Talbot* v. *Kemshead*, 4 K. & J. 93; *Bellamy* v. *Brickenden*, 4 K. & J. 670, 672.

It seems that in a foreclosure suit, it is not competent for the defendant to impeach the mortgage on the ground of fraud, without instituting a cross suit: *Eddleston* v. *Collins*, 3 De G., Mac. & G. 1.

A debenture holder of a railway company is not entitled to a decree either for a foreclosure or sale, as such companies have public duties

to perform, from which nothing but an Act of Parliament can release them: *Furness* v. *The Caterham Railway Company*, 25 Beav. 614.

It may here be mentioned, that the necessity for a foreclosure is generally obviated by giving the mortgagee a power of sale, but a power of sale does not affect the right to foreclosure: *Slade* v. *Rigg*, 3 Hare, 35; *Wayne* v. *Hanham*, 9 Hare, 62.

And now, by the Trustees and Mortgagees Act (23 & 24 Vict. c. 145, ss. 11—16), mortgagees of *hereditaments of any tenure or any interest therein*, have under instruments executed after the 28th of August, 1860, in the absence of any express declaration to the contrary, a power of sale under the Act, which, however, it should be remembered, does not apply to *chattels personal*. See Morgan and Chute's Chancery Acts and Orders, p. 263, 5th ed.

After the death of the mortgagor, the mortgagee has the option of commencing an action for administration, or one to enforce his security: *Dighton* v. *Withers*, 31 Beav. 424. If an administration suit is commenced by another creditor, and the mortgagee who is not made a party comes in, and consents to a sale, after the payment of the costs of the sale he is entitled to his costs in priority to those of the plaintiff: *Dighton* v. *Withers*, 31 Beav. 423.

And where the mortgagor died previously to the Judicature Act, 1875, coming into operation, the mortgagee might receive a dividend without prejudice to his security, so that he did not receive in the whole more than twenty shillings in the pound (*Rhodes* v. *Moxhay*, 10 W. R., 103); but if the mortgagor died subsequently to that Act coming into operation, the mortgagee in an administration suit can only prove on his whole debt upon giving up his security, and if he does not, he can only prove for the deficiency. Sect. 10, and see ante, pp. 96, 97, 98.

A mortgagee, although he may have taken no steps for many years after the death of the mortgagor to realise his security, may nevertheless be entitled to recover the deficiency arising on the sale of the security against the general assets (*Ridgway* v. *Newstead*, 2 Giff. 492), but he may, by his laches and acquiescence, lose his right to make the legatees refund: *Ib.*

A mortgagee may take proceedings for foreclosure after a decree made for the administration of the mortgagor's estate, and if he subsequently comes in and proves in the administration suit, he is entitled to stay proceedings in his own suit, and to have the costs of it: *Brooksbank* v. *Higginbottam*, 31 Beav. 35.

A legal mortgagee, although he takes proceedings for a sale and general administration of the de-

ceased mortgagor's estate, will, it seems, in case of a deficiency of assets, be entitled to the usual mortgagee's costs in priority to the costs of the executors and devisees of the mortgagor. *Pinchard* v. *Fellows*, 17 L. R. Eq. 421; *Cook* v. *Hart*, 12 L. R. Eq. 459, 463; *Mason* v. *Bogg*, 2 My. & Cr., 433; *Cutfield* v. *Richards*, 26 Beav. 241; *Wade* v. *Ward*, 4 Drew. 602; *Tuckley* v. *Thompson*, 1 J. & H., 126; *Upperton* v. *Harrison*, 7 Sim. 444; *Barnes* v. *Raister*, 1 Y. & C. C. C., 401; *Wild* v. *Lockhart*, 10 Beav. 320; but see *Armstrong* v. *Storer*, 14 Beav. 535, 538; *In re Spensley's Estate*, 15 L. R. Eq. 16; *Macrae* v. *Ellerton*, 6 W. R. (V. C. S.) 851; 4 Jur. N. S. 967; *Fuller* v. *Morgan*, Seton on Dec., p. 380, 3rd ed.

Although, according to the old practice, the Court would not appoint a receiver on the application of a legal mortgagee (*Habershon* v. *Gill*, Ch. D. 275, cited), the power of the Court has, under the Judicature Act, 1873, sect. 25 (8), been much enlarged, and a receiver may be appointed "in all cases in which it shall appear to the Court to be just and convenient that such order should be made." Hence, in a recent case, the order made on an interlocutory application in a foreclosure suit for the appointment of a receiver was extended to the whole property comprised in the plaintiff's security, as to part of which he was legal, and as to part equitable mortgagee: *Pease* v. *Fletcher*, 1 Ch. D. 273.

Upon the bankruptcy of the mortgagor, the mortgagee may, upon giving up his securities, prove for the whole debt, or he may apply for a sale, and prove for the deficiency. See Robson on Bankruptcy, p. 313, 3rd ed.

It may be here mentioned that, irrespective of any proceedings to enforce his security, the mortgagee, if he find that his security is defective, or that the legal estate is outstanding, may commence an action to compel a conveyance to himself of the legal estate or otherwise, for the perfecting of his security. See *Grugeon* v. *Gerard*, 4 Y. & C. 119; *Malone* v. *Geraghty*, 3 D. & W. 246; 1 Ho. Lo. 81; *Sporle* v. *Whayman*, 20 Beav. 607.

All matters and causes for the foreclosure of mortgages is assigned to the Chancery Division of the High Court by the Judicature Act, 1873, see sect. 34, subsect. 3.

It seems, moreover, that under the Judicature Acts, an order for personal payment may be combined with an order for foreclosure: *Dymond* v. *Croft*, 3 Ch. D. 512.

Redemption.]—As the conveyance of an estate by way of mortgage is merely to secure the debt, persons entitled to certain interests in the equity of redemption, which, as before observed, is con-

sidered an *estate* in the land, might, before foreclosure, and in some cases, as we have seen, even after, come into a Court of equity, for which in such matters the Chancery Division of the High Court is now substituted by the Judicature Act, 1873, sect. 34, subsect. 3, and redeem the estate.

The heir at common law, or the customary heir, according to the tenure of the land, may redeem; and to entitle him to relief, a *primâ facie title* is sufficient (*Pym* v. *Bowreman*, 3 Swanst. 241, n.; *Lloyd* v. *Wait*, 1 Ph. 61); or if he be a lunatic, his committee may for him (*Ex parte Grimstone*, Amb. 706). So may the devisee of the equity of redemption, who need not make the heir-at-law of the testator a party to his bill to redeem, unless he claims to have the will established: *Lewis* v. *Nangle*, 2 Ves. 431; *Philips* v. *Hele*, 1 Ch. Rep. 190. And a tenant for life, remainderman, or reversioner (*Ranald* v. *Russell*, 1 You. 9; *Raffety* v. *King*, 1 Keen, 618: *Aynsly* v. *Reed*, Dick. 249), dowress (*Palmer* v. *Danby*, Prec. Ch. 137), tenant by the curtesy (*Jones* v. *Meredith*, Bunb. 347), jointress (see principal case of *Howard* v. *Harris*), an assignee (*Anon.* 3 Atk. 314), assignees in bankruptcy (*Francklyn* v. *Fern*, Barnard. 30), a subsequent mortgagee making the mortgagor or his heir a party to his bill (*Fell* v. *Brown*, 2 Bro. C. C. 279), judgment creditors (*Stonehewer* v. *Thompson*, 2 Atk. 440), tenant by elegit or statute and sequestration (*Jones* v. *Meredith*, Bunb. 347; 2 Eq. Ca. Ab. 594; *Fawcet* v. *Fothergill*, Dick. 19); a judgment creditor, whose judgment does not affect the land at the date of a decree in a foreclosure suit, if he acquire a charge on the land by issuing a writ of elegit, and obtain a return from the sheriff, within six months from the date of the decree (*Mildred* v. *Austin*, 8 L. R. Eq. 220); a judgment creditor, also, although he is unable to proceed with the execution of an elegit by reason of there being mortgages on the estate, notwithstanding the provisions of 27 & 28 Vict., c. 112 (*Beckett* v. *Buckley*, 17 L. R. Eq. 435; and see *Hatton* v. *Haywood*, 9 L. R., Ch. App. 229); a plaintiff in a creditor's suit (*Christian* v. *Field*, 2 Hare, 177), a creditor whose debt subsists in equity, although released at law (*Acton* v. *Pierce*, 2 Vern. 480; *S. C.*, nom. *Acton* v. *Acton*, Prec. Ch. 237), the Crown or its grantee, upon forfeiture of the equity of redemption (*Attorney-General* v. *Crofts*, 4 Bro. P. C. 136, Toml. edit.; *Lovell's Case*, 1 Salk. 85: 1 Eden, 210), the lord claiming the reversion on forfeiture of the equity of redemption of a term (*Downe* v. *Morris*, 3 Hare, 394), and it seems a tenant (*Keech* v. *Hall*, Dougl. 22), may redeem. A volunteer, although claiming under a deed fraudulent and void under 27

Eliz. c. 4, as against the mortgagee *quoad* his mortgage, as to which he is a purchaser, may nevertheless redeem (*Rand* v. *Cartwright*, 1 Ch. Ca. 59; *Barthrop* v. *West*, 2 Ch. Rep. 62; *Thorne* v. *Thorne*, 1 Vern. 182); as may also persons entitled in default of appointment, where a mortgage is made in execution of a power: *Innes* v. *Jackson*, 16 Ves. 367.

Any person in short interested in the equity of redemption is entitled to redeem, and where being so entitled, he tenders the mortgage money and interest, he having a part in the equity of redemption, is entitled to the delivery of the title-deeds, and to have a conveyance of the property. Per Lord *Hatherley*, L. C., in *Pearce* v. *Morris*, 5 L. R. Ch. App. 229. The form of the conveyance depends upon circumstances. *Ib.*

Thus, if a tenant for life of the mortgaged estate takes a conveyance, provision ought to be made reserving any portion of the equity of redemption that he is not interested in, and giving those who are entitled the opportunity at a proper time of coming themselves and redeeming by paying a portion of their debt. *Ib.*, and see *Smith* v. *Green*, 1 Coll. 555; *Elisha* v. *Elisha*, Set. Dec. 475, 3rd ed.

So, after property has been mortgaged if it is put into settlement, the tenant for life is entitled to redeem, and to have the legal estate conveyed to himself, but he must hold the equity of redemption subject to the trusts of the settlement: *Wicks* v. *Scrivens*, 1 J. & H. 215. The same principle applies where the security is in the form of a trust for sale: *Ib.*

The tenant for life having a conveyance, and having the deeds, cannot be redeemed by those in remainder, but retains the life estate, and when the remainderman comes into possession of the estate, he can then obtain a redemption of the charge which the tenant for life had acquired. Per Lord *Hatherley*, L. C., in *Pearce* v. *Morris*, 5 L. R. Ch. App. 230.

But a mortgagee is not bound to convey the legal estate in the mortgaged property, and to deliver up the title-deeds to a person from whom he has accepted payment of principal, interest and costs, if that person have only contracted to purchase part of the mortgaged estate, and has not accepted the title: *Pearce* v. *Morris*, 5 L. R. Ch. App. 227, varying the decree in *S. C.*, 8 L. R. 217.

A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time (*Brown* v. *Cole*, 14 Sim. 427). And if he does not pay the debt at the appointed time, six months' notice of his intention to do so to the mortgagee is necessary.

But if the mortgagee, after due notice, refuses to accept a tender of a sum sufficient to cover principal, interest and costs, he will be compelled to pay the costs of a suit for redemption : (*Grugeon* v. *Gerrard*, 4 Y. & C. Exch. Ca. 128; *Harmer* v. *Priestley*, 16 Beav. 569), but it seems that he will not be deprived of his costs in a redemption suit because he has over-stated the amount due to him : *Cotterell* v. *Stratton*, 8 L. R. Ch. App. 295.

A defendant in a redemption suit, who admits that the plaintiff is entitled to a decree, cannot refuse to set out in his answer his accounts as mortgagee : *Elmer* v. *Creasy*, 9 L. R. Ch. App. 69. But a bill for redemption has been dismissed if the mortgagor did not pay what was due to the mortgagee at the appointed time, even although a tender were made before the motion to dismiss : *Faulkner* v. *Bolton*, 7 Sim. 319.

Previous to the new Statute of Limitations (3 & 4 Will. 4, c. 27) the time within which redemption was allowed depended upon a rule, as stated by Lord *Hardwicke*, in general analogous to the old Statute of Limitations, 21 Jac. 1, c. 16, viz., "that, after twenty years' possession of the mortgagee, he should not be disturbed, or otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account, which would be a great hardship :" *Anon.*, 3 Atk. 313.

Where, however, the mortgagor was prevented from asserting his claim by reason of certain impediments mentioned as exceptions in the stat. 21 Jac. 1, c. 16, viz., imprisonment, infancy, or coverture, or by having been beyond sea, not having absconded (which is an avoiding and retarding of justice), in all which cases, by analogy to the statute, ten years were allowed after the removal of the impediment, at the expiration of which time the bar was complete : *Jenner* v. *Tracey*, 3 P. Wms. 287 n. ; *Cornel* v. *Sykes*, 1 Ch. Rep. 193 ; *Price* v. *Copner*, 1 S. & S. 347 ; *White* v. *Ewer*, 2 Vent. 340; *Belch* v. *Harvey*, 3 P. Wms. 287, n. ; *Beckford* v. *Wade*, 17 Ves. 99.

Moreover, even in the absence of fraud or oppression, or unfair means, on the part of the mortgagor, to clog the redemption, which would clearly take the case out of the statute (*Spurgeon* v. *Collier*, 1 Eden, 55 ; *Ord* v. *Smith*, Sel. Ch. Ca. 9) ; a very slight act, on the part of the mortgagee, acknowledging the title of the mortgagor, although not to him or his heirs, as, keeping private accounts of the profits of the estate, in which it was treated as redeemable, was sufficient for that purpose (*Fairfax* v. *Montague*, cited 2 Ves. jun. 84 ; *Campbell* v. *Beckford*, cited 4 Ves. 474 ; *Lake* v. *Thomas*, 3 Ves. 17, 22. And see *Hansard* v. *Hardy*, 18 Ves. 455 ; *Hodle* v. *Healey*, 6 Madd. 181 ; *Price* v. *Copner*, 1 S. & S. 347) ; *à fortiori*

if the accounts were kept with the mortgagor or his heir (*Proctor* v. *Cowper*, 2 Vern. 377; *Anon.*, 2 Atk. 333); but a receiver's accounts delivered without authority were not sufficient (*Barron* v. *Martin*, G. Coop. 189); nor was a mere demand of the debt, without process or acknowledgment: *Hodle* v. *Healey*, 1 V. & P. 540.

If, however, the mortgagee in any way acknowledged the existence of the equity of redemption, either in a conveyance (*Smart* v. *Hunt*, 4 Ves. 478, n.; *Price* v. *Copner*, 1 S. & S. 347), or a devise (*Anon.*, 3 Atk. 314; *Ord* v. *Smith*, Sel. Ch. Ca. 9; 2 Eq. Ca. Ab. 600), or by entering into a contract with the heir for the purchase of the equity of redemption (*Conway* v. *Shrimpton*, 5 Bro. P. C. 187, Toml. edit.), the case would be taken out of the statute. And even parol evidence of conversation of the mortgagee was admissible on behalf of the mortgagor seeking redemption (*Perry* v. *Marston*, 2 Bro. C. C. 397; *S. C.*, cited 2 Cox, 295); but not unless it was clear and unequivocal: *Whiting* v. *White*, 2 Cox, 290. The case would also be taken out of the statute by the mortgagor or his heir remaining in possession *of part of the* mortgaged estate: *Rakestraw* v. *Brewer*, Sel. Ch. Ca. 55; 2 P. Wms. 511; Mos. 189; *Burke* v. *Lynch*, 2 Ball & B. 426, 527.

Other instances might also be mentioned; but the difficulties which previously arose upon the question, whether the equity of redemption was or was not subsisting, were, in a great measure, put an end to by the new Statute of Limitations (3 & 4 Will. 4, c. 27), by which it was enacted, that, "when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within *twenty* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an *acknowledgment* of the title of the mortgagor, or of his right of redemption shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, *in writing, signed by the mortgagee or the person claiming through him;* and in such case no such suit shall be brought but within *twenty* years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but

where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage-money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." Sect. 28.

On and after the 1st January, 1879, the 28th section of 3 & 4 Will. 4, c. 27, is repealed by the Real Property Limitation Act, 37 & 38 Vict., c. 57.

The 28th section of 3 & 4 Will. 4, c. 27, is retrospective; therefore, although, previous to that Act coming into force, there may have been a sufficient acknowledgment of the title of the mortgagor under the old law, if it be not sufficient under that section, the mortgagor will be barred from the benefit of such acknowledgment: *Batchelor* v. *Middleton*, 6 Hare, 75.

But time will not under this act run against the mortgagor while the possession of the mortgagee may be referred to another title, and is not adverse. Thus, in *Hyde* v. *Dallaway*, 2 Hare, 528, where a person to whom an estate was mortgaged by the tenant for life and remainderman, purchased the interest of the tenant for life, after having been in possession, without any acknowledgment of the mortgagor's title for six years, and then continued in possession for twenty years, it was held by Sir *James Wigram*, V. C., that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Will. 4, c. 27, s. 28, was not, therefore, a bar to any suit for redemption by the remainderman or reversioner. See, also, *Raffety* v.

King, 1 Keen, 601 ; *Price* v. *Copner*, 1 S. & S. 347.

As we have before seen (p. 1081) before the passing of 3 & 4 Will. 4, c. 27, a very slight act or admission, even by parol, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title, so as to save his right to redeem. That statute now requires that the acknowledgment should be made *in writing*. No particular form of acknowledgment is, however, necessary, and it is not essential that the amount actually due should be stated (*Trulock* v. *Robey*, 12 Sim. 402, 2 Ph. 396; *Lord St. John* v. *Broughton*, 9 Sim. 219 ; *Stansfield* v. *Hobson*, 16 Beav. 236 ; 3 De G. Mac. & G. 620 ; *Prance* v. *Sympson*, Kay, 678) ; and it may be made by an answer in Chancery (*Goode* v. *Job*, 1 Ell. & Ell. 6), an affidavit in a suit, or in a schedule to a deed, or in the Insolvent Debtors' Court (*Blair* v. *Nugent*, 3 Jo. & L. 658) as well as by a letter or other writing : *Stansfield* v. *Hobson*, 16 Beav. 236 ; 3 De G. Mac & G. 620. An acknowledgment, however, will not be inferred from equivocal expressions, especially if coupled with a denial of the mortgagor's claim : *Thompson* v. *Bowyer*, 9 Jur. N. S. 863, 11 W. R. (M. R.) 975.

It may appear singular, that the mortgagee should not be allowed to make an admission (in writing signed by himself) of his mortgage title to a third person of which the mortgagor may have the benefit ; but the statute requires that the admission should be made to the mortgagor himself, or to those who claim his estate ; and by that the Court is bound (see *Batchelor* v. *Middleton*, 6 Hare, 83 ; *Lucas* v. *Dennison*, 13 Sim. 584) ; but it seems that an admission in writing of the right of the mortgagor, made to his agent, will be sufficient : *Trulock* v. *Robey*, 12 Sim. 402 ; 2 Ph. 396. And see *Stansfield* v. *Hobson*, 3 De G. Mac. & G. 620 ; there more than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee, requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, " I do not see the use of a meeting, unless some one is ready with the money to pay me off." It was held by the Lords Justices, affirming the decree of Sir *John Romilly*, M. R. (16 Beav. 236), that the letter of the mortgagee was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations.

Although, if a mortgagor be a party to an assignment of the mortgage, this may be a sufficient acknowledgment of his title (*Batchelor* v. *Middleton*, 6 Hare, 75), a mere recital of the mortgage, and an assignment subject to the equity of redemption, when the mortgagor or the claimant under

him is not a party to the deed, will not be sufficient, inasmuch as the transferee cannot be considered as claimant of the mortgagor's estate, but of his mortgagee's: *Lucas* v. *Dennison*, 13 Sim. 584.

The point has been raised, whether, since the new Statute of Limitations, the bar thereby created by possession on the part of a mortgagee, was defeated by his having kept accounts of the rents received by him; it was not, however, decided; but it seems that it would not have that effect unless they were communicated in writing to the mortgagor, or perhaps his agent: *Baker* v. *Welton*, 14 Sim. 426.

It has been held not to be necessary that an acknowledgment should be given within twenty years after the mortgagee took possession, inasmuch as before and after the passing of 3 & 4 Will. 4, c. 27, an acknowledgment was sufficient to revive the right of redemption: *Stansfield* v. *Hobson*, 3 De G. Mac. & G. 620; *Pendleton* v. *Rooth*, 1 Giff. 35; 1 De G. F. & Jo. 81.

The mortgagee's acknowledgment will also bind his lessee: *Ball* v. *Lord Riversdale*, Beat. 550.

An admission of the title of the mortgagor by a tenant in tail under the will of a mortgagee in fee in possession, will bind those in remainder: *Pendleton* v. *Rooth*, 1 Giff. 35; 1 De G. F. & Jo. 81.

Suppose several persons are interested as mortgagees, how far will the acknowledgment of one of such persons in writing, enable a mortgagor to redeem after possession of the mortgagees for more than the time fixed as a bar by statute. This question was considered in *Richardson* v. *Younge*, 10 L. R. Eq. 275, 280, by Sir *R. Malins*, V. C., who came to the conclusion that the proper construction of the words of the 28th section of 3 & 4 Will. 4, c. 27, "that where there is more than one mortgagee, the acknowledgment of one of such mortgagees shall be effectual only against the party signing the acknowledgment," are directed to the case of *several mortgagees*, where an account taken against one will bind his interest, but not the interest of any other person. But where the mortgage is to secure money to two or more persons *jointly*, there must be an acknowledgment by all. This decision was on appeal affirmed by the Lord Justices (6 L. R. Ch. App. 478), Lord Justice *James* observing, "our decision is confined to the case of mortgagees who are trustees, and are shown to be such on the face of the deed."

By 3 & 4 Will. 4, c. 27, it is enacted that after the 31st of December, 1833, no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged

upon or payable out of any land or rent at law or in equity, or any legacy but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given. Sect. 40. This section has, however, been repealed by 37 & 38 Vict. c. 57, s. 9.

It is also thereby enacted that after the 31st December, 1833, no arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent . . . . shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." Sect. 42.

By 3 & 4 Will. 4, c. 42, s. 1, it is enacted that "all actions . . . . of covenant or debt upon any bond or specialty, and all actions of debt or scire facias upon any recognisance . . . . shall be sued and brought within *twenty years* after the cause of such actions or suits (sect. 3), and after extending the remedies of persons under disabilities or beyond the seas (sect. 4), there is a saving clause which provides that if any acknowledgment shall have been made either *by writing signed by the party liable*, by virtue of an indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being then due thereon, it shall be lawful for the person or

persons entitled to such actions to bring his or their action within *twenty* years after such acknowledgment by writing, part payment or part satisfaction, or within twenty years after any disability has ceased " (sect. 5).

As to the nature of the acknowledgment to be made under sections 40 and 42 of 3 & 4 Will. 4, c. 27, see *Holland* v. *Clark*, 1 Y. & C. C. C. 151; *Blair* v. *Nugent*, 3 Jo. & L. 658, 677; *Hill* v. *Stawell*, 2 Jebb & S. 389, and in this respect differing from section 28; the acknowledgment under these sections may be made by an agent (*St. John* v. *Boughton*, 9 Sim. 219); it may also be made by a devisee in trust of the debtor (*St. John* v. *Boughton*, 9 Sim. 219), or a trustee appointed by the Court: *Toft* v. *Stephenson*, 1 De G. Mac. & G. 28.

Payment of interest on an Irish mortgage made by a person appointed a receiver under 11 & 12 Geo. 3, c. 10 (Ir.), over the estates mortgaged, is within the terms of the 40th section of the 3 & 4 Will. 4, c. 27, payment by "an agent" of the party liable: *Chinnery* v. *Evans*, 11 Ho. Lo. Ca. 115.

And where there are several persons entitled to the equity of redemption, the part payment or payment of interest by one of such persons will have the effect not only of preserving the right of action against such persons, but also against all other parties liable on the specialty: *Pears* v. *Laing*, 12 L. R. Eq. 41, 54, and see *Roddam* v. *Morley*, 10 Hare, 228, 1 De G. & Jo. 1.

Payment of interest by a tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder: *Roddam* v. *Morley*, 1 De G. & Jo. 1; and see *Toft* v. *Stephenson*, 1 De G. Mac. & G. 40; *Pears* v. *Laing*, 12 L. R. Eq. 55, 56, and remarks there on *Coope* v. *Cresswell*, 2 L. R. Ch. App. 112.

Payment of interest by the widow of the mortgagor entitled to dower, who had entered into possession, has been held to prevent the Statute of Limitations running so as to bar the claims of the mortgagee against the heir-at-law: *Ames* v. *Mannering*, 26 Beav. 583.

A solicitor who pays off a mortgage debt due from his client must be taken to act as the agent of his client, and not on his own behalf; and if he receives the rent of the mortgaged property, the possession is that of his client, and the solicitor cannot be charged with wilful default, nor will the statute run against the client: *Ward* v. *Carttar*, 1 L. R. Eq. 29. Payment, however, of interest by a stranger would not be an acknowledgment within section 40: *Chinnery* v. *Evans*, 11 Ho. Lo. Ca. 115.

Upon the construction of 3 & 4 Will. 4, c. 27, s. 42, it has been decided that the only arrears of

interest that are a *charge upon land*, although there be a covenant in the mortgage deed to pay interest, are arrears of six years: *Shaw* v. *Johnson*, 1 Drew. & Sm. 412; *Round* v. *Bell*, 30 Beav. 121.

Money to arise from the sale of land is within the 42nd section of 3 & 4 Will. 4, c. 27, and upon a mortgage thereof six years arrears of interest only are recoverable. See *Bowyer* v. *Woodman*, 3 L. R. Eq. 313. There a married woman entitled, after the death of a tenant for life, to a share of a fund arising from moneys, the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage containing a covenant by husband and wife to pay full interest. It was held by Sir *W. P. Wood*, V. C., that the wife's estate was money payable out of land within the 42nd section of 3 & 4 Will. 4, c. 27, and that the mortgagee could not recover more than six years' arrears of interest on the mortgage of such an estate. "I put the covenant," said his Honor, "entirely aside, it being the covenant of a married woman."

And a mortgagee is not entitled thereunder to recover as against a second mortgagee and subsequent incumbrancers, the arrears of interest due for more than six years, by reason of an acknowledgment in writing by the mortgagor of the sum due in respect of interest, inasmuch as the words in the 42nd section, "by whom the same is payable," denote not merely those who are legally bound by contract to pay the interest, but all against whom payment of such arrears may be enforced by any action or suit. See *Bolding* v. *Lane*, 1 De G. J. & Sm. 122, 133, reversing the decision of Sir *J. Stuart*, V. C., 3 Giff. 561.

If, however, there were a trust term created (*Cox* v. *Dolman*, 2 De G. Mac. & G. 592; *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Lewis* v. *Duncombe*, 29 Beav. 175) or agreed to be assigned (*Shaw* v. *Johnson*, 1 Drew. & Sm. 412) for securing payment of principal and interest, inasmuch as this would bring the case within the exception of express trusts provided by the 25th section of 3 & 4 Will. 4, c. 27, the amount of arrears recoverable will not be limited to six years. (See also *Young* v. *Lord Waterpark*, 13 Sim. 202; 15 L. J. N. S. Ch. 63; *Ward* v. *Arch*, 12 Sim. 472.) But a trust for sale in a mortgage deed for that purpose, would not, it seems, have the same effect: *Locking* v. *Parker*, 8 L. R. Ch. App. 30, reversing the decision of Lord *Romilly*, M. R., reported 20 W. R. (M. R.), 737; see also *Kirkwood* v. *Thompson*, 2 H. & M. 392. See now 37 & 38 Vict. c. 57, sect. 10, *post*, 1091.

Although a mortgagee who had allowed interest to run into arrear could not under the 42nd section, recover more than interest for six years, if a mortgagor who had lost his legal right and

came into equity, insisting on his right to redeem, he would not be allowed to do so upon payment merely of six years' interest, if he owed more. See *Edmunds* v. *Waugh*, 1 L. R. Eq. 418. There certain premises had been mortgaged to secure a sum and interest at 5*l.* per cent., with a covenant to pay principal and interest, and a power of sale in default of payment, under which the mortgagee was to stand possessed of the proceeds of the sale upon trust to pay himself his principal, interest, and costs, and the residue to the persons entitled to the equity of redemption. A sale took place under the power, and the proceeds thereof were paid into Court in a suit for the administration of the mortgagee's estate, and there being nearly twenty years' arrears of interest due on the mortgage, exceeding in amount the fund in Court, the trustees of the mortgage petitioned for payment out of the fund to satisfy such arrears, and the assignee of the mortgagor was served with the petition. It was held by Sir *R. T. Kindersley*, V. C., that the petition was not a "suit" to recover arrears of interest within the 42nd section of the statute 3 & 4 Will. 4, c. 27, and therefore, that the mortgagee's trustees were entitled to more than six years' arrears of interest; and the fund was ordered to be paid over to them. "In the case," said his Honor, "of *Mason* v. *Broadbent* (33 Beav. 296), which was a suit by a mortgagor to recover the surplus money, the decision appears to have been that the mortgagee should only retain six years' arrears of interest. . . . . I am bound to say, that, with all deference, I cannot concur in the conclusion, that a bill by a mortgagor to recover the surplus comes within the terms of the 42nd section, as being a suit by which arrears of interest are sought to be recovered. Moreover it does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act taking away existing rights, and which must be construed with reasonable strictness. The intention of the legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then came to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the legislature intended that a mortgagor, who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid, less culpable than the omission of

the mortgagee to demand and enforce payment of it?"

Where, however, there was a bond or covenant to pay the interest, arrears on the mortgage debt could be recovered as against the mortgagor or his heirs for twenty years before the institution of the suit, their *personal* liability under 3 & 4 Will. 4, c. 42, not being affected by 3 & 4 Will. 4, c. 27, s. 42: see *Du Vigier* v. *Lee*, 2 Hare, 326, and cases there cited.

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which repeals ss. 5, 28, and 40 of 3 & 4 Will. 4, c. 27, from the 1st of January, 1879, it is enacted that, "When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within *twelve years* next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within *twelve years* next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a

divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. Sect. 7.

No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law, or in equity, or any legacy, but within *twelve* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit, or proceeding, shall be brought but within *twelve* years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given (sect. 8).

After the commencement of this Act, no action, suit, or other proceeding, shall be brought to recover any sum of money, or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent, or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust (sect. 10).

And under the doctrine of tacking in order to avoid circuity of action (see vol. i., pp. 679, 680), the heir of a mortgagor who has covenanted for himself and his heirs to pay the mortgage debt and interest cannot redeem without paying arrears of interest to the extent of twenty years, the mortgagee being entitled to tack the arrears of interest to the debt as against the heir: *Elvy* v. *Norwood*, 5 De G. & Sm. 240.

The same result will follow in case of a bill of foreclosure, but the question as to whether the mortgagee is entitled to tack should be raised on the pleadings: *Sinclair* v. *Jackson*, 17 Beav. 405.

As to a suit for the redemption of land in Canada, see *Smith* v. *Simpson*, 7 Moore, P. C. C. 205.

It should be remembered that by 4 & 5 Will. & M. c. 16, intituled "An Act to prevent Frauds by Clandestine Mortgages," a person mortgaging lands or tenements without discovering to the mortgagee any former mortgage or mortgages in writing under his hands, forfeits his right to redeem. See *Stafford* v. *Selby*, 2 Vern. 591; *Kennard* v. *Futvoye*, 6 Jur. N. S. 312.

By the Common Law Procedure Act (15 & 16 Vict. c. 76), in ejectment by the mortgagee upon the mortgagor's paying principal, interest, and costs, it shall be deemed a full satisfaction on his part, and the Court may compel the mortgagee to reconvey (sect. 219). But the Act is not to extend to cases where the right to redemption is controverted, or the money due not adjusted (sect. 220), or to prejudice any subsequent mortgagee: *Ib.*

It is an established rule of the Court that if a mortgagor files his bill for the redemption of a *legal* mortgage, and it is dismissed for any reason except for want of prosecution, the dismissal operates as a decree for foreclosure against him: per *James*, L. J., in *Marshall* v. *Shrewsbury*, 10 L. R. Ch. App. 253, 254. The mortgagor, by filing the bill, admits the title of the mortgagee, and admits the mortgage debt, and the dismissal of the bill operates as a decree for foreclosure, because he cannot afterwards file another bill for the same purpose; he is not thus allowed to harass the mortgagee. *Ib.*, 254.

The dismissal, however, of a bill by an equitable mortgagee for redemption will not, as in the case of a similar bill by a legal mortgagor, operate as a bill of foreclosure. See *Marshall* v. *Shrewsbury*, 10 L. R. Ch. App. 250, 254, where *James*, L. J., in commenting upon the distinction between the two cases, observes: "To say that because dismissal of a bill for redemption operates as a decree for foreclosure in the case of a legal mortgage, therefore the analogy would be good, that the dismissal of a bill by an equitable mortgagor has the same effect, is to say that the dismissal of the bill is to be held equivalent to a declaration that the mortgagee has a lien for the amount claimed, and that the mortgagor is a trustee for him, and is bound to convey the estate to him."

Accounting between Mortgagor and Mortgagee.]—The mortgagor is not bound to account for rents and profits while he is in possession: *Colman* v. *Duke of St. Alban's*, 3 Ves. 25; *Ex parte Wilson*, 2 V. & B. 252. Nor will his agent or any person claiming under his voluntary revocable deed: *Hele* v. *Lord Bexley*, 20 Beav. 127.

The mortgagee, however, must account, from the time he takes possession, for the rents and pro-

fits of the mortgaged estate; and he will be charged an occupation rent for any portion of it held by himself (*Smart* v. *Hunt*, 1 Vern. 418; *Trulock* v. *Roby*, 15 Sim. 237, 265; 2 Ph. 396); and annual rests will be directed by the Court, if there be no interest due at the time he takes possession, and the annual rents exceed the amount of the annual interest payable on the mortgage, in order that the excess of rent may be applied in sinking the principal (*Shepherd* v. *Elliott*, 4 Mad. 254; *Gould* v. *Tancred*, 2 Atk. 533); and annual rests will be directed in an account of occupation rent as well as in an account of rents and profits received: *Wilson* v. *Metcalf*, 1 Russ. 530. See also *Morris* v. *Islip*, 20 Beav. 654.

Where the liability of a mortgagee in possession to account without annual rests once begins, it continues until changed by some further agreement come to between the mortgagor and mortgagee: *Scholefield* v. *Lockwood*, 32 Beav. 439.

But it is a general rule not to direct annual rests to be made in the accounts of a mortgagee in possession, when the interest is in arrear at the time when he takes possession: *Wilson* v. *Cluer*, 3 Beav. 140.

In the case of a mortgage of leasehold house property, where there is no reasonable certainty that the ground rent and insurance will be duly paid, the houses kept in repair, and the property secured against forfeiture, the mortgagee is entitled to enter into possession, although there is no interest in arrear, and an account will not be directed against him with annual rests: *Patch* v. *Wild*, 30 Beav. 100, per Sir *John Romilly*, M. R.

But the burden of proof, that such was the reason that induced him to enter, lies on the mortgagee, and on failure of proof an account will be directed against him with annual rests: *Patch* v. *Wild*, 30 Beav. 99.

And accounts will be directed with rests against a person who has entered into possession under a contract for purchase (subject to mortgages) which afterwards goes off, although he afterwards obtains a transfer of the mortgage: *Patch* v. *Wild*, 30 Beav. 99.

As to circumstances under which the accounts of a mortgagee in possession will not be taken with rests, see *Horlock* v. *Smith*, 1 Coll. 287.

If, however, a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable when the arrear of interest is paid off (*Davis* v. *May*, G. Coop. 238; 19 Ves. 383; *Latter* v. *Dashwood*, 6. Sim. 462; *Finch* v. *Brown*, 3 Beav. 70; but see *Thorneycroft* v. *Crockett*, 2 H. L. Ca. 239; *Morris* v. *Islip*, 20 Beav. 654), nor till after the whole of the mortgage debt has been paid off by the

receipt of the rents, although from the time when the debt is ascertained to be paid off, annual rests will be decreed, though none were ordered previously: *Wilson* v. *Cluer*, 3 Beav. 140.

So, where a mortgagee in possession comes to an account with the mortgagor, whereby all arrears of interest are converted into principal, leaving thereby no arrears, the rents being more than sufficient to keep down the interest, he will be dealt with as a mortgagee who takes possession without any interest being in arrear, and annual rests will be directed; while he continues in possession: *Wilson* v. *Cluer*, 3 Beav. 136.

A mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first in payment of interest and costs, and then either pay the balance to the mortgagor, or apply it in reduction of the principal due on the mortgage; and in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgages are held by the same person, who sells one of the mortgaged estates: *Thompson* v. *Hudson*, 10 L. R. Eq. 497.

Where a mortgagee takes possession, and a tender is made to him, he refuses it at his peril, and in a bill for redemption caused by such refusal the Court will direct that, in case it turns out that the money due is less than the tender, the defendant shall pay all the costs of the suit, being allowed all sums laid out for necessary repairs, and being charged with an occupation rent: *Hoskin* v. *Sincock*, 13 W. R. (V. C. K.) 487.

And a mortgagee in possession, holding over after payment of his principal and interest, will be charged with the balance, and generally with simple interest at 4*l.* per cent. (*Quarrel* v. *Beckford*, 1 Madd. 269); and with costs (*Binnington* v. *Harwood*, T. & R. 485; *Archdeacon* v. *Bowes*, M'Clel. 149; *Lloyd* v. *Jones*, 12 Sim. 491); unless the decree to account contains no reservation of costs (*Lord Trimleston* v. *Hamill*, 1 B. & B. 377, 386). The Master was not at liberty to make rests, unless directed to do so by decree (*Webber* v. *Hunt*, 1 Madd. 13); but the Court may order it to be done on further directions: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Horlock* v. *Smith*, 1 Coll. 294.

Where a decree for redemption had been made against a mortgagee in possession without directing annual rests, a direction to take the account with rests could not be made at Chambers under 15 & 16 Vict. c. 86, s. 54,

nor under the General Orders of 16th Oct. 1852: *Nelson* v. *Booth*, 3 De G. & Jo. 119.

Where a mortgagee under an order of the Court had entered into possession of a mortgaged life estate, he was, upon the disappearance of the mortgagor, held liable to account for the rents from the time when it was to be presumed that the mortgagor died, as such case did not come within 21 Jac. 1, c. 16; 3 & 4 Will. 4, c. 27, s. 42. Nor could the Court hold that the mortgagee who had entered into possession under the order of the Court, had been converted into a mere trespasser by the death of the mortgagor, nor could laches be imputed to the remaindermen, since it was not possible for them to come to the Court until the presumption of death arose: *Hickman* v. *Upsall*, 3 Ch. D. 617.

In accounting, the mortgagee in possession is only liable for the fair rents and profits, and is only liable for wilful default in not receiving them; if, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was underlet, takes as new tenant another person, to whom there is no objection, offering more (*Hughes* v. *Williams*, 12 Ves. 494; *Parkinson* v. *Hanbury*, 2 L. R. Ho. Lo. 1); but the mortgagor cannot lie by, not giving notice that a greater rent may be had, and afterwards, by way of penal inquiry, charge the mortgagee with the effect of his own negligence: 12 Ves. 495, 496. It is said, in *Blacklock* v. *Barnes*, Sel. Ch. Ca. 53, "that if the mortgagor makes proof that the estate was let at such a price, while in the hands of the mortgagee, that shall be deemed the rate at which it was let the whole time, unless he shows the contrary, which is in his power, as being let by him."

A mortgagee in possession acting on the advice of an agent, in not letting the property, is not liable for wilful default (*Brandon* v. *Brandon*, 10 W. R., V. C. K., 287); but he was held to be liable where he had suffered a tenant to remain for several years in possession, paying no rent, and without demanding any: *Ib.*

In *Horlock* v. *Smith*, 1 Coll. 287, it seems to have been assumed that a sum of money in court, and rent in the hands of the receiver at the time the mortgagee took possession, were to go in discharge of the interest then due to him.

Although a mortgagee who takes possession of the mortgaged estate is, in a suit for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default (*Parkinson* v. *Hanbury*, 2 L. R. Ho. Lo. 1), nevertheless, where persons who, though in fact mortgagees, enter into possession of the rents and

profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established: *Parkinson* v. *Hanbury*, 2 L. R. Ho. Lo. 1, affirming *S. C.*, 2 De G. Jo. & Sm. 450; 1 Drew. & Sm. 143.

A mortgagee of an estate will not be chargeable with default, in not having received the rents and profits of part thereof, into which he has not entered into possession. See *Semmins* v. *Shirley*, W. N. 1877, p. 143. There a mortgaged estate consisted of land let as a farm, with timber on it, and copses. The farm was let by the mortgagor to a tenant, the mortgagor reserving the shooting, and the right to cut the timber. The mortgagees gave notice to the tenant to pay the rent to them. The mortgagor afterwards claimed to charge the mortgagees with default, as to the shooting, the copses, and the timber. It was held, however, by Fry, J., that the mortgagees were in possession of the farm only, and not of the shooting, the copses, or the timber, and were not therefore liable for default.

But a mortgagee who goes into possession under a contract between himself and his mortgagor made subsequently to the mortgage deed, has been held liable to be charged as mortgagee in possession: *In re McKinley's Estate*, 7 I. R. Eq. 467.

A mortgagee in possession is liable to account for any damage done to the property, as by pulling down buildings improperly (*Sandon* v. *Hooper*, 6 Beav. 246; 14 L. J., N. S., 120); or destroying (*Hornby* v. *Matcham*, 16 Sim. 325); or losing the title deeds (*Brown* v. *Sewell*, 11 Hare, 49; and see *Lord Middleton* v. *Eliot*, 15 Sim. 531; *Woodman* v. *Higgins*, 14 Jur. 846); and if he assign the mortgaged estate to an insolvent person, without the concurrence of the mortgagor, he will, as he in some measure stands in the position of a trustee, be liable for the rents, after as well as before the assignment (1 Eq. Ca. Ab. 328, pl. 2).

A mortgagee in possession of part of the mortgaged estate, and allowing the mortgagor to retain possession of the rest, will not, at the suit of a subsequent incumbrancer, be charged constructively as if he had been in possession of the whole: *Soar* v. *Dalby*, 15 Beav. 156.

Many allowances, however, will, in taking accounts, be made to the mortgagee in possession: such as money laid out in such repairs, for instance, as are necessary for the support of the property, and interest thereon, he will be allowed for: *Sandon* v. *Hooper*, 6 Beav. 246; *Neesom* v. *Clarkson*, 4 Hare, 97; *Eyre* v. *Hughes*, 2 Ch. D. 164. And he will not only be

allowed for repairs, but also for doing that which is essential for the protection of the title of the mortgagor: *Sandon* v. *Hooper*, 6 Beav. 248; *Pelly* v. *Wathen*, 7 Hare, 373.

Thus, where a mortgagee has been put to expense in defending the title to the estates, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate (*Parker* v. *Watkins*, Johns. 133); but if his title to the mortgage only be disputed, the costs of his defence should not be borne by the estate, as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation: *Ib.*

In *Blackford* v. *Davis*, 4 L. R. Ch. App. 304, a mortgage deed provided that it should be a security not only for the principal sums advanced, and interest, but also for the costs which might be incurred by the mortgagee in selling the property, or in any actions or suits relating to it. The mortgagor filed a bill to redeem, and a decree was made directing an account of what was due to the defendant for principal and interest under the mortgage deed, and an account of sale-moneys, rents, and profits received by the defendant. In taking the accounts the defendant carried in a claim for costs incurred in legal proceedings relating to the property, which the chief clerk refused to entertain, and the defendant then appealed from the decree. It was held by Lord Justice *Selwyn*, affirming the decree of Sir *John Stuart*, V. C., that the decree was right, for that all costs properly incurred in the actions might be claimed under it as "just allowances;" and by Lord Justice *Giffard*, that the costs might be claimed under the decree as principal moneys due under the deed.

A mortgagee in possession has been held not to be chargeable for wilful default, in declining to defend an action of replevin brought by the owner of property which was on the premises, and seized under a distress for rent levied by the mortgagee: *Cocks* v. *Gray*, 1 Giff. 77.

Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property (*Lord Trimleston* v. *Hamill*, 1 Ball & B. 385; *Sandon* v. *Hooper*, 6 Beav. 248); but he has no right to lay out money in what he may suppose increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor with his means ever to redeem. This is what has been termed "improving a mortgagor out of his estate." *Sandon* v. *Hooper*, 6 Beav. 248. Nor is he bound to engage in any specula-

tion or adventure for the benefit of the mortgagor, such as opening mines or quarries, which must be at his own cost and hazard (*Hughes* v. *Williams*, 12 Ves. 493; *Thorneycroft* v. *Crockett*, 16 Sim. 445); nor, if they are opened, will it be prudent for him to improve them by a large expenditure; at the utmost he is not bound to advance more than a prudent owner: *Rowe* v. *Wood*, 2. J. & W. 553, 556. And it is not a matter of course to direct an inquiry, whether any money has been laid out in lasting improvements, when there is no evidence in proof of their having been made: *Sandon* v. *Hooper*, 6 Beav. 246.

Where a mortgaged estate is of an insufficient value to pay the mortgage, a mortgagee, on entering into possession may open mines and cut timber, and he will be charged only with the net profits: *Millett* v. *Davy*, 31 Beav. 470.

But where the estate is sufficient, a mortgagee in possession has no such right, and if he opens and works mines he will be charged with the gross receipts, and will be disallowed the expenses of working (*Ib.*).

A mortgagee who holds property in pledge is responsible for it in its integrity; therefore a mortgagee of lands containing underneath unopened coal-fields, who allowed the owners of adjacent coal-mines to explore and work the coal, on a bill filed by the mortgagor against him and such coal-owners, was held responsible, and besides the common decree, the Court directed an account of all coal worked by the defendants, or either of them, and of the proceeds thereof: *Hood* v. *Easton*, 2 Giff. 692; aff. 20 Jur. 729, or 2 Jur. N. S. 729.

Formerly a mortgagee of houses, who was not by express contract with the mortgagor entitled to insure the premises against fire at the mortgagor's expense, nor to require the mortgagor so to insure them, was not entitled to add to his mortgage debt, and charge upon the property the premiums which he might have paid for such an insurance, effected by him without the privity of the mortgagor: *Dobson* v. *Laud*, 8 Hare, 216; *Bellamy* v. *Brickenden*, 2 J. & H. 137. By a recent Act (23 & 24 Vict. c. 145, s. 11), however, he can now do so.

A mortgagee in possession of a ship, is not chargeable if, in the prudent exercise of a fair discretion, he abstains from selling her, but if the sale cannot reasonably be effected, though he is entitled to employ the ship at the risk of the mortgagor in the ordinary course of business, and in such a manner as a prudent owner would use her if she were his own property, yet if he employ her imprudently, or in a trading speculation, he is chargeable with the value of the ship at the time when he took possession of her: *Marriott* v. *The Anchor Reversion-*

ary Company, 2 Giff. 457; 30 L. J. Ch. (N. S.) 571; and see the remarks there of Lord *Campbell*, C., 3 De G. F. & Jo. 185, on *The European Company* v. *The Royal Mail Company*, 4 K. & J. 676, as to whether any additional power is conferred on the mortgagee by the 70th sect. of the Merchant Shipping Act, 1856 (17 & 18 Vict. c. 104).

Where a lower rate of interest than that agreed upon in the mortgage-deed, has been paid by mistake, the mortgagee may claim the difference. See *Gregory* v. *Pilkington*, 5 W. R. 57; 26 L. J. (Ch.) 177, where a sum of money having been lent on mortgage, at the rate of $4\frac{1}{2}$ per cent. the mortgagor paid, and the mortgagee accepted interest at 4 per cent. This was done under the mistake of both parties. After several years the mortgage-deed, which had been mislaid, was found. It was held by the Lords Justices, reversing the decision of Sir *R. T. Kindersley*, V.-C., that the mortgagee was entitled to the arrears of the difference of the interest.

A mere agreement by the mortgagor with the mortgagee, not acted upon during a long period by the parties, to release his equity of redemption has been held not to disentitle the mortgagor to the surplus after a sale: see *Rushbrook* v. *Lawrence*, 8 L. R. Eq. 25, 5 L. R. Ch. App. 3; *Howells* v. *Wilson*, 34 Beav. 573.

SIR HARRY PEACHY *v.* THE DUKE OF SOMERSET.

Trinity Term, 7 *Geo.* 1.

[REPORTED 1 STRA. 447.]

S. C. Prec. Ch. 568; 2 Eq. Ca. Ab. 227, 228.

PENALTIES AND FORFEITURES.]—*A. having incurred a forfeiture of copyhold, by making leases contrary to the custom of the manor, without licence of the lord, and by felling timber, digging stones, and grubbing up hedges, although he offered by his bill to make a recompense, was held not entitled to relief in equity.*

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money; and the Court can give, by way of recompense, all that was expected or desired.

THE plaintiff brought his bill to be relieved against a forfeiture of his copyhold, by making leases contrary to the custom of the manor, without license of the lord, felling timber, digging stones, and grubbing up hedges, offering to make a recompense; and on the pleadings, the case was this:—Sir Harry, being seised of a copyhold estate of inheritance of 90*l.* per annum, held of the manor of Petworth, of which the Duke of Somerset is lord, made a lease of part of it for seven years, without licence, at 13*l.* per annum. The Duke, upon this, brings an ejectment against all the plaintiff's copyhold, which occasioned the plaintiff to bring a bill in his own and his infant son's name, for relief. The Duke, in his answer, insisting on other causes of forfeiture besides the making the lease without licence, Sir Harry brought a supplemental bill of discovery and relief against those other forfeitures. Upon the plaintiff's giving judgment

in ejectment, subject to the order of the Court, an injunction was granted; and now, upon the hearing, the case came out to be this:—

Upon Sir Harry's marriage, in 1693, all the copyhold lands were surrendered to the use of Sir Harry for life, with remainder to the first and every other son in tail male, in pursuance of an agreement before marriage for that purpose; but no admittance was ever taken upon that surrender. Before Sir Harry came into possession, there had been a quarry of stone in the freehold adjoining to the copyhold, and during Sir Harry's time it was worked in the copyhold; but whether it was first opened in the copyhold in the plaintiff's time did not appear. The avenue to the plaintiff's house, which consisted both of freehold and copyhold, was planted with timber trees by the plaintiff's father. The plaintiff had topped those trees that were on the copyhold part of the avenue, by which, from timber, they were become pollards. There were several hedges and boundaries of lands upon the copyhold, which the plaintiff had grubbed up and destroyed: but whether they are boundaries between copyhold and freehold, or only between one part and another of the copyhold, did not appear. And in the year 1714, the plaintiff, as before mentioned, let part of the copyhold for seven years, without licence, or any custom of the manor to warrant it.

Upon this it came in question, whether any and which of these several acts are forfeitures at law: and if so, whether any and which of them are relievable in equity; and if not, whether the son's case is to be distinguished from the father's.

First, whether these are forfeitures at law, which were of four sorts: the digging the quarry, the topping the timber trees, the destroying the boundaries, and making the lease without licence.

As to the quarry, the plaintiff's counsel insisted, it was opened even upon the copyhold in his father's time, and so purged by the admittance; and his digging it since was but like the case of a lessee, who may dig quarries and

mines that were open at the time of his lease, though he cannot open any new ones.

As to the topping of timber trees, which the plaintiff insisted was done only for the uniformity of his walk, and without design to injure the lord, it was answered, that it was voluntary waste, and the motives for doing it are not material to the lord.

As to the destroying of the fences, a case was cited out of Litt. Rep. 264, &c., where grubbing up the fences and removing the boundaries upon copyholds were held to be forfeitures, without distinguishing between the outward boundaries and those within the copyhold, as it tends to the destroying of the evidence relating to the lord's interest in the estate; and it was said, it is on this foundation laid down, 1 Inst. 53, that though a tenant might cut down wood to repair fences as he found them, yet not to make new fences.

As to the making of the lease without licence, it was acknowledged on all sides to be a forfeiture at law.

Secondly, the next question was, whether, supposing all these to be forfeitures, relief was proper in this Court, either upon the general case of this sort of forfeitures, or any particular equitable circumstances that may be in the present case.

For the particular equitable circumstances of this case, one was, that the steward's deputy engrossed and was a witness to the lease. This was compared to the lord's being privy to or witness to such lease, which would be held in equity as a permission, a kind of licence; and it has been held, that licence granted by a deputy steward was good. But answered, that this rather aggravated the injury, by making the lord's servant a party in the confederacy to injure him.

Another circumstance was the plaintiff's not having notice of this custom. But this is not material, for the tenant comes in under the customs of the manor, and is bound to take notice of them; and besides, this is common law.

But if those circumstances were not sufficient to

ground a relief upon, whether the general nature of those forfeitures will not admit of relief.

Argument for the plaintiff.

In favour of the plaintiff it was argued, that it is a sort of maxim, that all forfeitures are odious. That copyholds are now become a more fixed and established estate than they were formerly, and the law itself has been altering these hundred years very much in their favour: and therefore, a Court of equity ought to go as much in their favour, to keep them out of that vassalage and subjection which the original nature of their estates laid them under, and which their present fixed condition seems inconsistent with. That the forfeitures are intended only to secure the lord's rents and services, and therefore it was very proper for a Court of equity to interpose and prevent his having more than that security. And this is agreeable to the common cases of relief against the penalty of a bond, and upon mortgages and conditions of re-entry on non-payment of a rent, and *nomine pœnæ:* in which cases this Court will not allow the parties to take any other advantage of the forfeitures than what is necessary to satisfy the original intent of the agreement. The law has annexed these conditions in the case of copyholds instead of the parties; but as it had something else in view by them, than the gaining of the land to the lord, this Court may make amends to the lord, and fulfil the design of the law, and save the estate to the party. In the case of making a lease without licence, the intent of the law in making that a forfeiture is to prevent the lord's being disinherited of his interest in the copyhold, and to secure the fine due on a licence; both which may be easily secured by obliging the tenant either to accept a licence, or make surrender and admittance, and pay the fine; which will be a complete recompense for any injury the lord may have suffered; and then it comes within the common rule, that this Court will relieve against forfeitures, wherever a complete satisfaction can be made for the injury which is the cause of the forfeiture.

Several cases were cited: *Shelley* v. *Mason,* in Lord *Coventry's* time, 5 Car. 1, where a copyholder came into

this Court to be relieved against a forfeiture by making a lease without licence: the lord was decreed to account for the profits he had received since his entry, and pay the costs; 1 Ch. Rep. 51, where a copyholder was relieved by Lord *Coventry* for non-payment of fine on admittance; *Cox* v. *Higford* (*a*), by Lord *Harcourt*. The bill was to be relieved against a forfeiture by suffering a copyhold tenement to fall to ruin, and refusing to repair it for thirty years together, though frequently ordered to do it by the lord; the Chancellor refused to grant relief on two accounts,—his obstinacy, and the lord's having been in possession nine years after his entry, in which case great stress was laid on the obstinacy of the copyholder; case of *Rowland* v. *Dean of Exon*, where relief was granted against a forfeiture by cutting timber. In *Nash* v. *Lord Derby* (*b*), the decree of which was now read in Court, the plaintiff having a copyhold tenement that wanted repair, applied to the defendant, the lord of the manor, to have some timber assigned for that purpose, but the lord refused to assign any; upon which the plaintiff, hearing that there was a custom in the manor for two tenants to assign timber for the purpose of repair, did get two tenants to make such assignment, and then cut the trees down; upon which ejectment was brought, and a verdict for the lord, there being no such custom: the plaintiff brought his bill for relief, which was granted on his paying the value of the timber and costs at law and in equity: *Cudmore* v. *Raven* (*c*), where a Quaker, being tenant of a copyhold, refused to take an oath of fealty, and the lord entered for the forfeiture, and the tenant was relieved. *Cox* v. *Brown*, 1 Ch. Rep. 170, a lease being made on condition not to assign it without licence, the tenant did assign; but relief was granted on search of precedents; it being the case of an assignee of an executor makes no favourable circumstance, because there were assets without it. *Thomas* v. *Porter* (*d*), tenant of a copyhold *durante viduitate*, cut down timber upon one copyhold in order to repair another, which was a forfeiture, but yet relief was granted in this Court.

(*a*) 2 Vern. 664.

(*b*) 2 Vern. 537.

(*c*) Cited 2 Vern. 664.

(*d*) 1 Ch. Ca. 95; 1 Eq. Ca. Abr. 121, pl. 8.

If it is a difficult matter to ascertain damages in any of these cases of forfeiture, it is because there really is no damage; and surely it is no reason against relief, that the person who seeks it has done no injury.

Argument for the defendant.

For the defendant, these distinctions, as to relief against forfeitures, were insisted on:—Whether the forfeiture was for nonfeasance or malfeasance—whether the condition was annexed by law or the party—whether there were any particular circumstances of equity or not.

As to the difference between nonfeasance and malfeasance, as where tenant refuses to pay a fine upon admittance, this Court will relieve on doing that which he ought to have done. The difference is only as to the circumstance of time, which this Court easily supplies. So, where there is only permissive waste, the Court has relieved; but if, by obstinate refusal, this forfeiture is aggravated, the Court will look upon it as voluntary waste, and not grant relief, as in the case before cited of *Cox* v. *Higford*.

All these instances of forfeiture in the present case are of voluntary acts. One is making a lease without licence, which is a disseisin of the lord (4 Co. 21 b), and an attempt to disinherit him. The others are all voluntary wastes.

The next distinction is between conditions in law and by the party. The intention of the parties is easy to be discovered, and you answer the end of the contract if you give them everything they expected, which may in many cases be easily done. This is the case of all mortgages, conditions of re-entry on non-payment of rent, &c. But even in conditions of the parties, where the ascertaining of the damage is not plain and clear, the Court will not relieve against such conditions or penalties. It was never known that this Court relieved against a *nomine pœnæ* for ploughing up ancient meadow. It was denied in the duchy of Lancaster: *Eyre* v. *Hatton*.

But in case of forfeitures on conditions in law, this Court seldom relieves. If tenant for life makes a feoff-

ment, or levies a fine sur conusance de droit come ceo, &c., it was never pretended this forfeiture could be relieved in equity. Or if the reversioner brings waste on the statute for recovery of the place wasted, equity would not interpose. Those conditions in law are a sort of limitations of the estate of the party: and though the intent of the party is never so plain, equity will not alter the legal construction of the words; as where by will one gives an estate to A. for life, remainder to the heirs male of A., equity will not give the son of A. a remainder, and confine A.'s to a life estate, though the intent was plainly so.

But though this is generally the state of forfeitures, yet there may be some circumstances of equity to ground relief upon; and wherever the Court has granted relief, it is upon some such circumstances as where the party who is to take advantage of the condition is himself the means of its being broke. It was said by *Somers*, in the case of *Bertie* v. *Falkland* (*a*), that conditions precedent are not relievable, unless some indirect means are used by the party to prevent the performance. So, in the case of *Hammond* v. *Ainge*, before the present Chancellor (*b*), where a lord of a manor tells one that had a freehold held of his manor, that it was copyhold, and he must be admitted by copy of court roll, and pay a fine, the lord was, in this Court, obliged to erase the admittance, and repay the fine.

(*a*) 3 Ch. Ca. 134.

(*b*) Lord Macclesfield.

The third question relates to the infant plaintiff,—whether he is in any better condition than the father.

It was admitted on all hands, that, if an admittance had been taken pursuant to the surrender upon the marriage, the son, being remainderman, could not be prejudiced as to his estate by the forfeiture of the tenant for life: only in that case the bill was too early for the son, whose interest was not concerned till the death of the father.

But though the son had no legal right, yet there being a surrender to his use, and this pursuant to a marriage agreement, it shall be considered in a Court of equity as

if it had been executed; and the infant would be very proper to bring a bill in this Court against the father and the lord, in order to admit his father, pursuant to the surrender, that he might in law be entitled to the remainder.

On the other side it was said that Sir Harry, not being admitted upon that surrender, continued tenant under his former admittance: and the lord was no party to or concerned in the marriage settlement: his title was paramount to that, and consequently the forfeiture affected the inheritance, and should not be subject to or limited by the private trusts or transactions of the parties.

Lord Chancellor Macclesfield.—This is a point of so great consequence, that if relief could be given in this Court, it is strange it should not have been found out long ago. The forfeitures in those cases arise purely from the imbecility of the copyholder's estate. He was originally merely tenant at will, and is so still on all accounts but as to the continuance of his estate. There have been, indeed, very favourable constructions for the copyholder in that particular, because he is called tenant at will, *secundum consuetudinem manerii;* it has been held, the lord cannot determine his will but according to that custom. The true meaning of those words, *secundum consuetudinem manerii*, was not to bound the lord's pleasure in the determination of his will, but that the tenant, as long as he continued tenant, was to hold his land under those terms and conditions which the custom had established.

These matters, which are mentioned as forfeitures, are indeed limitations of the estate; such as determined it when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right he had before, and yet he does no damage to the remainder-man. So, tenant by copy, taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate;

the law has made it so; and what is there in this case to ground relief upon, and require me to set aside the law?

It is a hard law, and therefore the party must not be subject to it; but is not this directly repealing the law?

In an action of waste for recovery of the place wasted, it is certain and admitted this Court cannot relieve; and yet this may be called a very unconscionable thing. But is it so to take advantage of a law which is known and equal to all? Nor can I see any difference, whether the statute makes this condition or the common law makes it.

It is not sufficient to say, here is no damage in this case, and therefore it is there can be no recompense given by this Court; for it is the recompense that gives this Court a handle to grant relief.

The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired; but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none.

But even in the case of copyholds there are some cases of forfeitures intended for a different purpose; as for non-payment of rent or fines, which are only by way of security of the rent or fine; and, therefore, when these are paid afterwards, with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true foundation of the relief which this Court gives in those cases.

Cases of agreements and conditions of the party and of the law are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a hard bargain.

Thus it stands on the general state of these kind of forfeitures. But what equitable circumstances are there peculiar to this case? It is certain there may be circum-

stances which may make it fit and equitable for this Court to relieve, either in these cases or in actions on the Statute of Waste. If the lord should give the tenant encouragement, by *parol* only, to pull down a messuage, and he did it accordingly, this might induce the Court to prevent the lord's taking advantage of a fraudulent act of his own. In the present case, if the lord had been present at the making of the lease, and advised it, relief might be reasonable; but the steward's standing by, or even engrossing the lease, is rather a circumstance against relief, as it looks like a confederacy to cheat the lord, and break the customs of the manor.

As to the other cases of forfeiture relating to the quarry, the topping of the trees, and the destroying of the boundaries, there does not enough appear to determine whether they are legal forfeitures or not (*a*); but if they are, I think they are all, as the making of the lease under the same consideration in this Court, and not proper for relief.

(*a*) See *Dearden* v. *Evans*, 5 Mee. & W. 11; *Hoyle* v. *Coupe*, Id. 450.

As to the infant, his case does not seem as yet ripe for this Court; but it may be a question how far his equitable interest will entitle him to be secured against these forfeitures.

I am apprehensive the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

Suppose one lets a trustee be admitted for him, who commits a forfeiture; no doubt the estate would be forfeited, and the cestui que trust would have no equity against the lord.

Suppose the trustee should die without heir, the lord would be entitled by escheat, without being subject to the trust.

But see now, 3 & 5 Will. 4, c. 23, ss. 2, 3.

The person who is the legal tenant is subject, with regard to that estate, to all the imbecilities of that estate; if not, by the means of a trust, a copyhold would be entirely discharged from all those imperfections it labours under, and the lord's interest be taken away; for the lord can take advantage of nobody's acts but those of his

tenant. He is not at all concerned with the private agreements or trusts of the parties.

In the present case, suppose Sir Harry admitted according to the surrender, the infant is then tenant in remainder, and the father's act cannot prejudice the son, who is now admitted as a distinct tenant. But till admittance the son is no tenant; and suppose, when he comes of age, he should release to his father, there would be no occasion for any admittance at all, but Sir Harry would continue tenant upon his old admittance. The lord is not bound to take notice of anything but what appears on the Court rolls.

I am, therefore, apprehensive it will be a hard case to relieve the son. But I agree that, if the lord's fine for admittance be paid, though there was no actual admittance, since the lord received all the advantage that could be had from the admittance, it might be a good reason for relieving the son; and then it might be proper, perhaps even now, for the son to bring a bill against his father and the lord, in order to have his father admitted pursuant to the surrender. But it does not appear whether the fine was paid.

I should, therefore, for these reasons, dismiss the bill absolutely. But since the points of law are disputed as to all the forfeitures, excepting the making of the lease, which concern other parts of the copyhold, and since judgment in ejectment is given, which would take in other lands as well as those comprised in the lease, I think the bill should be retained till the points of law are tried at law upon the ejectment, which the plaintiff shall immediately receive declarations in, and plead to trial.

As to costs, they shall wait the event of the trial; and, as to them, I think the equity of them will depend upon the issue of that; if the plaintiff recovers there, he should pay costs here, because he had no occasion to come into this Court, excepting as to the discovery. If the Duke gets the better, I think, as this is a point of equity that has not been fully settled before, and in such case it is natural for a man to struggle the most to retain his estate,

it would be too hard to make him lose his estate and pay costs likewise.

As to the infant, I will not dismiss the bill absolutely, but without prejudice, because, being an infant, he may not have made the best of his case.

SLOMAN *v.* WALTER.

[1 BRO. C. C. 418.]

PENALTY WHEN RELIEVED AGAINST.]—*Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery of it, and an issue quantum damnificatus, to try the real damage.*

UPON showing cause why an injunction should not be dissolved, the case appeared to be thus: That the plaintiff and defendant were partners in the Chapter Coffee-house, and, upon entering into the partnership, it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And, in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty of 500*l.* After some time, the defendant demanded the use of the room, and being refused brought an action for the penalty of the bond. Plaintiff filed this bill, praying an issue to try *quantum damnificatus*, and an injunction in the meanwhile. He obtained an injunction till answer or further order; and the answer being now come in, the only question, in respect to continuing the injunction till the hearing, was, whether the penalty of the bond was merely intended as a security for the enjoyment of the room, or in the nature of assessed damages between the parties.

Mr. *Scott* and Mr. *Harvey*, for the defendant, contended the injunction ought to be dissolved, and the defendant permitted to have his remedy upon the bond. It was impossible a jury, upon an issue of *quantum damnificatus*,

could assess any other damages than those already assessed by the parties themselves. They referred to the case in the House of Lords, where 5*l.* per acre penalty for ploughing up meadow land was reserved in a lease, and the Court of Chancery having relieved against the penalty, and directed an issue to try the actual damage, the decree was reversed: *Rolfe* v. *Peterson*, 2 Brown's Parl. Cases, 470, Toml. edit., and also cited, *Roy* v. *The Duke of Beaufort*, 2 Atk. 190, and *Tall* v. *Ryland*, 1 Ch. Ca. 183.

Lord Chancellor Thurlow said, the only question was, whether this was to be considered as a penalty or as assessed damages. The rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light. The injunction must be continued till the hearing.

Lord *Macclesfield*, in the principal case of *Peachy* v. *Duke of Somerset*, puts the jurisdiction of equity to give relief, in cases where forfeitures or penalties might be insisted upon at law, on the only foundation upon which it could properly be maintained, viz., that the true ground of relief *is from the original intent of the case, where the penalty was designed only to secure money, and the Court could give a party, by way of recompense, all that he expected or desired.* His Lordship, however, seems to confine the cases in which equity interfered, to those in which the penalty was only designed to secure a sum of money. The principal case, however, of *Sloman* v. *Walter*, shows that the jurisdiction of equity was not of so limited a nature, but was extended to cases where the penalty was inserted, not merely to secure the payment of money, but *the performance of some collateral act.* The origin of the doctrine, indeed, as Lord *Eldon* has remarked, is probably to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time; the Court holding that, by the payment of interest, the party was put in just the same state as

if the principal had been paid at the time stipulated; though he adds in condemnation of the doctrine, "The failure of the payment at the time may be attended with mischievous consequences, that never can be cured in a rational sense by subsequent payment, with the addition of interest:" *Reynolds* v. *Pitt*, 19 Ves. 140.

Upon examining the authorities it will be found that Courts of equity only granted relief in cases of penalties and forfeitures when they were able to give compensation in lieu thereof, and in such cases only they treated stipulations in contracts for penalties or forfeitures as unessential. By the Judicature Act, 1873 (36 & 37 Vict. c. 66), the doctrines of equity upon this subject are made prevalent in all the Divisions of the High Court.

It is proposed in this note to consider:

I. What breaches of, or non-compliance with, the penal stipulations of contracts considered as unessential in Courts of equity, have been therein relieved against.

II. The distinction between penalties and liquidated damages.

III. What breaches of, or non-compliance with, the penal stipulations in contracts, deemed in Courts of equity essential, have not ordinarily been relieved against therein.

IV. How far accident, fraud, surprise, or acquiescence are sufficient to prevent a party from taking advantage of a forfeiture.

V. Waiver of forfeitures.

VI. As to the extension to all the Courts of the doctrines of equity, with respect to forfeitures and penalties.

I. *What breaches of, or non-compliance with, the penal stipulations of contracts considered as unessential in Courts of equity have been therein relieved against.*] —The most familiar, and perhaps earliest case, in which equity gave relief against penalties, was in the case of a penalty to a common bond, the meaning of inserting which is evidently to secure the payment of the principal and interest; but the interference of equity in relieving from the penalty in such case was rendered unnecessary by 8 & 9 Will. 3, c. 11, and 4 & 5 Anne, c. 16, ss. 12 & 13, by which the contract was in effect rendered incapable of being enforced, even at law, to the extent of the penalty; but the debtor was discharged on paying principal, interest, and costs.

The same principle has been recently acted upon where a penalty was inserted in a contract to secure the payment of purchase-money. See *In re Dagenham (Thames) Dock Company, Ex parte Hulse*, 8 L. R. Ch. App. 1022. There a company incorporated by Act of Parliament for

making a dock, agreed with landowners to purchase a piece of land for 4,000*l.*, of which 2,000*l.* was to be paid at once, and the remaining 2,000*l.* on a future day named in the agreement, with a provision that if the whole of the 2,000*l.* and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate, without any obligation to repay any part of the purchase-money. It was held by the Lords Justices, affirming the decision of Lord *Romilly*, M.R., that the provision was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase-money with interest.

The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 125), permits payment into Court to be pleaded by leave of the Court or a Judge in any action on a bond, "which has a condition to make void the same upon payment of a lesser sum at a day or place certain." Sect. 25.

This enactment, however, does not apply to an action brought on a bond, conditioned to be void upon payment of a lesser sum by instalments: *Preston* v. *Dania*, 8 L. R. Exch. 19, and cases there cited.

Upon the same principle, when an estate at law becomes the absolute property of the mortgagee, in consequence of the non-payment of the mortgage-money at the appointed time, Courts of equity at an early period, looking at the original intention of the parties, and considering that payment of principal, interest, and costs, was an adequate compensation to the mortgagee, decreed that the mortgagor might redeem on making such payment. See *ante*, p. 1062.

Where, as in the principal case of *Sloman* v. *Walter*, the intent of the insertion of a penalty in an instrument was merely to secure the performance of some collateral act or undertaking, the bill has been retained, and an issue *quantum damnificatus* directed, and relief granted upon payment of the damages as assessed by a jury. Thus, in *Hardy* v. *Martin*, 1 Bro. C. C. 419, n., the plaintiff and defendant had been partners as brandy merchants; and on the plaintiff's quitting the business, and selling the lease and goodwill of the shop to the defendant for 300*l.*, he entered into a bond in 600*l.* penalty not to sell for nineteen years, any quantity of brandy less than six gallons, within the cities of London and Westminster, or five miles thereof, or to permit any person so to do in his name. Upon an action being brought, and a verdict obtained for the penalty, the plaintiff filed his bill, praying that an account might be taken of the actual damage sustained by the defendant, and an issue directed for

that purpose; and that, on payment of the damages, the defendant might be restrained from taking out execution for the penalty of the bond. Lords Commissioners *Loughborough*, *Ashurst*, and *Hotham*, upon a motion to dissolve the injunction, and cause shown, continued the injunction, and directed an issue, when the jury gave a verdict for the plaintiffs at law (defendants in equity), with 1*s.* damages: *S. C.*, 1 Cox, 26; *Benson* v. *Gibson*, 3 Atk. 395; *Errington* v. *Aynesley*, 2 Bro. C. C. 341.

Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation that in case of its not being paid at the time appointed *a larger sum shall become payable, and be paid*, in either of these cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, viz., the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve. Per Lord *Hatherley*, C., in *Thompson* v. *Hudson*, 4 L. R. Ho. Lo. 15.

The reservation, however, of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty; therefore, where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance: *Thompson* v. *Hudson*, 4 L. R. Ho. Lo. 1, reversing *S. C.*, 2 L. R. Eq. 612; 2 L. R. Ch. App. 255; and see *Ex parte Bennet*, 2 Atk. 527; *Davis* v. *Thomas*, 1 Russ. & My. 506; *Ford* v. *Chesterfield*, 19 Beav. 428.

A contract in a certain event, not that the amount of the debt should be increased, but that the time of its payment should be accelerated, will not fall within the principle of the cases before discussed. Thus, in *Sterne* v. *Beck*, 11 W. R. (L. J.), 791, where a mortgage provided for the payment of sums by instalments, and

contained a stipulation for payment of the whole sum due, in default of payment of any such instalments, it was held by the Lords Justices, reversing the judgment of Sir *John Stuart*, V.-C. (*Ib.* 587), that such proviso was binding, and was not in the nature of a penalty: and see *Stanhope* v. *Manners*, 2 Eden, 197. But such stipulation may be waived, *Langridge* v. *Payne*, 2 J. & H. 423.

Although at common law the plaintiff, on proof of a breach of an agreement, could recover the full amount of the penalty for its non-performance (*Betts* v. *Burch*, 4 H. & N., 510), by the statute 8 & 9 Will. 3, c. 11, s. 8, (which relates to actions upon any bond, or on any penal sum for non-performance of any covenant or agreement contained in any indenture, deed, or writing), no more than the actual damages were recoverable at law: see *Beckham* v. *Drake*, 2 H. L. Ca. 579, 598, 628; *Betts* v. *Burch*, 4 H. & N. 506, and the authorities there cited, with regard to which *Bramwell*, B., observes, *Ib.* p. 511, "That it is remarkable that from the first to the last the statute (8 & 9 Will. 3, c. 11) is not mentioned. It seems as if, by some singular instinct, the Courts have been right, though without referring to the statute by which they ought to have been governed. I believe that the reason is, that the judges have considered when equity would have relieved:" see 1 Wms. Saund. 58, note 1.

From a very early period, equity would, at any *indefinite* time after a tenant had incurred forfeiture, and been ejected for non-payment of rent at a particular time, under a stipulation in his lease, relieve him, upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle, that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when it was originally due. This principle was recognised by the legislature, which, however, remedied a palpable injustice, by limiting the time within which the lessee might obtain relief by filing a bill in equity to six calendar months after execution executed. This was effected by the statute 4 Geo. 2, c. 28, sections, 2, 3, & 4, repealed by 30 & 31 Vict. c. 59, after having been previously with a few unimportant variations re-enacted and in effect superseded by 15 & 16 Vict. c. 76, which enacts, that "in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor, shall and may without any formal demand or re-entry, serve a writ in ejectment,

for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and *without proceeding for relief in equity, within six months after such execution executed*, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be non-suited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any *mortgagee* of such lease, or any part thereof, who shall *not be in possession*, so as such mortgagee shall and do, within *six months* after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part or behalf of the first lessee, are and ought to be performed." Sect. 210.

In case the said lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of in or to the said lease, shall within the time aforesaid, proceed for relief in any Court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within *forty days* next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court, and lodge with the proper officer, such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court: and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord, what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands. Sect. 211.

A lessee applying to redeem a lease, which had become forfeited at law by non-payment of rent, was not required before the hearing to pay into court the arrears of rent or costs at law, if no injunction was granted until the hearing, and the lessor was in possession: *Bowser* v. *Colby*, 1 Hare, 109.

Where, however, the suit to redeem the lease was brought by the personal representatives of the lessee, evidence having been given tending to show, that the lessee in his lifetime was insolvent, and had committed breaches of covenant, and that his estate was also insolvent, the Court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the plaintiff that he should personally pay into Court the costs at law and the arrears of rent due at the time the lessor sued out his writ of possession: *Bowser* v. *Colby*, 1 Hare, 109.

If the lessee was proceeding at law, not merely on account of the non-payment of rent, but also for the breach of other covenants, against the breach of which equity did not relieve, he could only be restrained from proceeding for a

breach of covenant for non-payment of rent, but he would be allowed to proceed on any other covenant against the breach of which the Court did not relieve: *Wadman* v. *Calcraft*, 10 Ves. 67; *Davis* v. *West*, 12 Ves. 475; *Swanton* v. *Biggs*, Beat. 170.

If the lessor could prove any breaches of covenant by the lessee other than that for the payment of rent, if breaches of such other covenants were proved, for which the lessee might have been ejected, the Court would not relieve against the breach of covenant for payment of rent: *Bowser* v. *Colby*, 1 Hare, 109; *Horne* v. *Thompson*, 1 Sausse & Scul. 615.

A Court of equity would relieve a lessee from a forfeiture by non-payment of rent, where there was a proviso, that in that case the lease *should be void*, as well as where there was a *mere power of re-entry: Bowser* v. *Colby*, 1 Hare, 128, 129.

Under the old law, when a lease was forfeited for non-payment of rent, the Court used to consider that the only way relief could be given was by creating a new lease (*Taylor* v. *Knight*, 4 Vin. Abr., Chanc. Y. pl. 31, p. 406; *Bowser* v. *Colby*, 1 Hare, 130); and where the mesne lessor forfeited his lease for non-payment of rent, and afterwards took a new lease from the lessor, he might compel his underlessee to take a new lease for so much of the term as was unexpired, with the same covenants as in the old lease.

This form of relief, however, was rendered unnecessary by the 212th section of 15 & 16 Vict. c. 76 (in effect re-enacting the 4th section of 4 Geo. 2, c. 28), which enacts that,—"If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease.

And it seems that even in the case of copyholds, where the forfeitures are intended for a different purpose, as for non-payment of rent or fines, which are only by way of security for the rent or fines, when these are paid afterwards, with interest, the money itself being paid according to the intent, save as to the circumstance of time, equity acting according to its ordinary principles would relieve against forfeiture. See

Peachy v. *Duke of Somerset*, ante, p. 1108.

The jurisdiction of Courts of common law with regard to granting relief in the case of forfeiture for non-payment of rent was enlarged and assimilated to that exercised by Courts of equity, by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), whereby it is enacted "that in case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, *up to and within the like time after execution executed*, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made without any new lease (sect. 1).

It is clear that a Court of equity could not until recently grant any relief against proceedings at law, where a tenant had committed a breach of covenant by omitting to insure, even if he had made considerable expenditure in improvements; and the omission to insure was considered stronger against the tenant than the omission to repair, because in the latter case, the landlord might, by exercising due vigilance, see to the observance of the covenant; but in the former, where the lessee had undertaken to keep insured, the landlord must rely upon him for the fulfilment of his obligation: See *Reynolds* v. *Pitt*, 19 Ves. 134; *Bracebridge* v. *Buckley*, 2 *Price*, 218; *White* v. *Warner*, 2 *Mer.* 459; *Green* v. *Bridges*, 4 Sim. 96; *Gregory* v. *Wilson*, 9 Hare, 683.

A covenant, however, by the lessee to insure the demised premises in the names of himself and the lessor, although not literally performed by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the lessor, that he could not recover for a breach of the covenant, the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter, he is at liberty to dispense with it: *Havens* v. *Middleton*, 10 Hare, 641.

The legislature, however, conferred upon the Courts of equity power to relieve against forfeiture for non-insurance in certain cases. See The Act to further amend the law of property and to relieve Trustees (22 & 23 Vict. c. 35), whereby it is enacted that "a Court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has

in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as the Court may seem fit (sect. 4): See *Page* v. *Bennett*, 2 Giff. 117.

The Court where relief shall be granted, is to direct a record of such relief having been granted to be made by endorsement on the lease or otherwise (sect. 5), but is to have no power under the Act to relieve the same person more than once in respect of the same covenant or condition; nor where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of Court in favour of the person seeking the relief (sect. 6).

The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant (sect. 7).

Where, on the *bonâ fide* purchase after the passing of the Act of a leasehold interest under a lease containing a covenant on the part of a lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages, or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant (sect. 8).

The preceding provisions are applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons (sect. 9).

The Court has jurisdiction to relieve against a breach of a cove-

nant to insure, committed after the date of the Act (22 & 23 Vict. c. 35) arising on a lease dated before the passing of the Act: *Page* v. *Bennett*, 2 Giff. 117.

Similar jurisdiction was conferred upon the Courts of Common Law by the Common Law Procedure Act 1860 (23 & 24 Vict. c. 126), which enacts that in case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the Court or judge shall have power upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of 22 & 23 Vict. c. 35, and upon such terms as would be imposed in such Court (sect. 2), and where such relief shall be granted, the Court or a judge thereof shall direct a minute thereof to be made by indorsement on the lease or otherwise (sect. 3).

II.—*Distinction between penalties and liquidated damages*].—As, on the one hand, a Court of equity would give a person relief against a penalty, where it was only intended to secure the performance of the contract, so, on the other hand, it would not permit him to resist specific performance of the contract, by electing to pay the penalty. Where, however, the real intent of the contract was, that a person might, if he chose, do certain acts, upon payment of an additional sum of money, in such case, as the agreement for payment of an additional sum was not intended to secure the performance of any other contract, but was a contract which the parties were at liberty to make, a Court of equity would neither relieve him from payment of the additional sum agreed upon, on doing such acts, although it might bear the appearance of a penalty, nor, on the other hand, would it compel him to abstain from them. The principle upon which the Court acted is sufficiently clear, though its application, which, in fact, depended upon the construction of the contract, was often attended with some difficulty. It is well explained by Lord *St. Leonards* in an important case. "The general rule of equity," he observes, "is, that, if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate, and execute his bond for 600*l.*, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So, if a man covenant to abstain from doing a certain act, and agree, that, if he do it, he will pay a sum of money,

it would seem that he will be compelled to abstain from doing that act; and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract . . . . The question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent. If a man let meadow land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking up the land is not inconsistent with the contract, which provides, that in case the act is done, the landlord is to receive an increased rent:" *French* v. *Macale*, 2 D. & War. 274.

The authorities clearly show that a person might compel another to perform an agreement, whether to do or refrain from doing a particular act, where, although there were a penalty annexed, it was only intended to secure its performance (*Howard* v. *Hopkyns*, 2 Atk. 371; *Chilliner* v. *Chilliner*, 2 Ves. 528; *City of London* v. *Pugh*, 4 Bro. P. C. 395, Toml. edit.; *Hardy* v. *Martin*, 1 Cox, 26; *Roper* v. *Bartholomew*, 12 *Price*, 796; *Logan* v. *Wienholt*, 1 C. & F. 611; *French* v. *Macale*, 2 D. & War. 269; *Carden* v. *Butler*, 1 Hayes & J. 112; *Long* v. *Bowring*, 33 Beav. 585; *Bray* v. *Fogarty*, 4 I. R. Eq. 544), or he might, if he elected to do so, proceed at law for damages. He could obtain relief in either, but not in both of the Courts. See *Fox* v. *Scard*, 33 Beav. 327. There a surgeon at Weymouth, upon taking an assistant, required him to give his bond in a penalty not to practise there. Afterwards he discharged the assistant, who thereupon commenced practice at Weymouth. The surgeon then filed a bill to restrain him, to which the defendant demurred. In support of the demurrer it was argued, that it was a case for an action at law on the bond and not for a suit in equity, and that the parties had by their contract agreed that the remedy upon the breach of the bond should be by pecuniary damages only. Sir *John Romilly*, M. R., overruled the demurrer. "I cannot," said his Honor, "accede to the defendant's view of this case, for I take the principle to be this:—Where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right both at law and equity, and can obtain relief in either, but not in both Courts. If he proceeds at law on

the bond and recovers damages, and afterwards comes into equity and states that fact in his bill, a demurrer will lie, because he has chosen the jurisdiction and the remedy he will have. Accordingly, the practice has been, to adopt the rule very strictly in equity. It sometimes happens that the legal right is in doubt, and, in such cases, the Court had formerly to direct an action to try the right. This is now prevented by Mr. Rolt's Act (25 & 26 Vict. c. 42), which compels the Court to determine the legal right. But the practice under the old system is a good illustration. When the Court gave liberty to the plaintiff to try his right in an action, if he succeeded and took only nominal damages, he obtained his equitable relief; but if he sought and obtained substantial damages, the Court, when he came back, dismissed his bill, saying, 'you have already had your remedy at law.' But the plaintiff had a right to say, 'I will not have money or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond,' which, in this case, is in the nature of a covenant by the defendant that he will not practise at Weymouth. The bill contains a paragraph waiving the penalties of the bond; but, without that, if, after an injunction had been granted against the defendant, the plaintiff should bring an action for damages, the defendant might come here and have the injunction dissolved." See also *Clarkson* v. *Edge*, 33 Beav. 227; *Mercer* v. *Irving*, 1 Ell. Bl. & Ell. 563; *Graveley* v. *Barnard*, 18 L. R. Eq. 518; *Jones* v. *Heavens*, 4 Ch. D. 636.

The right to insist upon a penalty may be waived. See *Thornhill* v. *Neats*, 8 C. B. (N. S.) 831.

As before observed, we must carefully distinguish between the cases where the penalty is merely for the purpose of securing the performance of the agreement, and those cases where a sum is agreed upon by the parties, to be paid as the price for doing or refraining from doing a certain act. Thus, where, in leases, a person covenants not to do an act, as to plough pasture land, or to cease to reside on the premises, but if he does, to pay an additional rent, a Court of equity will look upon the additional rent not as a penalty, but as liquidated damages fixed upon by the parties, and will not give relief. *Rolfe* v. *Peterson*, 2 Bro. P. C. 436, Toml. edit., is the leading case on this subject. There the lessee covenanted not to plough up any of the ancient meadow or pasture ground; and if he did, to pay an additional rent of 5*l*. per acre. Lord *Camden* looked upon the additional rent as a penalty, and decreed that the tenant should be relieved, and directed an issue quantum damnificatus; but the House of Lords overruled the

decree. Of this case it has been well remarked by Lord *Rosslyn*, in *Hardy* v. *Martin*, 1 Cox, 27, "that it was the demise of land to a lessee to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it." And see *Ponsonby* v. *Adams*, 2 Bro. P. C. 431, Toml. edit.

And upon the principle, that, the real meaning in such a contract is, that a party may do a particular act upon payment of an additional sum, the Court of equity has properly refused to restrain, by injunction, the person from doing the act by which the additional sum becomes payable. Thus, in *Woodward* v. *Gyles*, 2 Vern. 119, the plaintiff let a farm to the defendant at an annual rent, and, part of it being pasture land, covenanted, amongst other things, not to break up or plough any part of it; and if he did plough any part of it, he would pay after the rate of 20*s*. an acre. But the Court held, that the parties had themselves set a price for ploughing, and therefore would not grant any injunction, and declared that, if the defendant were plaintiff against paying the 20*s*. per acre for ploughing, they would not relieve him. And see *Forbes* v. *Carney*, Wallis, Rep. by Lyne, 38; *Jones* v. *Green*, 3 Y. & J. 298; *Sainter* v. *Ferguson*, 1 Mac. & G. 286; 7 C. B., 716; *Cass* v. *Thompson*, 5 W. R. 289; *Carnes* v. *Nesbitt*, 7 H. & N. 778.

And upon the principle that stipulated damages are not in the nature of a penalty, a person who by doing, or abstaining from doing an act, which under his contract subjected him to the payment of such damages, would not be able to protect himself against discovery. Thus, in *Jones* v. *Green*, 3 Y. & J. 289, by an indenture a farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments, in case the tenant should not crop, manure, and manage the farm in manner therein specified and covenanted: and also in case the tenant, in the last three years of the term, should sow more than 70 acres of clover in one year, the additional rent of 10*l*. an acre for every acre above seventy acres for the residue of the term. It was held, that the additional rents were in the nature of liquidated damages, and not of penalties; and therefore, on a bill filed by the landlord for a discovery of breaches of the covenants, in aid of an action at law, a plea that the discovery might subject the tenant to penalties was overruled.

And the Court will not infer, from the fact of the additional sum reserved upon doing or not doing a particular thing being disproportioned to the damage which results therefrom, that it is

in the nature of a penalty. See *Chilliner* v. *Chilliner*, 2 Ves. 528; *Roy* v. *Duke of Beaufort*, 2 Atk. 190; *Logan* v. *Wienholt*, 1 C. & F. 611; and see *French* v. *Macale*, 2 D. & War. 280, disapproving of *Burne* v. *Madden*, L. & G., t. Plunk. 493.

And it seems where there are sums made payable in case certain acts are not done, and the performance thereof is over and above that secured by bond with a penalty, this is a reason for holding the first sums to be liquidated damages: *Ranger* v. *Great Western Railway Company*, 5 Ho. Lo. 73; but see *Chilliner* v. *Chilliner*, 2 Ves. 528.

The Court may, however, relieve against the additional rent, if the landlord has acquiesced in the acts of the tenant; but it must be remembered that it will not in general interfere against the legal effect of a covenant: there must be fraud, such as acquiescing for a benefit to arise from taking advantage of the breach, or giving reason to suppose that there would not be any interference. See *Barret* v. *Blagrave*, 6 Ves. 104; *Williams* v. *Earl of Jersey*, Cr. & Ph. 91; *Dann* v. *Spurrier*, 7 Ves. 231; *Jackson* v. *Cator*, 5 Ves. 688; *Macher* v. *The Foundling Hospital*, 1 V. & B. 188; *Hume* v. *Kent*, 1 Ball and B. 188; *Gerrard* v. *O'Reilly*, 2 C. & L. 165; 3 D & War. 414.

Upon this principle partly, Lord *Hardwicke* appears to have decided the case of *Roy* v. *The Duke of Beaufort*, 2 Atk. 108.

Where, however, there is not only a stipulation than an increased rent is to be paid upon certain acts being done by the tenant, but also that his interest shall be forfeited, the sum so stipulated to be paid will be considered as a penalty and not liquidated damages: *French* v. *Macale*, 2 D. & War. 269.

The question whether a sum is considered to be in the nature of a "penalty" or as "liquidated damages" is sometimes difficult to determine, and depends upon the construction of the whole instrument taken together; thus it has been laid down that the words "liquidated damages" or "penalty" are not conclusive as to the character of the sum stipulated to be paid, for if the whole agreement is such that the Court can see that the sum is a penal sum, it must be so treated. On the other hand, if it is not a penal sum, it would be incorrect to treat it as a penalty merely because it is so called in the agreement: *Betts* v. *Burch*, 4 H. & N. 511, per *Bramwell*, B.; and see *Galsworthy* v. *Strutt*, 1 Exch. 659; *Jones* v. *Green*, 3 G. & J. 298; *Cole* v. *Sims*, 5 De G. Mac. & G. 1; and see *Finch* v. *Earl of Salisbury*, Ca. t. Finch, 212; *Chilliner* v. *Chilliner*, 2 Ves. 528: *Bonsall* v. *Byrne*, 1 Ir. C. L. 573; *Parfitt* v. *Chambre*, 15 L. R. Eq. 36; *Lea* v. *Whitaker*, 8 L. R. C. P. 70;

Wright v. *Tracey*, 7 I. R. C. L. 134; *Jones* v. *Heavens*, 4 Ch. D. 636.

The general principle of law, however, appears to be that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty: *Kemble* v. *Farren*, 6 Bing. 141; *Betts* v. *Burch*, 4 H. & N. 506; *Thompson* v. *Hudson*, 4 L. R. Ho. Lo. 30; *Magee* v. *Lavell*, 9 L. R. C. P. 107; *In re Newman, Ex parte Capper*, 4 Ch. D. 724; *Cairnes* v. *Lambert*, 7 I. R. C. L. 564; overruling *Reilly* v. *Jones*, 1 Bing. 302: *Davies* v. *Penton*, 6 B. & C. 216; *Lea* v. *Whitaker*, 8 L. R. (C. P.) 70.

We have hitherto considered cases with regard to forfeiture, where a legal relation, as that of lessor and lessee, existing between the parties, the remedy of the former to enforce the forfeiture was at law. Where, however, there was a mere contract for a lease, which would only be enforced in equity, how far would a Court of equity interfere on behalf of the lessee where there had been acts on his part, which if the lease had been granted according to the contract, would amount to a forfeiture at law? It seems that where a lessee had done such acts, the Courts of equity, in the exercise of their discretion, would refuse specific performance of the contract upon a bill filed by the lessee, for it would be useless to require the execution of a lease when it might be immediately determined: *Gourlay* v. *The Duke of Somerset*, 1 V. & B. 68, 72; *Gregory* v. *Wilson*, 9 Hare, 683, 687; *Lewis* v. *Bond*, 18 Beav. 85; *Rankin* v. *Lay*, 2 De G. F. & Jo. 65.

A strong case, however, was necessary to be made on the part of the defendant, for the Court, in refusing specific performance, prevented the question of forfeiture from being tried at law; and therefore, before it refused its interference, it required to be well satisfied that there had been a forfeiture on which an ejectment could be maintained: *per* Sir *George Turner*, V. C., 9 Hare, 691; and see *Rogers* v. *Tudor*, 6 Jur. N. S. 692.

Where specific performance of an agreement for a lease was decreed, notwithstanding it was doubtful whether breaches of covenant had not taken place which would enable the lessor to re-enter, the Court would direct the lease to be dated at a period antecedent to the alleged breaches, and would require from the plaintiff an undertaking to admit in any action that the lease was executed on the day of its date: *Pain* v. *Combs*, 1 De G. & J. 34; *S. C.*, 3 Sm. & Giff. 449; *Lillie* v. *Legh*, 3 De G. & J. 204; *Poyntz* v. *Fortune*, 27 Beav. 393;

Rankin v. *Lay*, 2 De G. F. & Jo. 65.

Where there was no clause of re-entry for breach of a covenant, as, for instance, a breach of a covenant to repair, the Court would not refuse specific performance of a covenant to renew a lease, merely because there was a breach of the covenant to repair, for the lessor might recover damages at law for the breach: *Hare* v. *Burges*, 5 W. R. 585.

Specific performance would be decreed of a contract to sell the fee where it was independent of a contract to grant a lease, a forfeiture of which had been incurred by the acts of the plaintiff, although the two contracts might be contained in the same instrument. Thus, in *Green* v. *Low*, 22 Beav. 625, the defendant agreed to grant a lease of a plot of ground to the plaintiff upon his building a villa of a certain value thereon, which he was to keep insured in the joint names of himself and the defendant in a particular office. And it was also agreed, that if the plaintiff should not perform the agreement on his part, the agreement for a lease was to be void, and that the defendant might re-enter. The agreement contained a further stipulation, according to which the plaintiff was to have the option of purchasing the fee within two years. The plaintiff erected the villa, but insured in the wrong office, and in his own name only. It was held by Sir *John Romilly*, M. R., that the right to purchase being independent of the right to a lease, the plaintiff was entitled to specific performance of the contract to sell to him the fee.

III. *What breaches of, or non-compliance with, the penal stipulations in contracts deemed in Courts of equity essential, have not ordinarily been relieved against therein.*]—As a general rule equity would not relieve against forfeiture arising from the breach of covenants, where compensation could not be made; for instance, where a forfeiture had been incurred by a breach of a covenant to repair: *Gregory* v. *Wilson*, 9 Hare, 683, 689.

With regard, however, to covenants to repair, a distinction has been taken between covenants to repair *generally* and covenants to lay out a *specific sum* in a given time; it seems, however, that whatever might have been formerly the practice, that Courts of equity would in later times, in neither case, in the absence of special circumstances, give relief. Lord *Macclesfield* indeed, in *Hack* v. *Leonard*, 9 Mod. 90, relieved a tenant against a verdict obtained against him in ejectment, for breach of a general covenant to repair, observing, he could not apprehend what damage the landlord could sustain, if the lessee suffered the buildings to be

out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term; therefore it was referred to the Master to see what damage was done (if any) by non-performance of the covenants, and at what time. And see *Webber* v. *Smith*, 2 Vern. 103; *S. C.*, 1 Eq. Ca. Ab. 115, pl. 14; and Lord *Erskine*, in *Sanders* v. *Pope*, 12 Ves. 282, 290 (where, however, the question was as to a covenant to lay out a specific sum), seems to have thought that equity would relieve even in the case of a general covenant to repair merely, though he said that it might be a case of very complicated consideration and much detail, as to what would put the party in the same situation, though even in such cases Courts of equity had gone a great way. The authority, however, of *Webber* v. *Smith* and *Hack* v. *Leonard* was denied most strongly, both by Lord *Eldon* and Baron *Richards*. See *Hill* v. *Barclay*, 16 Ves. 406; 18 Ves. 61; *Bracebridge* v. *Buckley*, 2 Price, 215. The opinion expressed by Lord *Macclesfield*, in *Hack* v. *Leonard*, and adopted by Lord *Erskine*, in *Sanders* v. *Pope*, 12 Ves. 294, that if the repairs were not done until the close of the term, the landlord would have his premises in better order than if they had been done sooner, has been disapproved of by Lord *Eldon* in the strongest terms. "The Court," said his Lordship, "is surely not authorised so to deal with contracts. . . . . It is taking a prodigious liberty with a contract by which the tenant has undertaken forthwith to repair, and to keep the premises in repair constantly, in order that the landlord may, during the whole currency of the term, have the property, if returned upon his hands, in exactly the state he intended. If this doctrine can be maintained in general cases, what is to be said of the case where, the Court administering this species of equity, the tenant has become bankrupt before the end of the term, the assignees refuse to take to the lease, and the premises are thrown back to the lessor in a state of utter non-repair? Would that be anything like an execution of the contract?" *Hill* v. *Barclay*, 18 Ves. 62.

With regard to a covenant to lay out a specific sum within a given time, in an early case relief was refused on breach of the covenant (*Barker* v. *Holden*, 1 Vern. 316; *S. C.*, 1 Eq. Ca. Ab. 28, pl. 5); but in *Sanders* v. *Pope*, 12 Ves. 282, Lord *Erskine*, distinguishing between a general covenant to repair, and a covenant to lay out a specific sum within a given time, granted the relief, as he considered that complete compensation might be made. In *Hill* v. *Barclay*, 16 Ves. 402, 403; 18 Ves. 56 Lord *Eldon*, although he did not expressly overrule *Sanders* v. *Pope*, for he distinguished it from

that case upon grounds since held immaterial, refused relief. However, in a case in the Exchequer (*Bracebridge* v. *Buckley*, 2 Price, 200), which must be considered as distinctly overruling *Sanders* v. *Pope*, it was held, after an elaborate consideration of the authorities by *Richards*, B., *Graham*, B., and *Thompson*, C. B., dissentiente *Wood*, B., that a lessee, who, in breach of a covenant, had omitted to lay out a specific sum of money in a given time, was not entitled to relief in equity. "There is, certainly," said *Richards*, B., "no direct authority against the case of *Sanders* v. *Pope*, but both the present Chancellor (Lord *Eldon*) and the Master of the Rolls (*Sir W. Grant*) have intimated, by dicta, that they think otherwise; and I think the case of *Hack* v. *Leonard* does not sustain Lord *Erskine's* decision. I am of opinion, therefore, that the lessor, in this case, is entitled to repossess his estate, by consequence of the non-performance of the covenant.

"But the bill suggests, that the lessee will expend as much money as will put the premises in as good repair as if the money had been laid out according to the contract. In that case, it must be referred to the Master, to say what money would be required; and the sum directed by him to be laid out, though sufficient at that time, might, by a change of circumstances, become insufficient when the repairs are in progress.

"This bill was filed in 1809; now, if the lessee had died insolvent in the meantime, and pending the suit, what compensation could have been made to the lessor? In covenants to insure, the Court will not relieve, as has been decided; and what distinction is there in such cases and the present? If the lessee had died, and repairs had become necessary again, must an action of ejectment, and another bill in equity, be again resorted to? But, above all, how can the thing sought be done? The lessor cannot enter to superintend the repairs; and must the Master be directed to do so? If this had not been a long term, it might by this time have been exhausted. The Chancellor has said, the Court will not superintend repairs. The Master cannot: it is impossible. Lord *Thurlow* thought a building could not be erected under the superintendence of the Court: *Lucas* v. *Comerford* (3 Bro. C. C. 166; 1 Ves. jun. 235). Lord *Hardwicke* thought a building might (*City of London* v. *Nash*, 3 Atk. 512); but both thought that repairs could not be carried on under the direction of the Court. The Court, therefore, cannot give a compensation, because they have no means of ascertaining precisely what the compensation should be, or the mode of making it when ascertained. If affidavits were adduced, they could not enable the Court

to arrive at any conclusion. . . . Lord *Erskine's* decision did not give satisfaction in Westminster Hall."

Lord *Eldon*, indeed, distinguished *Hill* v. *Barclay* from *Sanders* v. *Pope*, on the ground that, in the latter case, there had been no demand, or notice, given to repair; but it was held, in *Bracebridge* v. *Buckley*, that in the absence of any stipulation in the lease rendering a demand or notice necessary, it is immaterial; for, as observed by *Thompson*, C. B., "If a man covenant to do an act within a certain time, no demand is necessary; and a neglect of performance is tantamount to a refusal in law:" 2 Price, 213. In *Hill* v. *Barclay*, as observed by *Graham*, B., and *Thompson*, C.B., the landlord was partly obliged to give notice by the terms of the covenant, which, in that respect, was particularly worded: 2 Price, 228—230.

It has not been decided whether, under a general covenant to repair, notice from the landlord to repair is necessary: it is, however, presumed, that, as it is not necessary on a covenant to insure (*Rolfe* v. *Harris*, 2 Price, 206—209; *Green* v. *Bridges*, 4 Sim. 96), it is immaterial. See *Hill* v. *Barclay*, 18 Ves. 62; *Job* v. *Banister*, 2 K. & J. 374: 3 Jur. N. S. 93; 26 L. J. (Ch.) 125.

A breach of a covenant to make a roadway in front of a particular house is not to be relieved against in equity, because, if made before the roadway in front of adjacent houses is made, it would be continually cut up and useless: *Nokes* v. *Gibbon*, 3 Drew. 681.

Nor would Courts relieve against a breach of a covenant to erect houses within a specified period: *Croft* v. *Goldsmid*, 24 Beav. 312. See *Jones* v. *St. John's College*, 6 L. R. (Q. B.) 115.

Equity would not relieve a lessee, who, contrary to his covenant, did not cultivate land in a husbandlike manner (*Hills* v. *Rowland*, 4 De G. Mac. & G. 430), or who carried on a trade without a licence (*Macher* v. *The Foundling Hospital*, 1 V. & B. 187); or a lessee who assigned without licence: "for, he cannot," observed Lord *Eldon*, "shew that, by the assignment, the lessor sustains no damage; that, on the contrary, he the lessee, is a beggar, who could not pay the rent, and the assignee a solvent tenant; that the lessor is therefore in a better condition, having two persons answerable to him instead of one tenant, under the circumstances I have mentioned. The answer is, that the Court cannot estimate the damage. The fact, as it is alleged, may be true at this moment; but the consideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the whole continuance of the lease: it is sufficient that the lessor insists upon his covenant, and no one has a right to put him

in a different situation: " *Hill* v. *Barclay*, 18 Ves. 36; and see *Wafer* v. *Mocato*, 9 Mod. 112; *Wadman* v. *Calcraft*, 10 Ves. 67; *Lovat* v. *Lord Ranelagh*, 3 V. & B. 24; *Bracebridge* v. *Buckley*, 2 Price, 200, 221. Upon the same principle, in *Descarlett* v. *Dennett*, 9 Mod. 22, Sir *Joseph Jekyll*, M. R., refused to relieve a lessee, who, contrary to a particular covenant which he had entered into, not to suffer persons to make use of a way over part of the lands demised, had put up a gate at the entrance of the close, and permitted any person to pass over the way, requiring them to pay. "For the Chancery," said his Honor, " cannot relieve the non-performance of a covenant or condition, the prejudice in breach of which cannot be estimated by damages. This tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence for a prescription over the close. The case of an entry for non-payment of rent is very different; for there the loss is certain, and may be recompensed by damages. This has been a settled rule in equity;" and see *Bracebridge* v. *Buckley*, 2 Price, 221, where this case is approved of.

If there were breaches of several covenants in a lease, and there were any one of them with respect to which there existed no equitable ground for relief, although there might be so as to all the others the most unquestionable right to relief in equity, the Court would not interfere to prevent the lessor from recovering in an action of ejectment founded on those breaches: *Nokes* v. *Gibbon*, 3 Drew. 693.

It seems, that in the absence of any fraud or acquiescence on the part of the lord, the Court, as was decided in the principal case, could not relieve, in the case of the forfeiture of customary estates and copyholds, by acts of the tenant, contrary to the contract imposed upon him by the law: *Hill* v. *Barclay*, 18 Ves. 64. See, however, and consider the cases cited in the principal case of *Peachy* v. *Duke of Somerset*, in which relief was granted.

But although a Court of equity would not give relief to a copyholder against a forfeiture properly incurred, it had concurrent jurisdiction with Courts of law to lieve a copyholder against an illegal seizure of the property by the lord: *Andrews* v. *Hulse*, 4 K. & J. 392.

But the Court would not upon an interlocutory application at the suit of copyhold tenants in a bill to establish certain customs disputed by the lord of the manor, restrain the lord from prosecuting his legal rights against one of such tenants in respect of an alleged forfeiture: *Lord Sefton* v. *Lord Salisbury*, 7 W. R. (V. C. W.) 272.

Where, in public undertakings, there was a stipulation that shareholders, on non-payment of calls,

should forfeit their shares, equity, upon grounds of public policy, and from the necessity of the punctuality in payment in such cases, would refuse to interfere, and grant relief upon forfeiture. Thus, in *Sparks* v. *The Company of the Proprietors of the Liverpool Waterworks*, 13 Ves. 428, Sir *William Grant*, M. R., refused to relieve against a forfeiture under a bye-law of an incorporated Company for waterworks, which provided, that the members receiving notice of default in paying a call should incur forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from town when the notice was sent, and other accidental circumstances. "This bill," said his Honor, "is founded in forfeiture, and upon the ground, that the plaintiff did not consider himself as a partner, and offering compensation, and praying to be relieved from the forfeiture. The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings, they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in the majority of cases it is no compensation, from the uncertainty in which they may be left. The effect is the same, whether money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can in equity enter into a discussion of the circumstances, each may bring his suit. They must remain a considerable time, to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted, there cannot be any certainty that every member who has made default may not file a bill. Can the Court impose a limitation of the period when bills may be filed? If the Court ever began to deal with these cases, the number must be infinite. This is the mode which a party has to withdraw from a losing concern. Why is not this equity open to contractors for the government loans? Why may not they come here to be relieved, when they have failed in making their deposit? And if they could have relief, how could government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made, it ought not to be attempted. It would be hazardous to entertain such a bill. Accident here is only the want of precau-

tion. The plaintiff did not inform himself of the orders and rules of the Company. It was easy for the plaintiff to direct the secretary to send the notices as he pleased. The Court cannot relieve against such accidents. The plaintiff ought to have taken all due pains to inform himself." His Honor afterwards mentioned a late instance in Ireland of a person who, after having paid some instalments on a loan, neglected to make a further payment, and forfeited the instalments he had paid. He petitioned Parliament for relief, but without success. With reference to this case, Mr. Eden, in his work on Injunctions, p. 22, note (*b*), observes that there is a case in the Hargrave MSS., in which Lord *Harcourt* relieved a member of a benefit society against a forfeiture incurred by neglecting to pay the weekly instalments; but that the reasoning of Sir *W. Grant* is so conclusive and satisfactory, that it is probable, if the question should ever be agitated again, that his decision would be adhered to. See *Prendergast* v. *Turton*, 1 Y. & C. C. C. 98, 110, 111, 112; *Naylor* v. *South Devon Railway Company*, 1 De G. & Sm. 32; *Sudlow* v. *The Dutch Rhenish Railway Company*, 21 Beav. 43.

The result of a forfeiture of shares may relieve the shareholder from being a contributory (*Woollaston's case*, 4 De G. & Jo. 437; *Marshall* v. *Glamorgan Iron Company*, 7 L. R. Eq. 129; *In re Cobre Copper Mine Company*, 9 L. R. Eq. 107), but not if the shares were forfeited by the directors ultra vires (*Spackman* v. *Evans*, 3 L. R. Ho. Lo. 171; and see Lord *Belhaven's Case*, 3 De G. J. & S. 41; *Stanhope's case*, 1 L. R. Ch. App. 161; *Dixon's case*, 5 L. R. Ch. App. 79): or were fraudulently forfeited not for the benefit of the company but for the purpose of relieving the shareholder from liabilities: *Richmond's case and Painter's case*, 4 K. & J. 305.

As to the liability of past members of companies in respect of shares extinguished by forfeiture. See *In re The Blakeley Ordnance Company, Crcyke's case*, 5 L. R. Ch. App. 63; *Bridger's case* and *Neill's case*, 4 L. R. Ch. App. 266.

Where a company authorised to buy land for purposes beneficial to the public enters into a contract with a landowner that if a portion of the purchase-money, which the company is to pay him, remains unpaid on a particular day, he shall be entitled to take back the land with all the works which have been executed upon it by the Company, such contract would, it seems, be void as *ultra vires*, unless it could be construed as a mere penalty which could be relieved against in equity. *In re Dagenham (Thames) Dock Company, Ex parte Hulse*, 8 L. R. Ch. App. 1022.

Where there is no clause in the deed of a Joint Stock Company

conferring on the directors a general power to forfeit shares, they have no implied power to do so: *In re The National Patent Steam Fuel Company*, 7 W. R. (V. C. K.) 369.

And the power of co-adventurers to forfeit the shares of one of their number for non-payment of calls, is not necessarily incident to a mining adventure conducted on the cost-book principle: *Clarke* v. *Hart*, 6 Ho. Lo. Ca. 633.

Where such power exists by agreement between the parties, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed (*Ib.*). And where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement) that his shares are liable to forfeiture, on non-payment of calls, will not affect his rights under the agreement: *Ib.*

A resolution of forfeiture by directors must be passed according to the terms of the articles, otherwise it will be invalid. Thus where, according to the articles of association, no shares could be forfeited except by a resolution passed by *all* the directors, a resolution passed by four out of five will be illegal: *Goulton* v. *London Architectural Brick and Tile Company*, W. N. 1877, p. 141. So a resolution of directors declaring shares of a shareholder forfeited for non-payment of calls will be invalid, if the notice to the shareholder claim interest from the day of the call instead of from the day fixed for its payment by clause 6, table A, of the Companies Act, 1862 (clauses 16, 17): *Johnson* v. *Lyttle's Iron Agency*, W. R. 1877, p. 78.

Mere laches, moreover, do not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture: *The Garden Gully United Quartz Mining Company* v. *M'Lister*, 1 App. Cas. 39.

The principle applicable to cases of contract between the parties, is not applicable to the provisions of an Act of Parliament or conditions in law. For although, as we have seen, in cases of contract between parties, equity will often relieve against penalties and forfeitures, where compensation can be granted, relief against the provisions of a statute can never be given: *Keating* v. *Sparrow*, 1 Ball & B. 367, 373, 374; *In re Brain*, 18 L. R. Eq. 389, 410.

Thus penalties imposed by a Benefit Building Society, in accordance with their rules under the Friendly Societies Act (6 & 7 Will. 4, c. 32), could not be relieved against in equity, nor can a borrowing member redeem a mortgage to the society without paying the fines which he has incurred (*Parker* v. *Butcher*, 3 L.

R. Eq. 762); but the fines, according to the terms of the Act, must be reasonable, otherwise they cannot be enforced. See *Lovejoy* v. *Mulkern*, W. R. 1877, p. 127, varying S. C. p. 74; *Parker* v. *Butcher*, 3 L. R. Eq. 762; *Pilkington* v. *Baker*, W. R. 1877, p. 210.

IV. *How far accident, fraud, surprise, or acquiescence are sufficient to prevent a party from taking advantage of a forfeiture.*] —If, either, by unavoidable accident, by fraud, by surprise, or ignorance not wilful, parties might have been prevented from executing a covenant literally, a Court of equity would interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, would give relief: (per Lord *Alvanley*, M. R., in *Eaton* v. *Lyon*, 3 Ves. 693;) because, although at law a covenant must be strictly and literally performed, in equity it would suffice if it were really and substantially performed according to the true intent and meaning of the parties, so far as circumstances would admit. And see *Hill* v. *Barclay*, 18 Ves. 62, where Lord *Eldon* expressly guards his observations, which are strongly against relief being granted in ordinary cases, from being taken to apply to cases of accident and surprise; the effect of the weather, for instance, in that case, or permissive want of repair, the landlord standing by and looking on. See *Hannam* v. *South London Waterworks Company*, 2 Mer. 61; *Bamford* v. *Creasy*, 3 Giff. 675; *Meek* v. *Carter*, 6 W. R. (V. C. S.) 852; *Burke* v. *Prior*, 15 Ir. Ch. Rep. 106. And equity would relieve a lessee against forfeiture for a breach of a covenant to repair, when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on. *Hughes* v. *The Metropolitan Railway Company*, 1 C. P. D. 120.

In *Bargent* v. *Thompson*, 4 Giff. 473, where a lessor brought ejectment for breach of covenant to repair within three months after notice, it appearing that out of twenty-two items twenty had been proceeded with and fourteen completed, that the works had been partially delayed by the weather, and that no further remonstrance had been made by the lessors, Sir *J. Stuart*, V. C., restrained the action, and directed an inquiry whether the covenants had been performed.

A breach, however, of a covenant to repair was not excused because the covenantor had *bonâ fide* employed persons to repair, who neglected to make them, for as the covenantor's agents had in fact not repaired, the breach was not such as equity would relieve against: *Nokes* v. *Gibbon*, 3 Drew. 681.

A party entitled to take advantage of a forfeiture, would not be

allowed to do so when the act of forfeiture was committed in reliance upon the assurances of an agent of such party. See *Wing* v. *Harvey*, 5 De G. Mac. & G. 265. There a life policy was subject to a condition, making it void if the assured went beyond the limits of Europe without licence. An assignee of the policy, on paying the premium to a local agent of the Assurance Society, at the place where the assurance had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums till the assured died. It was held, by the Lords Justices, that the society was precluded from insisting on the forfeiture. See also *Duke of Beaufort* v. *Neeld*, 12 C. & F. 248.

But although relief might be obtained in equity against a forfeiture where a person incurring it had been misled by the person legally entitled to insist upon it, a subsequent distinct forfeiture, where no such excuse could be alleged, might be taken advantage of, as the Court would have no *ground* for its interference. Thus, although relief might be had in equity against a forfeiture of a lease during a period when the landlord dealt with the tenant so as to lead him to suppose the forfeiture would not be insisted on, if a subsequent forfeiture was incurred after such dealings had ceased, the prior transaction would raise no equity for relief: *Flattery* v. *Anderdon*, 12 Ir. Eq. Rep. 218.

In the case of a lunatic's estate, relief will be given to a tenant who has incurred a forfeiture, if it were beneficial to the lunatic not to insist upon it. Thus, in *Ex parte Vaughan*, T. & R. 434, the tenant of a lunatic's estate upon petition was relieved against an ejectment brought by the committee, founded on a forfeiture, by breach of covenant to repair. *Pitt* v. *Reynolds* was cited against the petition. But Lord *Eldon* said, that there were forfeitures arising from breaches of covenant against which Courts of equity could not relieve, but which a judicious landlord would not take advantage of. The case which had been cited would not apply if the question was, whether that were a case in which the landlord, acting for himself, would not have taken advantage of the forfeiture; and that care must be taken not to get rid of a good tenant by being too strict.

And even at law, long acquiescence in a breach of covenant, as for instance not to apply a house to purposes of trade, will raise a presumption of a licence so to use it, that the lessor cannot insist upon his right to a forfeiture: *Gibson* v. *Doag*, 6 W. R. Ex. 107; *Whitehead* v. *Bennett*, 9 W. R. (V. C. K.) 626; *Page* v. *Bennett*, 6 Jur. N. S. 419.

V. *Waiver of forfeiture.*]—The

right to insist upon a forfeiture might be waived at law (*Croft* v. *Lumley*, 5 Ell. & Bl. 648; *Att.-Gen. of Victoria* v. *Ettershank*, 6 L. R. P. C. 354, 368; *Walrond* v. *Hawkins*, 10 L. R. C. P. 342), as well as in equity (*Bridges* v. *Longman*, 24 Beav. 27), by the acceptance of rent after the forfeiture was incurred (*Price* v. *Worwood*, 4 H. & N. 516), even although the landlord when the rent was tendered took it not as rent but as compensation for use and occupation subsequent to the forfeiture. See *Croft* v. *Lumley*, 5 Ell. & Bl. 648: there, after all the forfeitures had been incurred, the time having come when the rent would become due, the lessee tendered the rent to the lessor. He refused to take it except on the terms that it should be taken not as rent, but as compensation for use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition; the lessor then took the money, declaring he would not take it as rent, or as waiving the forfeitures. It was held by the Court of Queen's Bench, that in legal effect money must be taken according to the intent of the party paying it—in this case as rent,—and that the receipt of rent, as a matter of law, operated as a waiver of all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect; and, moreover, that the lessor must be taken to waive all forfeitures by that breach of which he had notice, although it was more extensive than he was aware of.

Where, moreover, a landlord brings an action of ejectment for a forfeiture, he unequivocally treats his tenant as a trespasser, and a subsequent distress for rent will not affirm the tenancy or waive the breaches in respect of which the forfeiture had taken place: *Grimwood* v. *Moss*, 7 L. R. C. P. 360.

Where there was in a lease a general covenant to repair, and a covenant to repair within a certain period after notice, a notice to repair within a certain period might be a waiver of the forfeiture incurred by a breach of the general covenant to repair (*Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606); secus, when the notice was to repair forthwith (*Roe* d. *Goatly* v. *Paine*, 2 Camp. 520), or in accordance with the covenants of the lease: *Few* v. *Perkins*, 2 L. R. Ex. 92.

The mere claim, however, of forfeiture by reason of the non-payment of rent, did not of itself preclude the plaintiff from relying on a previous forfeiture: *Toleman* v. *Portbury*, 5 L. R. Q. B. 288; 7 L. R. Q. B. (Exch. Ch.) 344.

VI. *As to the extension to all the Courts of the doctrines of equity with respect to forfeitures and penalties.*]—By the Judica-

ture Act, 1873 (36 & 37 Vict. c. 66) it is enacted "that stipulations in contracts, as to time *or otherwise*, which would not before the passing of this Act (*i. e.*, its commencement, *i. e.*, 1st November, 1875) have been deemed to be or to have become, of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity, sect. 25, subsect. 7." Under the expression "or otherwise," is involved the doctrine of equity as to relief against forfeitures and penalties, and other cases in which Courts of equity would relieve against a penalty or forfeiture, while decreeing compensation instead thereof. Trower on Prevalence of Equity, p. 70.

The expression seems somewhat a slight one to effect such an important change in the law. In its absence, however, the same change, it is presumed, would be effected under sub-section 11 of sect. 25 of The Judicature Act, 1873, which enacts that "generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict and variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail."

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